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THE EU READMISSION POLICY AND ITS TRANSFORMATIVE TRENDS:

THE INTERPLAY WITH INTERNATIONAL LAW

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"Una volta ancora – non la prima volta, tanto meno l'ultima – il bacino del Mediterraneo è tracciato da esuli sconfitti e braccati alla ricerca di una patria appena abbandonata in macerie e perpetuamente promessa, di un'identità profonda che non mette radici se non nel futuro, e non si purifica se non contaminandosi. Sí, perchè la patria è anche una patria futura e una patria perdura, una speranza e un rimpianto".

Vittorio Sermonti, *Eneide*, 2008

LIST OF ABBREVIATIONS AND ACRONYMS

AFSJ	Area of Freedom Security and Justice
ASGI	Association for Juridical Studies on Immigration
CERD	Committee on the Elimination of Racial Discrimination
CFR	Charter of Fundamental Rights of the European Union
CIREFCA	International Conference on Central American Refugees
CJEU	Court of Justice of the European Union
Commission	European Commission
Council	Council of the European Union
Doc.	Document
EASO	European Asylum Support Office
EC	European Community
EDF	European Development Fund
EEAS	European External Action Service
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ECRE	European Council on Refugees and Exiles
EMN	European Migration Network
ENP	European Neighbourhood Policy
EU	European Union
EURA	European Union Readmission Agreement
EU Treaties	Treaty on the Functioning of the European Union and Treaty on the European Union
FRA	Fundamental Rights Agency
FRONTEX	European Border and Coast Guard Agency
GAM	Global Approach to Migration
GAMM	Global Approach to Migration and Mobility
GATT	General Agreement on Tariffs and Trade

GCM	Global Compact for Safe, Orderly and Regular Migration
GCR	Global Compact on Refugees
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICE	United States Immigration and Customs Enforcement
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICJ	International Court of Justice
ICMPD	International Centre for Migration Policy Development
IDPs	Internally Displaced Persons
ILC	International Law Commission
IOM	International Organization for Migration
JDMC	Joint Declaration on Migration Cooperation between Afghanistan of the EU
JHA	Justice and Home Affairs
JRC	Joint Readmission Committee
JWF	Joint Way Forward with Afghanistan
MEP	Member of the European Parliament
MoU	Memorandum of Understanding
NDICI	Neighbourhood, Development and International Cooperation Instrument
NGO	Non-Governmental Organisation
NSIA	National Strategy for Immigration and Asylum
OAS	Organization of American States
R.G.	Ruolo Generale
SOPs	Standard Operating Procedures
STC	Safe Third Country
TCN	Third Country National
TEC	Treaty establishing the European Community
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights

UK	United Kingdom
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
Union	European Union
U.S.	United States
WTO	World Trade Organization

TABLE OF CONTENTS

INTRODUCTION.....9

METHODOLOGY.....28

CHAPTER I

INTERNATIONAL LAW PERSPECTIVES ON READMISSION

1. The international obligation on States to readmit their own nationals 33

1.1. The legal foundation of the international obligation on States to readmit their own nationals in connection with the sovereign right of States to regulate the entry and exit of aliens.....37

1.2. The legal foundation of the international obligation on States to readmit their own nationals in connection with international human rights law.....39

2. The international obligation on States to readmit third country nationals (TCNs).....54

2.1. The scope and content of the obligation on States to readmit TCNs under treaty law.....59

2.2. The relevance of international human rights law and refugee law in the context of readmission of TCNs.....66

3. The evolution of international legal norms on cooperation over readmission: insights from the Global Compact for Safe, Orderly and Regular Migration (GCM).....78

CHAPTER II

READMISSION COOPERATION AT THE EU LEVEL

1. Readmission cooperation at the EU level: setting the legal framework.....87

2. The evolution of readmission clauses. From the origins to the "post–Cotonou era".....96

3. EU readmission agreements (EURAs).....104

3.1. Readmission obligations.....107

3.2. Human rights–related clauses and issues.....111

4. The EU–Member States' interplay in readmission cooperation.....122

4.1. The nature of the EU and Member States' competence in concluding readmission agreements.....125

4.2. Competences overlap and criteria for coordination.....131

4.3. The role of the EU and Member States in implementing EURAs.....139

5. The autonomy of EU law and its relevance in shaping readmission cooperation.....145

CHAPTER III

THE "INFORMALISATION" PROCESS WITHIN THE EU READMISSION POLICY

1. "Informal" tools: key concepts and definition attempts.....151

2. EU "informal" cooperation on readmission with third countries: laying the groundwork.....158

3. The main features and challenges of EU readmission arrangements.....163

3.1. The procedure for the adoption of "informal" readmission arrangements and their legal nature.....164

3.2. Readmission-related provisions.....177

3.3. Human rights issues.....181

4. Readmission and return through administrative cooperation: the role of FRONTEX and its Working Arrangements.....188

5. "Informal" cooperation instruments with readmission provisions in the aftermath of the New Pact on Migration and Asylum. The case of "global partnerships".....198

6. Towards a strategic "institutionalisation" of the soft law mechanism in the area of readmission? The (potential) impact on international law.....214

CHAPTER IV

CONDIONALITY IN EU READMISSION COOPERATION

1. EU "readmission conditionality" and the "holistic approach" 224

2. The use of visa policy in the context of readmission.....233

3. The "issue linkage" between readmission and development.....245

4. The link between readmission and trade.....252

5. Regular pathways and resettlement as bargaining tools to manage migration.....256

6. "Reversed conditionality": bargaining powers in the hands of third countries.....270

7. Conditionality in EU readmission policy and the international obligations on readmission.....282

CONCLUSION.....291

BIBLIOGRAPHY.....300

INTRODUCTION

The research question guiding this Ph.D. thesis can be formulated as follows:

What are the scope and content of the European Union (EU) current readmission toolbox, and how does it interplay with international law?

This Ph.D. thesis aims at examining the scope and content of the EU readmission toolbox and how it may interplay with and influence readmission obligations under international law and, more broadly, international migration governance. In our view, this dynamic relationship between international and EU law lies at the heart of readmission policy, where the tensions between State sovereignty, the need for international cooperation and the protection of individual rights are most evident – as the following pages make clear.

This research seeks to fill a gap in the existing literature on EU readmission policies and measures: while much of the available analysis focuses on implementation issues, human rights concerns, the process of "informalisation" of readmission cooperation and its constitutional challenges within the EU legal framework[1], only a few studies address this particular interplay between these two distinct but interrelated legal orders. In this regard, Molnár – who instead focused on the interplay between the EU return acquis and international law – argued that more research is needed to assess the extent of this influence and to determine

[1] *Ex multis*, N. COLEMAN, *European Readmission Policy: Third Country Interests and Refugees Rights*, Martinus Nijhoff Publishers, Leiden-Boston, 2009; C. BILLET, "EC Readmission Agreements: A Prime Instrument of the External Dimension of the EU's Fight against Irregular Immigration. An Assessment after Ten Years of Practice", in *European Journal of Migration and Law*, Vol. 12, Issue 1, 2010, pp. 45–79; J. P. CASSARINO, "Dealing with Unbalanced Reciprocities: Cooperation on Readmission and Implications", in Middle East Institute, 19 July 2012; S. CARRERA, *Implementation of EU Readmission Agreements: Identity Determination Dilemmas and the Blurring of Rights*, T.M.C. Asser Institute, The Hague, 2016; E. CARLI, "EU Readmission Agreements as Tools for Fighting Irregular Migration: An Appraisal Twenty Years on from the Tampere European Council", in *Freedom, Security & Justice: European Legal Studies*, No. 1, 2019, pp. 11–29; E. FRASCA, E. ROMAN, "The Informalisation of EU Readmission Policy: Eclipsing Human Rights Protection Under the Shadow of Informality and Conditionality", in *European Papers*, Vol. 8, No. 2, 2023, pp. 931–957, and, more generally, all relevant scholarship considered in this thesis.

whether EU practices have contributed (or are still contributing) to the development of international law in this specific area[2].

The relationship between EU law and international law has been the subject of considerable academic interest in order to understand the full extent of the "mutual" impact. Art. 3(5) of the Treaty on the EU (TEU) clearly states that in its international relations the Union shall uphold and promote its values and interests and ensure the strict observance and development of international law[3]. This provision clearly inspires the EU to play an active role in both shaping, respecting and promoting international law[4]. It is also worth noting that the origins of the European Community (EC), which later evolved into the EU, were firmly rooted in instruments of international law. Indeed, the founding Treaties that established the EC were created through international agreements between sovereign States, following principles and procedures recognised in international law. These instruments of international law provided the legal framework and guidelines for cooperation, integration and governance between the Member States, thus laying the foundations for the development and enlargement of the EU.

Since its "birth", the EU has been the subject of an ongoing debate about its legal nature and "identity". This view has been significantly influenced by key judgments of the European Court of Justice (ECJ) which, together with the establishment of the EU's own legal framework, have underlined the emergence of a so-called "new international legal order"[5]. These rulings have been instrumental in defining the EU as an autonomous legal order, independent and distinct from the legal framework of Member States (the so called "*internal dimension of the*

[2] T. MOLNÁR, *The Interplay between the EU's Return Acquis and International Law*, Edward Elgar Publishing, Cheltenham, UK – Northampton, MA, USA, 2021, p. 218.

[3] European Union, Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union.

[4] E. KASSOTI, R. A. WESSEL, "The Normative Effect of Article 3.5 TEU: Observance and Development of International Law by the European Union", in P. GARCÍA ANDRADE (ed.), *Interacciones entre el Derecho de la Unión Europea y el Derecho internacional público*, Tirant Lo Blanch, Valencia, 2023, pp. 19–46; E. FRASCA, "Informal agreements and quasi-legal mechanisms in EU-Africa cooperation on migration: how the EU takes advantage of the GCM commitments", in *Frontiers in Human Dynamics*, 12 October 2023.

[5] Court of Justice of the European Communities (CJEC), Case 26–62, *Van Gend & Loos*, Judgement 5 February 1963, ECLI:EU:C:1963:1, p. 12.

autonomy of EU") and from international law (the so called "*external dimension of the autonomy of EU law*")[6].

On the one hand, regarding the "internal dimension" of the autonomy of the EU legal order, the ECJ clarified as early as 1963 that EU law constitutes a distinct legal system, operating independently within Member States and not as an extension of national law. In the *Van Gend en Loos* and *Costa v ENEL* cases, the Court reaffirmed this separation, clarifying that EU law confers rights directly on individuals and becomes an integral part of national legal systems, without being dependent on national legislation for its validity or effect[7]. This unique and autonomous nature of EU law ensures its supremacy and uniform application in all Member States, thus preserving the coherence and unity of the EU legal order[8]. This "normative autonomy" also implies a "jurisdictional autonomy" of EU law: this means the ECJ has the sole power to interpret and determine the meaning, scope, and validity of EU law. The Court has always justified its autonomy (as well as its exclusive powers in this area) by claiming that EU law is an independent source of law, with supremacy over national law and direct applicability within the legal systems of the Member States. According to Eckes, "the Court justifies its conception of the normative autonomy of the EU legal order in a circular reasoning: the essential characteristics of EU law justify its autonomy, and autonomy makes its essential characteristics as a domestic legal order possible"[9].

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[6] Court of Justice of the European Communities (CJEC), Case 6–64, *Flaminio Costa v E.N.E.L*, Judgement 15 July 1964, EU:C:1964:66, p. 593: "[b]y contrast with ordinary international treaties, the EEC treaty has created its own legal system which, on the entry into force of the treaty, became an integral part of the legal systems of the Member States and which their Courts are bound to apply." Cfr. T. MOLNÁR, "The concept of autonomy of EU law from the comparative perspective of international law and the legal systems of Member States", in *Hungarian Yearbook of International Law and European Law*, 2015, p. 434. See also, T. MOLNÁR, R. A. WESSELS, *Interactions Between EU Law and International Law: Juxtaposed Perspectives*, Edward Elgar Publishing, Cheltenham, 2024, pp. 3 ff. A "formal" disclaimer is required: in this Ph.D. thesis, italics are used to emphasise certain concepts and key terms, as well as to indicate foreign words, as in the case reported in the text.

[7] Court of Justice of the European Communities (CJEC), Case 26–62, cit., p. 1; Court of Justice of the European Communities (CJEC), Case 6–64, cit., p. 593. See also, European Court of Justice (ECJ), Case 13-61, *Kledingverkoopbedrijf de Geus en Uitdenbogerd v Robert Bosch GmbH and Maatschappij tot voortzetting van de zaken der Firma Willem van Rijn*, Judgment 6 April 1962, ECLI:EU:C:1962:11, para 49.

[8] T. MOLNÁR, "The concept of autonomy of EU law from the comparative perspective of international law and the legal systems of Member States", in *Hungarian Yearbook of International Law and European Law*, 2015, pp. 7 ff.

[9] C. ECKES, "The Autonomy of the EU Legal Order: The Case of the Energy Charter Treaty", in *European Papers*, Vol. 8, No. 3, 2023, p. 1468.

On the other hand, the "external" dimension of the autonomy of the EU legal order reflects the independence of EU law from international law and it applies to third countries, international organisations and the broader framework of general international law. A significant example of how this conception of autonomy has also shaped the EU's external relations is the 2014 ECJ decision to halt the EU's accession to the European Convention on Human Rights (ECHR)[10]. The Court concluded that the draft accession agreement would have undermined the autonomy of the EU legal order, particularly the exclusive jurisdiction of the ECJ in interpreting EU law[11]. Nonetheless, the ECHR and the jurisprudence of the European Court of Human Rights (ECtHR) have significantly influenced the development of general principles within EU law, as highlighted in Art. 6(3) TEU[12]. This influence is particularly important because of the dual overlap between the two legal systems. First, *ratione personae*, as all EU Member States are also signatories to the ECHR; second, *ratione materiae*, as both systems safeguard many of the same fundamental rights, though sometimes with different wording.

This suggests that the autonomous nature of EU law does not mean that the EU legal order and the international legal order coexist without any interplay. International law retains a pivotal place within the EU legal framework, just as it does within national legal orders, which incorporate international norms according to their own constitutional principles. While the ECJ treats EU law and international law as separate and parallel legal systems, we believe that in practice international law has become an integral part of the EU legal framework. The concept of the "external" dimension of the autonomy of the EU legal order, as elaborated by the ECJ, should not be seen as creating a kind of "Berlin Wall" isolating the EU legal framework from international law[13]. Without delving further into this debate –

[10] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, Council of Europe Treaty Series, No. 5, Rome, 4 November 1950.

[11] European Court of Justice (ECJ), Opinion 2/13, *EU Accession to the ECHR*, 18 December 2015, EU:C:2014:2454. In this regard, see, among others, D. HALBERSTAM, *"It's the Autonomy, Stupid!" A Modest Defense of Opinion 2/13 on EU Accession to the ECHR*, Public Law and Legal Theory Research Paper Series, Paper No. 432, February 2015.

[12] "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law".

[13] *Contra*, C. ECKES, "The autonomy of the EU legal order", in *Europe and the World: A law review*, 2020.

which is extensively discussed in the relevant scholarship – while it is important to note that the EU has evolved into a unique entity, distinct from any other international organisation, it is also true that the same Art. 3(5) TEU appears to advocate for a close interplay between international law and EU law[14]. It is undeniable that the EU has developed a unique and autonomous legal order, separate from the national order of its Member States and from international law; nonetheless, this should not necessarily lead to its origins as an international organisation being called into question. In other words, the EU does not cease to be recognised as a "creature of international law"[15].

In this regard, according to Art. 21(1) TEU, the Union's action on the international scene shall be guided by the principles which have inspired its own creation, including respect for the principles of the United Nations (UN) Charter and international law[16]. In the light of Art. 21 TEU, the Union must also respect the agreed rules of international law. In particular, the role of international law becomes increasingly crucial in the protection of fundamental rights, where its norms and principles have notably shaped the development and content of EU law. This influence has manifested implicitly, through the recognition of fundamental rights as a general principle of EU law, and explicitly, through the explicit reference to the ECHR mentioned above[17]. The "infiltration" of international human rights

[14] In addition to the references already cited, see, *ex multis*, F. CASOLARI, *L'incorporazione del diritto internazionale nell'ordinamento dell'Unione europea*, Giuffrè Editore, Milan, 2008; E. CANNIZZARO, P. PALCHETTI, R.A. WESSEL (eds.), *International law as law of the European Union*, Martinus Nijhoff Publishers, Boston/Leiden, 2011; M. BENLOLO-CARABOT, U. CANDAS, E. CUJO (eds.), *Union européenne et droit international. En l'honneur de Patrick Daillier*, Editions A. Pedone, Paris, 2012; R.A. WESSEL, *Close Encounters of the Third Kind. The Interface between the EU and International Law after the Treaty of Lisbon*, Swedish Institute for European Policy Studies, December 2013; I. GOVAERE, *Interconnecting Legal Systems and the Autonomous EU Legal Order: A Balloon Dynamic*, College of Europe, Research Paper in Law, No. 2/2018; K. LENAERTS, *"The Autonomy of European Union Law", in Il Diritto dell'Unione Europea, Fasc. 4, 2018.* See also, in particular, B. DE WITTE, "European Union Law: How Autonomous is its Legal Order?", in *Zeitschrift für öffentliches Recht*, 2010, Vol. 65, pp. 141–142: "[t]he autonomy of EU law is not absolute but relative; it does not mean that EU law has ceased to depend, for its validity and effective application, on the national law of its Member States, nor that it has ceased to belong to international law."

[15] J. ODERMATT, *International Law and the European Union*, Cambridge University Press, Cambridge, 2021, p. 1; J. SHAW, "European Integration", in *The Oxford Encylopedia of EU Law*, June 2022.

[16] United Nations Charter, 26 June 1945.

[17] P. GARCÍA ANDRADE, "Derecho de la UE y gestión de los flujos migratorios: interacciones con el Derecho internacional y con el Derecho Interno", in P. GARCÍA ANDRADE, (ed.), *Interacciones entre el Derecho de la Unión Europea y el Derecho internacional público*, *op. cit.*, p. 157.

instruments into EU migration and asylum law has been also explicitly recognised through the inclusion of a direct reference to the 1951 Geneva Convention relating to the Status of Refugees (hereinafter, the 1951 Geneva Convention), a cornerstone of international refugee law, as the legal basis for the common asylum policy[18]. Indeed, the reference in Art. 78(1) of the Treaty on the Functioning of the EU (TFEU) to the 1951 Geneva Convention elevates it to the status of the international normative instrument with the greatest legal authority within EU law in this field[19]. This reference obliges the EU's asylum policy and its development to comply with the Convention: as a result, the 1951 Geneva Convention has a profound impact on the substantive content of EU asylum and migration legislation[20].

The relationship between international law and EU law is not one-sided: indeed, as also mentioned above, Art. 3(5) TEU explicitly frames the role of the EU in a dual dimension, emphasising both the obligation to respect international law and the ambition to contribute to its development. On the one hand, the EU is obliged to respect existing norms and principles of international law and to ensure that its external action is consistent with the global legal order. On the other hand, it seeks to actively shape and develop international law, promoting its progressive evolution. This dual role underlines the Union's position as both a "norm-compliant" and a "norm-shaping" actor on the international stage. Its economic, political, and normative influence gives the EU a significant role in influencing international law, with its decisions and policies potentially impacting international norms far beyond its borders. This "mutual" relationship can be observed in several key areas, such as the Union's active role in treaty-making, its participation in international organisations such as the UN, where it has "enhanced observer status",

[18] United Nations General Assembly, *Convention Relating to the Status of Refugees*, resolution 429 (V), Geneva, 28 July 1951. T. MOLNÁR, "EU Migration Law Shaping International Migration Law in the Field of Expulsion of Aliens: The Empire Strikes Back?", in *Pécs Journal of International and European Law*, 2017/II, p. 44. *Ivi*, p. 158.

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

[20] P. GARCÍA ANDRADE, *op. cit.*, p. 158.

and its wider efforts to export its norms globally[21]. As a global actor, the EU often serves as a "testing ground" where legal principles and solutions are developed and later incorporated into the codification processes of international law[22].

This aspect has become increasingly important as the EU's external competences and activities have matured, where EU actions directly affect the lives of many people[23]. This role is particularly pronounced in the area of migration and asylum, as García Andrade notes, where political sensitivities regarding State sovereignty often intersect with international legal frameworks protecting individual rights. The "equilibrium" revolves mainly around the tension between State sovereignty and its legal obligations to protect individual rights. The tension often arises when States seek to balance their domestic interests with their international legal commitments[24]. Therefore, migration has a dual nature: on the one hand, it is inherently linked to the territorial sovereignty of the State and its authority to control and regulate the entry and exit of individuals from its territory; on the other hand, it is characterised by its essentially international nature, since it involves at least one country of origin and one country of destination and therefore cannot be managed unilaterally[25].

In our opinion, this dual nature becomes even more apparent in the context of readmission. Indeed, the interplay between international and EU law in the context of readmission is in fact particularly compelling, as it demonstrates how EU readmission policy may operate not only as a mechanism to ensure compliance with international law (what we have called a "norm-compliant" actor in the international arena), but also as a driver of normative innovation in this area (what we have called a "norm-shaping" actor): in the last sense , the expanding network of EU readmission instruments may have the capacity to subtly shape how other

[21] United Nations General Assembly, Participation of the European Union in the work of the United Nations, Resolution 65/276, 3 May 2011, UN Doc A/RES/65/276. Cfr. T. MOLNÁR, *The Interplay between the EU's Return Acquis and International Law*, *op. cit.*, p. 4.

[22] J. MONAR, "The Dynamics of Justice and Home Affairs: Laboratories, Driving Factors and Costs", in *Journal of Common Market Studies*, Vol. 39, 2001, p. 747*;* T. MOLNÁR, *The Interplay between the EU's Return Acquis and International Law*, *op. cit*., p. 2.

[23] R. A. WESSEL, "Foreword", in T. MOLNÁR, *The Interplay between the EU's Return Acquis and International Law*, *op. cit*., p. 1.

[24] P. GARCÍA ANDRADE, *op. cit*., p. 152.

[25] *Ibid*. In this sense, see also, V. CHETAIL, *International Migration Law*, Oxford University Press, Oxford, 2019, p. 5.

States manage the readmission of irregular migrants, potentially influencing global practices in this area.

Ensuring the return of irregular migrants and unsuccessful asylum seekers is crucial for States' migration policies. In this regard, readmission is an important part of international cooperation on migration: it refers to the act by a State to accept the re-entry of an individual on its territory. Readmission involves individuals who have entered a country irregularly, overstayed their visas, or otherwise violated national migration laws[26]. Readmission to the country of origin reflects an obligation under customary international law – and, in some cases, treaty law – that requires every State to readmit its nationals back into its territory.

Readmission plays a key role in the EU's efforts to fight irregular immigration: indeed, together with return, it was at the heart of the very first proposals by the Commission and the Council of Ministers to harmonise Member States' migration policies[27]. However, according to the European Commission, a distinction must be made between readmission and return, as they are not interchangeable terms. In fact, return generally refers to the entire process of going back to one's country of origin, transit or another third country, including planning and implementation[28]. As follows, the term "return" does not specifically concern the action of a State, unlike readmission[29]. In any case, the literal meaning of the word "return" – *i.e*, "to come or go back to a previous place"– implies that an individual must have been previously present in a country before being able to return there[30]. There are specific types of return that characterise the methods of the process, *e.g.*, voluntary, forced

[26] International Organization for Migration (IOM), Immigration and Border Management Division, *Readmission*, available here: https://www.iom.int/sites/g/files/tmzbdl486/files/documents/readmission.pdf.

[27] Quatrième Conférence des ministres Européens responsables des questions de migration, Conclusions et résolution adoptées par la Conférence, Luxembourg, 17–18 septembre 1991, MMG-4 (91) 9 définitif. Cfr. S. LAVENEX, "From something to "offer in return" to something to "withdraw": Retracing trade conditionality in EU readmission policy", in *EU Immigration and Asylum Law Blog*, 5 September 2023.

[28] So, to a general "point of departure". Cfr. European Commission, Communication COM (2002) 175 final to the European Parliament and the Council on a Community Return Policy on illegal residents, Brussels, 14 October 2002. This distinction is also essential as to circumscribe the focus of this thesis.

[29] O. SUNDBERG DIEZ, *Diminishing safeguards, increasing returns: Non-refoulement gaps in the EU return and readmission system*, European Policy Center (EPC), Discussion Paper, 4 October 2019, p. 5.

[30] Cambridge Dictionary, "Return", Cambridge University Press 2023, cited in N. COLEMAN, *op. cit.*, p. 10.

and assisted return[31]. Moreover, while return policy is generally part of the EU's internal dimension, readmission policy falls under its external dimension[32]. The link between a return decision and the readmission procedure is clear: without a return decision, the readmission procedure cannot start. However, if the country of origin opposes readmission, the return decision becomes unenforceable and thus ineffective. Establishing the identity of an irregular migrant is crucial for a return decision, but this process often depends on the cooperation of the country of origin[33].

Given this context, it is crucial to distinguish between two aspects of readmission. On the one hand, there are the *obligations of States* with regard to readmission, which are based on international law – both customary and treaty law. On the other hand, there is *cooperation on readmission*, which refers to the range of international instruments that regulate the unauthorised movement of persons between States, including, *inter alia*, readmission agreements. In this regard, during the last decades several States have concluded readmission agreements to facilitate the removal of unauthorised migrants. Readmission agreements are defined as "binding bilateral or multilateral agreements between States that establish and facilitate the bases, procedures and modalities for one State to promptly and in an orderly manner return non-nationals who do not or no longer fulfil the conditions for entry or stay on its territory"[34]. While the personal scope of readmission agreements may cover not only nationals of the Parties but also third-country nationals (TCNs) who have transited through the territory of these Parties, customary international law obliges States to readmit only their own nationals[35].

Moving on from this remit, the analysis thereof begins with an examination of the main "loopholes" that characterise the international norms and obligations

[31] International Organization for Migration (IOM), *Glossary on Migration*, 2019, p. 186.

[32] It is also important to note that the EU's migration policy goes beyond readmission and encompasses various aspects, such as addressing the root causes of irregular migration; combating trafficking in human beings, irregular immigration and smuggling of migrants; organising legal migration; promoting the integration of third-country nationals (TCNs) in the Member States. Cfr. F. MARTINES, "Il nuovo Patto sulla migrazione e l'asilo e la riammissione dei migranti irregolari da parte dei paesi di origine o di transito", in *Annali AISDUE*, Focus "La proposta di Patto su immigrazione e asilo", No. 4, 2020, p. 46.

[33] *Ibid. Infra,* CHAPTER I.

[34] International Organization for Migration (IOM), *Glossary on Migration*, cit., p. 2.

[35] J. P. CASSARINO, *Readmission Policy in the European Union*, EU Directorate General for Internal Policies, Policy Department C: Citizen's rights and Constitutional affairs, 2010, p. 13.

governing readmission, which seem to be only partially defined. Indeed, it should be noted that certain important theoretical issues related to readmission under international law remain unresolved or insufficiently developed[36]. This analysis is quite important for the purposes of this research, as such ambiguities leave flexibility for States to adopt new "instruments" to curb mobility, especially at the EU level – what we called "transformative trends" in the EU readmission policy.

As mentioned before, under customary international law States are obliged to readmit only their own nationals. Nonetheless, a first uncertainty in this regard concerns the legal basis of this customary obligation, which traditionally stems from the *fundamental right to return to one's country* and *the State's sovereign right to expel aliens*. The "duality" surrounding the legal foundations of the readmission obligation under international law (as well as its upshots) is a primary factor contributing to its partial lack of definition. There are therefore two main perspectives in this regard: the so-called "State rights-based perspective" and the "human rights-based perspective".

As for the "State rights-based perspective", it considers the "States' sovereignty over territories and borders, notably the right of a State to decide freely whom to admit and to expel from its territory" as the legal basis of the readmission obligation under international law[37]. From this perspective, it may be reasonable to think that if a State has the right to expel aliens, then the States of which those aliens are citizens should have the obligation to readmit them. Without this obligation, the right of States to expel individuals from their territory would become virtually meaningless[38]. This theory frames readmission as an obligation of intergovernmental cooperation, which is independent of the will of the individual readmitted.

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[36] S. OLIINYK, "International Legal Institute of Readmission of Persons", in *Migration & Law*, Vol. 1, Issue 2, 2021, p. 21.

[37] M. PANIZZON, "Readmission Agreements of EU Member States: A Case for EU Subsidiarity or Dualism?", in *Refugee Survey Quarterly*, Vol. 31, Issue 4, 2012, pp. 108. See also, D. MARTIN, "The Authority and Responsibility of States", in A. ALEINIKOFF, V. CHETAIL (eds.), *Migration and International Legal Norms*, The Hague, T.M.C. Asser Press, 2003, pp. 31–45.

[38] K. HAILBRONNER, "Readmission Agreements and the Obligation on States under Public International Law to Readmit their Own and Foreign Nationals", in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Band 57, 1997, p. 8. See also, M. GIUFFRÉ, "Obligation to Readmit? The Relationship between Interstate and EU Readmission Agreements", in F. IPPOLITO, S. TREVISANUT (ed.), *Migration in the Mediterranean: Mechanism of international cooperation*, Cambridge University Press, Cambridge, 2015, p. 269.

Under the "human rights-based perspective", instead, the customary obligation of readmission would be directly linked to the individual right to return to one's country, which should only cover voluntary return. If we argue that the obligation to readmit is about protecting human rights, then it seems logical that this obligation should only apply if the individual chooses to return voluntarily. However, if the basis of the readmission obligation under international law is the right of individuals to return to their country, it also remains controversial whether this right extends to a right to dignified return and sustainable reintegration. Many international instruments stipulate that States have an obligation to ensure both dignified return and sustainable reintegration for returnees. The question is whether individuals have been recognised as having a right to both dignified return and sustainable reintegration as part of their right to voluntary return.

From these initial considerations, it can be assumed that the international rules governing readmission are decidedly unclear as to their precise content and may lead to uncertainty and divergent interpretations. For this reason, CHAPTER I aims at analysing the main "loopholes" regarding readmission obligations under international law as briefly described above. The discussion addresses first the State obligation to readmit from the perspective of international law, including the obligation to readmit TCNs, which, as mentioned before, is instead only enshrined in treaty law. In particular, the analysis highlights the importance of international human rights and refugee law in shaping the readmission of TCNs[39]. Furthermore, CHAPTER I examines the evolution of the international legal norms relating to State cooperation on the readmission of irregular migrants, with a particular focus on the role of the Global Compact for Safe, Orderly and Regular Migration (GCM)[40]. As the first comprehensive attempt to create a unified international governance framework for migration, the GCM aims to address migration in a holistic and comprehensive manner. Although classified as soft law and non-binding, the GCM may influence existing law and contribute to the progressive development of customary international migration law. Non-binding instruments such as the GCM may in fact fill gaps in international law and contribute to the formation of

[39] *Infra*, CHAPTER I, SUB–SECTION 2.2.

[40] United Nations, General Assembly, Global Compact for Safe, Orderly, and Regular Migration, Final Draft, resolution 73/195, 11 July 2018.

customary norms, especially if they are supported by a significant number of States[41]. In other words, CHAPTER I analyses how the GCM may have influenced and refined international cooperation on readmission – and migration governance more broadly – by claiming to promote a more structured and cooperative approach.

The examination of the existing obligations of States with regard to readmission under general international law provides also the indispensable legal basis for a thorough examination of readmission cooperation within the current EU legal framework, which is the object of CHAPTER II. Indeed, the EU legal system is embedded in general international law and is inevitably affected by the international legal rules on this specific issue. The analysis of EU "formal" international readmission cooperation mechanisms, *i.e.*, readmission clauses included in broader agreements and readmission agreements, is pivotal to fully addressing the research question of this Ph.D. thesis. Firstly, this phase represents the initial "conceptualisation" of the EU readmission policy and thus serves as a foundation on which subsequent developments are built. By examining the origins and early manifestations of "formal" cooperation on readmission, it is possible to identify the original intentions, objectives and mechanisms envisaged by both the EU and its Member States in this area. Analysing the evolution of these "formal" instruments sheds also light on the early dynamics of EU readmission policy. The aim of this analysis is to understand whether and how this "formal" cooperation on readmission has been shaped by international legal norms on this issue and, in turn, to what extent it has the potential to influence international law.

The progression from CHAPTERS I and II to CHAPTERS III and IV reflects a logical and thematic continuity, demonstrating how the uncertainties and challenges identified in the earlier CHAPTERS underpin the shifts analysed later in the thesis. CHAPTER I examines the "loopholes" within the international legal framework governing readmission obligations; CHAPTER II builds on this foundation by analysing the EU's early attempts to address the issue of readmission cooperation with third countries through "formal" instruments, such as readmission clauses and EURAs. However, as the analysis shows, the inherent limitations of these "formal

[41] A. BUFALINI, "The Global Compact for Safe, Orderly and Regular Migration: What is its contribution to International Migration Law?", in *Questions of International Law,* Zoom-in 58, 2019, p. 18.

approaches" – such as, for example, their limited adaptability to the political and operational challenges of readmission cooperation – have highlighted the need for alternative strategies (what we call *"transformative trends"* in the EU readmission policy). This transition sets the stage for CHAPTER III, which examines how the uncertainties identified in CHAPTER I and the "difficulties" discussed in CHAPTER II led the EU towards the "informalisation" of its readmission policy, characterised by "flexible", non-binding arrangements with third countries. CHAPTER IV continues this trajectory by examining how the Union's increasing reliance on conditionality has become standard strategy for approaching cooperation with third countries in this area.

CHAPTER III examines the adoption by the EU of a complex set of instruments to cooperate with third countries on readmission, which differ from the traditional instruments described in CHAPTER II. These developments in readmission – and more generally in EU migration law – are closely linked to the increasing use of "informal" instruments; this "transformative trend" marks the "second phase" of the EU readmission policy, having the potential to have a significant impact on international obligations regarding readmission and, more broadly, on the international governance of migration. In the absence of conditions for concluding EURAs and given the EU's primary focus on implementing an "effective" readmission policy, there has been a notable trend towards "informalisation". Indeed, the use of "informal" instruments has become increasingly widespread as they allow the EU to navigate complex international relations and achieve practical results without the lengthy negotiation and ratification processes associated with formal agreements. By using these "informal" mechanisms, the EU can respond more swiftly to emerging migration challenges, foster cooperation and ensure the effective return and readmission of irregular migrants. The shift towards "informal" arrangements was partly driven by the unsuccessful negotiation of EURAs with key strategic third countries: this led the EU to increasingly rely on "informal" methods and a broader range of instruments. Given the circumstances, the EU's turn to "informalisation" and diverse strategies seemed in fact inevitable.

The transition to this "transformative trend" in dealing with readmission is marked by the emergence of two types of cooperation instruments with third

countries on this issue. The first type relates to "informal" arrangements that deal *specifically with readmission issues* (CHAPTER III, SECTIONS 2 ff.). The content and function of these readmission arrangements is the same as that of "formal" readmission agreements, but they are unofficial, and their precise provisions are often kept secret; they also claim to be non-binding and without legal effect[42]. The EU has so far reached readmission arrangements with the following countries: Afghanistan, Mali, Guinea, Bangladesh, Gambia, Côte d'Ivoire and Ethiopia.

The renowned EU–Türkiye Statement also falls into the category of "informal" readmission arrangements; however, it has a special "feature"[43]. Indeed, according to the Court of Justice, it cannot be considered as an arrangement *attributable to the EU*. As will be elaborated further, the General Court determined that the Statement could not be attributed to the Union but rather to the individual Member States, who negotiated directly with the Turkish Prime Minister, acting independently of the Union[44]. Nevertheless, it is undeniable that the Declaration marked a significant step towards the "informalisation" of readmission procedures and, more generally, the control of irregular migration within the Union: for this reason, the Statement deserves particular attention in this dissertation (CHAPTER III, SECTION 3).

A common feature of these instruments is that their negotiation and adoption process – which will be analysed in more detail in CHAPTER III – does not follow the procedures for the conclusion of international agreements by the EU as established in Art. 218 TFEU. This procedure includes numerous safeguards, such as a high level of transparency and a clear definition of the roles and responsibilities of the EU institutions. It is therefore clear that these "informal" instruments pose particular challenges in a legal system such as the EU's, where the conclusion of international agreements is strictly regulated both procedurally and substantively. Furthermore, the inclusion of the "Working Arrangements" of the European Border

[42] M. SORMUNEN, "The outdating of asylum policy from within: The EU's informal readmission arrangements and the Rule of Law", in *Reconnect*, 8 April 2022. *Infra*, CHAPTER III.

[43] European Council (EU), *EU–Turkey statement*, Press Release, 18 March 2016. This Ph.D. thesis refers to the country as "Türkiye" rather than "Turkey" because in December 2021 the Turkish government asked States and international organisations to use "Türkiye" in recognition of its official and preferred name, which reflects its own language and identity.

[44] Court of Justice of the European Union (CJEU), General Court, Cases T–192/16, T–193/16 and T–257/16, *NF, NG and NM v European Council*, Order of 28 February 2017, ECLI:EU:T:2017:128. *Infra*, CHAPTER III, SUB–SECTIONS 3.1–3.3.

and Coast Guard Agency (FRONTEX) in this analysis highlights the wider range of soft law instruments that interplay with the area of readmission at EU level. The research sheds light on how "informalisation" has influenced the operational and administrative dimensions of EU policy in this field. These arrangements, which are primarily technical or administrative in nature, serve as a flexible mechanism to facilitate cooperation between the European Agency and the competent authorities of third countries. They do not, however, impose any international obligations on the Union itself[45]. In particular, the analysis provided for in CHAPTER III, SECTION 4 focuses on the main characteristics of these Working Arrangements, as well as on the mandate of the Agency in relation to return and readmission.

The second category analysed in CHAPTER III, SECTION 5 encompasses instruments of cooperation with third countries *which are not primarily focused on readmission*, although they do contain readmission–related commitments. These cooperation instruments have indeed found support and fertile ground thanks to the objectives proposed by the New Pact on Migration and Asylum[46]. In this respect, the New Pact not only underlines the importance of implementing EURAs but also stresses the need to cooperate with the main third countries of origin of irregular migrants: to this end, the EU should commit to mobilise all relevant policies and instruments to strengthen its "holistic approach" to migration management[47].This comprehensive strategy integrates various elements, with readmission as a central component in addressing migration challenges. According to the Commission's press release, the Pact is a form of cooperation with third countries that focuses on comprehensive, balanced and tailor-made migration partnerships that are mutually beneficial to the parties involved[48]. The New Pact's proposals and input have

[45] D. VITIELLO, *Le frontiere esterne dell'Unione europea*, Cacucci Editore, Bari, 2020, pp. 45, 117–118. *Infra*, CHAPTER III, SECTION 4.

[46] European Commission, Communication COM (2020) 609 final to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, Brussels, 23 September 2020. 10 legislative parts of the New Pact on Migration and Asylum were eventually approved in May 2024. European Commission, *Pact on Migration and Asylum: A common EU system to manage migration*, 21 May 2024.

[47] COM (2020) 609 final, cit. para. 6.5. See also, more in detail, *infra*, CHAPTER III.

[48] European Commission, *A fresh start on migration: Building confidence and striking a new balance between responsibility and solidarity*, Press Release, 23 September 2020. Cfr. P. GARCÍA ANDRADE, "EU cooperation on migration with partner countries within the New Pact: new instruments for a new paradigm?", in *EU Migration Law Blog*, 8 December 2020. See also, European Council Meeting, Conclusions, 24 and 25 June 2021, EUCO 7/21, para. 12.

translated into significant concrete initiatives over the past year. Indeed, the EU has, *inter alia*, recently agreed three cooperation instruments with Tunisia, Mauritania and Egypt, referred to as "global partnerships": while these instruments are broadly aimed at fostering cooperation between the EU and these countries in various sectors, they also include specific measures to improve cooperation on the return and readmission of irregular migrants[49].

In sum, CHAPTER III looks at the complex set of transformative instruments shaping the "second phase" of EU action on readmission. The aim is to examine how these instruments affect and interplay with international obligations on readmission and human rights under international law. It also seeks to understand the extent to which they might influence such obligations on a wider, international scale. By analysing this "transformative trend", this research aims at determining not only how the EU's evolving approach is redefining its readmission cooperation strategies with third countries, but also whether the EU's influence could extend to shaping the readmission policies of other countries that might choose to follow the "EU example".

As for CHAPTER IV, it examines the EU's use of conditionality to secure third country cooperation on readmission. More in detail, both "formal" and "informal" readmission cooperation tools can have a negative impact on third countries that rely on migration to alleviate domestic unemployment and benefit from remittances. For this reason, these agreements/arrangements can often be more "advantageous" for the EU than for the third countries. As a result, both the negotiation and implementation of these cooperation instruments often reflect an imbalance of power, with the EU using incentives and "pressure" – referred to as "readmission conditionality" measures – to obtain the effective collaboration of less willing third countries.

Conditionality has "historically" been a key tool in the EU's external relations, designed to encourage partner countries to align themselves with the Union's core values and priorities. Traditionally, the EU has made its cooperation conditional on a partner State's commitment to democracy, human rights and the rule of law. This

[49] See *infra*, CHAPTER III, SECTION 5. The term "global partnerships" was first used by J. VALLENTINE, B. FROUWS, R. FORIN, "Power dynamics, arm twisting and migrant rights: the many (ugly) faces of migration diplomacy", in *Mixed Migration Centre*, 11 April 2024.

has been achieved by offering incentives such as closer political ties and economic benefits in exchange for adherence to these principles and values, and by including clauses in association or cooperation agreements that allow them to be suspended if these fundamental values are not respected[50]. However, in recent years there has been a noticeable shift in the focus of EU conditionality, particularly in the area of migration cooperation. Rather than prioritising the promotion of democratic values and human rights, EU conditionality in migration partnerships increasingly revolves around securing cooperation on the control of irregular migration and readmission[51]. This represents a departure from the "traditional" model to a "new" approach, in which the EU and its Member States use a mix of incentives and pressures to achieve migration management objectives, often prioritising these over the broader normative and political objectives that once defined the EU's approach to external relations. In doing so, the EU appears to have shifted from promoting its values to promoting its own interests, redefining its external relations framework to serve more "urgent" migration priorities.

Among the various policy instruments used by the EU to secure third country cooperation on readmission, visa policy plays a central role. The EU offers visa facilitation as an incentive, granting easier access to its territory in exchange for cooperation on readmission; conversely, it can use visa restrictions as leverage to pressure third countries to fulfil their readmission obligations or commitments. In addition to visa policy, the EU also seeks to use its other policy areas, such as trade and development, to encourage third countries to cooperate effectively on readmission. The trend described so far has been reaffirmed by the Commission not only in 2019, when it stated that "[a]dditional incentives and leverage should be sought also in other policy areas, on a case-by-case approach", but also in the New Pact[52]. Regarding the latter, the Commission proposes in fact to use the "*embedding*" (or "*issue-linkage*") technique to promote cooperation with third countries in managing migration issues, both through "informal" and "formal" instruments: such cooperation should be achieved taking into account the "full

[50] E. FRASCA, E. ROMAN, *op. cit.,* pp. 947 ff.

[51] *Ivi,* p. 948.

[52] European Commission, Communication COM (2019) 481 final to the European Parliament, the European Council and the Council, Progress report on the Implementation of the European Agenda on Migration, Brussels, 16 October 2019, p.16.

range of the EU's and Member States' policies, tools and instruments, which can be pulled together in a strategic way"[53].

The link with readmission has also been emphasised in EU proposals over the last decades in relation to legal pathways, with the intention of using them as *another* leverage to encourage third countries to cooperate effectively with the Union in the area of readmission. As early as 2016–2017, the European Commission highlighted the importance of adopting a "tailor-made approach" to identify interests, incentives and leverage points with partner countries to enhance cooperation on migration management, including return and readmission[54]. To support these efforts, the Commission highlighted the potential of "*offering legal pathways for regular migration through pilot projects at the EU level*"[55]. With the New Pact, the EU reaffirmed its belief that the development of legal pathways is closely linked to strengthened cooperation on return and readmission[56].

CHAPTER IV also aims at assessing whether the use of other EU policies to achieve readmission at any cost, as a clear expression of the EU's policy of deterring irregular migration, could lead to a diversion from the stated objectives in these areas. For example, while development policy under Art. 208(1) TFEU seeks to reduce and eradicate poverty, the strategic use of conditionality to secure readmission could divert resources or attention away from these objectives, potentially undermining long-term development outcomes in partner countries. Similarly, the EU's commitment to providing regular pathways for migration as a humanitarian alternative to irregular crossings could be overshadowed by the emphasis on readmission, potentially undermining the EU's broader humanitarian objectives[57]. Finally, CHAPTER IV analyses the impact and dynamics of the EU's use of "readmission conditionality" on international law. Specifically, this CHAPTER examines how the Union's approach to "readmission conditionality"

[53] COM (2020) 609 final, cit., para. 6.5. Cfr. F. MARTINES, *op. cit.,* 2020, p. 53.

[54] European Commission, Communication COM (2017) 200 final on a more effective return policy in the European Union – A renewed Action Plan, Brussels, 2 March 2017, Section II.

[55] European Commission, Communication COM (2017) 558 final to the European Parliament, The Council, the European Economic and Social Committee and the Committee of the Regions on the Delivery of the European Agenda on Migration, Brussels, 27 September 2017, p. 22.

[56] European Commission, *Return and readmission: improving cooperation within the EU and with external partners*, Press Release, 10 February 2021.

[57] In this sense, K. BAMBERG, *The EU Resettlement Framework: From a humanitarian pathway to a migration management tool?,* EPC Discussion Paper, 26 June 2018.

might influence international readmission obligations and international law more generally, while also exploring the broad implications for international cooperation on migration. In addition, this analysis seeks to determine whether the EU's approach to this kind of conditionality has influenced other States to adopt similar approaches, potentially positioning the Union as a key "player" in their development.

METHODOLOGY

As to answer the research question outlined in the INTRODUCTION, it is imperative that the methodology – or, more appropriately, the set of analytical methods – employed in this thesis stand up to scrutiny. Research, particularly in a field as complex as law, often involves a mixture of methods, making it difficult to categorise an entire analysis under specific headings[58]. This difficulty becomes even more substantial when analysing the interplay between two legal systems which are different in their functioning and scope, yet interrelated, such as international and EU law[59]. This SECTION briefly outlines the most relevant methodological steps undertaken to analyse and systematise sources, explaining the main approaches used as well as their limits.

As legal dogmatics allows to delve deep into the various legislative complexities surrounding EU readmission policy, as well as its relationship with international law, it was selected as the principal methodological platform upon which this thesis lies. Rooted in the study of positive law, legal dogmatics involves the systematic study of international and European legal norms, principles, doctrines, case law and scholarly interpretations[60]. This methodology serves as an organised and structured means of identifying legal standards, defining their scope and meaning, resolving ambiguities, bridging gaps and ensuring their consistent application to specific cases. This methodological approach is particularly well suited to answering the research question of this thesis, which requires a reasoned examination of the interplay between two different legal systems, such as EU and international law, in a specific field of action, *i.e.*, readmission. This methodology makes it possible to analyse whether EU practices are consistent with international legal obligations, in particular those relating to human rights and the protection of migrants, and to reflect on how these practices can potentially contribute to the development of

[58] M. SALTER, J. MASON, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research*, Pearson, Edinburgh, 2007, p. 31.

[59] *Supra*, INTRODUCTION.

[60] J. VRANKEN, "Exciting Times for Legal Scholarship", in *Law and Methods*, Vol. 2, Issue 2, 2012, p. 43.

international law. In our view, the methodology of legal dogmatics is thus perfectly suited to the objectives of this study.

The research draws on a wide range of legal sources, which are systematically categorised for ease of reference. Firstly, the *international legal instruments* examined include international conventions, such as, *ex multis*, the ECHR, as well as readmission agreements between third countries and between individual Member States and third countries. Second, the analysis takes into account *EU legal sources*, *i.e.*, relevant primary legislation, international agreements concluded by the EU (with a particular focus on EURAs) and secondary legislation such as, *inter alia*, regulations, directives, decisions, recommendations, implementing acts. Thirdly, *case law* also contributes to the analytical framework: at the level of international law, this second category of sources includes mainly (but not only) the jurisprudence of the International Court of Justice (ICJ) and the ECtHR; at the EU level, it includes the jurisprudence of the Court of Luxembourg; the study also includes relevant decisions of national courts, in particular Italian and Spanish courts.

Systematising the above-mentioned legal sources in order to better establish the interplay between two different, yet interrelated legal systems was not an easy task in practice. While international law establishes broad, principle-based norms intended to apply across different contexts, EU law is characterised by a high degree of specificity, shaped by the Union's unique regional and political needs. The latter often emphasises operational measures, including for example border control initiatives, which are largely driven by security and economic considerations. Reconciling these two legal frameworks poses a dual challenge of interpretation and implementation. This tension is further exacerbated by political factors, such as geopolitical considerations, assertions of national sovereignty and domestic political pressures, which significantly shape the development and implementation of migration policies. The increasing prevalence of "informal" readmission arrangements, coupled with the growing use of conditionality in this field, has introduced additional complexities, particularly in relation to legal accountability.

For these reasons, the Author of this thesis found that "rigorous" legal sources – and thus only a "normative-evaluative approach"– were insufficient for the

purposes of this research. To fill this gap, the study incorporates a wide range of non-legal instruments, with a focus (of course) on "informal" readmission arrangements adopted by the EU and, where possible and accessible, by third countries. Furthermore, the analysis includes official documents from UN bodies and Council of Europe bodies (*e.g.*, the Parliamentary Assembly, the Committee for the Prevention of Torture and the Commissioner for Human Rights), as well as communications, conclusions, political declarations and reports from EU institutions and agencies. The research is also supported by scholarly literature, policy papers and academic contributions such as journal articles and edited volumes. It also draws on analysis from blogs and other online platforms, as well as studies by international organisations and non-governmental organisations (NGOs). In addition, media sources such as newspaper articles and online reports are used to provide a broader context and complement the analysis thereof. It was therefore necessary to draw on additional sources to complement the "strictly legal methodology" and guide this research.

Another significant challenge concerned access to information. Indeed, one of the main issues of this research – which is also one of the aspects that made it particularly "engaging" – was the difficulty in analysing State readmission practice and the accessibility of both "formal" and "informal" readmission agreements *beyond the EU context*. In this respect, the EU stands out as one of the few exceptions where "formal" readmission agreements are fully published and accessible; however, as discussed in more detail in CHAPTER III, in the case of the EU the challenge is to identify "informal" deals, which are often characterised by a significant lack of transparency. These "informal" arrangements often remain unpublished or are difficult to trace, creating substantial obstacles to a deep legal analysis. In the case of third countries, the situation is even more complex: the availability of both "formal" and "informal" readmission tools is limited, making it difficult to assess the scope and content of these instruments. In many cases, even "formal" agreements concluded by third countries with others third countries have not been always readily available, raising concerns about the transparency and accountability even in the case of these "official" readmission practices[61].

[61] See also the disclaimer *infra*, CHAPTER I, SECTION 1.

Given this lack of clear, well-defined and accessible State practices, particularly in relation to general international obligations on readmission, much of the research had to rely on secondary sources from the academic literature. While this reliance was crucial, it did not come without its own challenges. Much of the available literature was outdated and, as a result, not fully reliable for drawing conclusions about current customary international law in relation to readmission practices. This created a gap between theory and practice, making legal analysis more complex. Nevertheless, this diverse body of literature was essential in shaping the theoretical framework of this dissertation. Combined with the primary sources that the Author of this work was able to access, it laid the groundwork for a thorough examination of the evolving interplay between EU readmission cooperation and its "transformative trends" in relation to international law.

As for the structure of this thesis, it has been deliberately designed to reflect the interrelated nature of the different aspects of EU readmission policy, its "transformative trends" and its interplay with international law. Each CHAPTER builds in fact logically on the previous one, addressing different but interrelated facets of the issue, with the aim of fully addressing the research question outlined in the INTRODUCTION. More in detail, CHAPTER I is fundamental to understanding the international obligations relating to readmission, exploring their nuanced and often ambiguous nature and highlighting the legal loopholes that may potentially arise from these obligations: it adopts an exclusively *international law perspective*. Instead, the approach in the following CHAPTERS adopts the perspective of EU law and policy. In particular, CHAPTER II examines the "standard" approach initially adopted by the EU in this area and places it within the broader framework of international law discussed in the first CHAPTER. This formal approach is crucial to understanding how the EU has sought to integrate international readmission obligations, as well as human rights and refugee law considerations, into its readmission legal and policy framework. CHAPTER III examines the "transformative trends" of the EU's increasing reliance on "informal" readmission arrangements and also compare them with the "formal" agreements discussed in the previous CHAPTERS. This "informal" approach provides a different perspective on the EU's readmission policy and its interplay with international law compared to the previous

analysis. Finally, the last CHAPTER is devoted to another "transformative trend" in EU readmission policy: the increasing use of conditionality. This CHAPTER examines how conditionality, by linking readmission cooperation to broader political and financial considerations, is changing the nature of the EU's external relations and reinforcing the trends analysed in the previous CHAPTERS. Finally, the thesis concludes with the main findings of the research (CONCLUSION), offering reflections and broader insights derived from the analysis.

CHAPTER I

INTERNATIONAL LAW PERSPECTIVES ON READMISSION

TABLE OF CONTENTS: 1. The international obligation on States to readmit their own nationals. – 1.1. The legal foundation of the international obligation on States to readmit their own nationals in connection with the sovereign right of States to regulate the entry and exit of aliens. – 1.2. The legal foundation of the international obligation on States to readmit their own nationals in connection with international human rights law. – 2. The international obligation on States to readmit third country nationals (TCNs). – 2.1. The scope and content of the obligation on States to readmit TCNs under treaty law. – 2.2. The relevance of international human rights law and refugee law in the context of readmission of TCNs. – 3. The evolution of international legal norms on cooperation over readmission: insights from the Global Compact for Safe, Orderly and Regular Migration (GCM).

1. The international obligation on States to readmit their own nationals

A thorough examination of readmission under general international law should first cope with the State obligation to readmit its own nationals[62]. While many scholars argue that this obligation is an established norm of customary international law, citing the presence of both *opinio juris* and consistent State practice, these arguments often rely heavily on doctrinal reasoning[63]. As a sample, Goodwin-Gill describes the obligation to readmit nationals as "firmly fixed within the corpus of general international law", and Weis similarly regards this norm as a "generally accepted" and "universally recognised" State obligation[64]. However, studies that

[62] This CHAPTER adopts a strictly international law viewpoint, with the aim of presenting the issues surrounding readmission from an international perspective. The contribution of EU law, and particularly its interplay with the international law issues presented in this CHAPTER, is the focus of the subsequent CHAPTERS.

[63] On international customary law, see, *ex multis*, C. FOCARELLI, *Diritto internazionale*, Seventh Edition, Wolters Kluwer, CEDAM, Padua, 2023, pp. 108–126.

[64] G. S. GOODWIN-GILL, *International Law and the movement of persons between states*, Oxford University Press, Oxford, 1978, p. 137; E.B. WEIS, *Nationality and Statelessness in International Law*, Second Edition, Alphen aan den Rijn, Sijthoff & Noordhoff, 1979, pp. 47–48. See also, *ex multis*, M. GIUFFRÉ, *op. cit.*, pp. 268 ff.; M. PANIZZON, *op. cit.*, pp. 108 ff; N. COLEMAN, *op. cit.*, pp. 27 ff.

closely examine State practice and *opinio juris* are much rarer, with the notable exception of Hailbronner's work, which argues for the existence of a customary international norm in this regard[65]. Noll has pointed out that it is "surprisingly difficult" to document a general State obligation to readmit nationals, suggesting that statistical information would be most helpful[66]. Unfortunately, however, global statistics on this issue are largely lacking[67]. This problem is likely to be more pronounced in many countries of return, which may lack the administrative capacity to collect such data and may not see the need to do so if they are simply readmitting their nationals. Thus, more than a decade and a half after Noll's call for better data, such information remains scarce, raising the question of whether it will ever become available[68].

Despite these nuances, the obligation to readmit is widely recognised in sources beyond doctrinal literature, including, *inter alia*, the Draft on the Expulsion of Aliens, which is widely regarded as marking an important stage in the development of international law on migration[69]. The Draft appears to "reflect the joint effort of the [International Law Commission (ILC)]'s distinguished experts on public international law, from all regions of the world, to enunciate principles that regulate states' exercise of a power that is frequently abused", involving both the codification and the progressive development of international norms relevant for the topic at stake[70]. The obligation to readmit a State's own nationals is also

[65] K. HAILBRONNER, *op. cit*.

[66] G. NOLL, "Return of persons to states of origin and third states", in A. ALEINIKOFF, V. CHETAIL (eds.), *op. cit.,* p. 63.

[67] C. M. F. MOMMERS, *Voluntary return and the limits of individual responsibility in the EU Returns Directive,* Ph.D. Thesis, University of Leiden, 2022, p. 161. Even within the EU context, which has made considerable efforts to improve data collection on readmission and return, there are significant gaps and inconsistencies in the data.

[68] *Ibid.*

[69] International Law Commission (ILC), *Draft Articles on the Expulsion of Aliens, with commentaries*, 2014, General Commentary (2), Arts. 22 and 29. The ILC was created by the General Assembly in 1947 to fulfil its mandate under Art. 13(1)(a) of the UN Charter, *i.e*., "to initiate studies and make recommendations for the purpose of [...] encouraging the progressive development of international law and its codification". United Nations, *International Law Commission*, available here: https://legal.un.org/ilc/.

[70] G. L. NEUMAN, "Human Rights and the International Law Commission's Draft Articles on the Expulsion of Aliens", in *Harvard Human Rights Journal*, Vol. 30, 2017, p. 3.

regarded as a norm of customary international law by several major international organisations, including the IOM and the Council of Europe[71].

The existence of a customary obligation is also supported by the fact that States do not normally refuse to readmit their own nationals. Instead, they often question whether they are in fact the State of nationality of the persons to be readmitted. Indeed, the readmission process can be complicated by the difficulty of proving an individual's nationality, especially when documentation is insufficient. In such cases, the responsibility shifts to the requested State to recognise the presumed nationality and to issue the necessary documents[72]. Procedural hurdles imposed by the requested State may cause significant delays or complications in the readmission process and may be perceived as a reluctance to accept the returning nationals[73]. As a sample, the United States (U.S.) identified some "recalcitrant" countries, as labelled by the Department of Homeland Security, that refused to accept returnees. These countries argued that the individuals in question were not their nationals but citizens of other countries[74]. However, as long as the requested State only disputes the nationality claim, it is difficult to argue that the State does not believe that such a request reflects a norm of customary international law. The fact that requested States resort to these procedures does not imply that they disagree with the norm; rather, the fact that they resort to these procedures when faced with an undocumented person (rather than refusing readmission outright) can be seen as evidence that States consider this behaviour to be legally binding as part of customary international law.

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[71] See for example, International Organization for Migration (IOM), *Global Compact Thematic Paper: Readmission*, 2016, p. 1; Council of Europe, Parliamentary Assembly, Readmission agreements: a mechanism for returning irregular migrants, Resolution 1741 (2010) Final version, 22 June 2010, para. 1.

[72] For the purposes of this thesis, the term "requesting State" refers to the State which requests readmission. The term "requested State" refers to the State which must readmit its own nationals, or TCNs.

[73] N. COLEMAN, *op. cit.*, p. 33.

[74] As of 2020, the U.S. considered 13 countries and territories recalcitrant: Bhutan, Burundi, Cambodia, China, Cuba, Eritrea, Hong Kong, India, Iran, Iraq, Laos, Pakistan, and Russia. U.S. Immigration and Customs Enforcement (ICE), *Visa Sanctions Against Multiple Countries Pursuant to Section 243(d) of the Immigration and Nationality Act*, updated in 2022, available here: https://www.ice.gov/remove/visa-sanctions; J. H. WILSON, *Immigration: "Recalcitrant" Countries and the Use of Visa Sanctions to Encourage Cooperation with Alien Removals*, Congressional Research Service Washington D.C., 2020. Cfr. E. PAASCHE, "Recalcitrant' and 'Uncooperative': Why Some Countries Refuse to Accept Return of Their Deportees", in *Migration Policy Institute* (MPI), 20 December 2022.

The dissenting opinion on the existence of such customary norm comes from a part of the doctrine which argues that – in addition to the difficulty described with regard to the available data that could clarify State practice – in this case there is a lack of the *opinio juris* requirement, *i.e.*, the conviction of the requested State that it has a legal obligation under general international law to accept the readmission request. These doubts concern mainly the practice of the conclusion of readmission agreements: since readmission takes place mainly (or exclusively) in the context of relations governed by readmission agreements or similar instruments, according to part of scholarship it may not be possible to affirm the existence of a clear *opinio juris* between States in this sense[75]. However, in this regard, it is also undisputed that treaties play an important role in shaping customary international law. The ICJ in the *North Continental Shelf Case* in fact affirmed that treaty law can either codify existing customary international law or serve as the basis for new customary rules[76]. Indeed, with respect to the readmission obligation, the practice of concluding readmission agreements itself does not negate the customary status of this obligation. Indeed, a rule may co-exist under both customary and treaty law as long as there is consistent State practice and *opinio juris*[77]. Overall, therefore, the proliferation of readmission agreements as it stands does not call into question the customary nature of the obligation of States to readmit their own nationals.

It has thus been established that customary international law recognises the existence of a norm obliging States to readmit their own nationals. At this point, as also mentioned in the INTRODUCTION, a comprehensive analysis of the legal loopholes of readmission obligations implies, first and foremost, the duty to examine the basis on which this customary obligation is grounded. Two main foundations have been identified: the first, viewed from a "State rights-based perspective", is based on *the sovereign right of States to regulate the entry and exit of aliens*; the second, from a "human rights-based perspective", is rooted in the *right to return to one's country,* and it is often matched with the individual right to leave

[75] See, among others, E. LAPENNA, *La cittadinanza nel diritto internazionale generale*, Giuffré Editore, Milan, 1966, pp. 207–208.

[76] International Court of Justice (ICJ), *North Sea Continental Shelf (Federal Republic of Germany/Denmark)*, 20 February 1969, I.C.J. Reports 1969, p. 3, paras. 61 ff.

[77] M. GIUFFRÉ, *op. cit.*, p. 269.

any country, including his/her own. The following SUB-SECTIONS aim to analyse both perspectives.

1.1. The legal foundation of the international obligation on States to readmit their own nationals in connection with the sovereign right of States to regulate the entry and exit of aliens

A first basis for the State obligation to readmit nationals lies in the sovereign right of States to regulate the entry and exit of aliens from their territories[78]. From this viewpoint, the obligation to readmit nationals is fundamentally linked to the sovereign right of a State to control its territories and borders and to decide freely whom to admit and to remove from its territory, framing the customary readmission obligation in terms of national sovereignty. Migration is in fact a matter that directly impacts a State's core sovereignty, particularly the authority to control who can enter and remain within its borders. Sovereignty gives States the power to determine the rules of entry and residence, including the power to remove TCNs whose right to reside has expired under a country's domestic law, or those who never had the right to enter in the first place[79]. In principle, sovereign States have great power in matters of removal of aliens, subject to precise limitations derived from international human rights law[80]. This sovereign prerogative is also recognised as part of customary international law and has been particularly emphasised, *inter alia*, in the case law of the ECtHR[81].

[78] In support of this argument, see, *ex multis*, B. NASCIMBENE, *Il trattamento dello straniero nel diritto internazionale ed europeo*, Giuffré Francis Lefebvre, Milan, 1984, p. 244; K. HAILBRONNER, *op. cit.*; M. PREVIATELLO, *La dimensione esterna della politica di immigrazione e d'asilo: competenze e strumenti*, Ph.D. Thesis, University of Udine, 2022, pp. 86 ff.

[79] N. RONZITTI, *Diritto internazionale*, Seventh Edition, Giappichelli Editore, Turin, 2023, pp. 77 ff.

[80] First and foremost, the principle of *non-refoulement*. See, more in detail, *infra*, SUB–SECTION 2.2.

[81] See, in particular, European Court of Human Rights (ECtHR), Grand Chamber, Judgement of 23 February 2012, *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, para. 113 and all the case-law cited therein: "[a]ccording to the Court's established case-law, Contracting States have the right, as a matter of well-established international law [...], including the Convention, to control the entry, residence and expulsion of aliens". On the customary nature of this State right, see also, inter alia, International Organization for Migration (IOM), *IOM's policy on the full spectrum of return, readmission and reintegration,* 2021; p. 2; International Law Commission (ILC), cit., para (1) and Art. 3.

According to the "State-rights based perspective", the obligation of States to readmit their own nationals is a natural extension of their sovereign rights. The act of removal by a State inherently requires the acceptance of the removed person by another State: a State's decision to remove a TCN from its territory could be meaningless if no other State is willing to accept such a person. By asserting the power to remove TCNs, States implicitly acknowledge a corresponding responsibility to readmit their own nationals. This reinforces the idea that while States have the power to regulate the presence of TCNs within their borders, they are equally bound by their sovereignty to accept the readmission of their citizens. A common argument in the literature is that when a State refuses to readmit a national who has been removed from the territory of another State, it violates the territorial sovereignty of the latter State[82]. This assertion is based on the idea that a country cannot refuse to take back one of its citizens who is irregularly present in another territory, as this would unfairly place the burden of accepting the individual on another country. International law does not allow States to impose such burdens on each other[83]. Moreover, territorial sovereignty gives States the power to determine which foreigners may reside within their borders. If a State is forced to retain a person whose residence it has lawfully terminated, its sovereignty is compromised[84]. In this sense, "the practice of readmission, viewed as a form of expulsion is, in its various forms, perhaps as old as the exercise, whether soft or violent, of state sovereignty and interventionism designed to regulate the entry and exit of aliens"[85].

From this "State-rights-based" perspective, it is therefore possible to point out that the "human rights-based" thesis – which grounds the readmission obligation to in the human right to return to the country of origin – seems difficult to support because it is based on an analysis that mixes up two different issues that should instead remain clearly separated: on the one hand, the relationship between the individual and his or her State of nationality, and on the other, the inter-State relationship. In this respect, while it is true that the right of every individual to return

[82] G. S. GOODWIN-GILL, *op. cit.*, pp. 136–137; K. HAILBRONNER, *op. cit.*, pp. 6–12.

[83] G. J. BOLING, *Palestinian Refugees and the Right of Return: An International Law Analysis*, BADIL, Information & Discussion Brief, Issue No. 8, January 2001.

[84] N. COLEMAN, *op. cit.*, p. 30.

[85] J. P. CASSARINO, *Readmission Policy in the European Union*, cit., p. 13.

to his or her own country can only be realised to the extent that he or she is guaranteed entry and residence, it is equally true that the readmission obligation imposed on the requested State does not derive from the citizen's right to return, but rather from the requesting State's right to remove TCNs from its territory, and ultimately from the latter's right to have its territorial sovereignty respected[86]. The principle that each State must take back its own citizens who have been readmitted by another State is based on the idea that a State is responsible for its nationals. This responsibility arises from the special relationship between the State and its citizens, including those who are readmitted[87]. However, this bond of nationality also entails a responsibility for individuals when another State removes them: such a responsibility can, moreover, be seen as linked to the personal sovereignty of the State over its nationals[88].

Having analysed the obligation of States to readmit their own nationals from a "State rights-based perspective", it is important to analyse also the "human rights-based perspective", which, as also mentioned above, instead frames this obligation in terms of human rights law, particularly the right to return.

1.2. The legal foundation of the international obligation on States to readmit their own nationals in connection with international human rights law

As for the "human rights-based perspective", the generally accepted argument is that the right to return would only be meaningful when coupled with a

[86] C. M. F. MOMMERS, *op. cit.*, p. 117.

[87] International Court of Justice (ICJ), *Nottebohm (Liechtenstein v. Guatemala) Case (second phase),* Judgement 6 April 1955, I.C.J. Reports 1955, p. 4, p. 23: "[n]ationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection *vis-à-vis* another State, if it constitutes a translation into juridical terms of the individual's connection with the State which has made him its national".

[88] For example, it allows a State to grant diplomatic protection to its citizens. Diplomatic protection is a principle of international law that allows a country to intervene on behalf of its nationals who are facing serious harm or injustice in another country. Essentially, if a citizen of a country is being mistreated or has his or her rights violated abroad, his or her home country can offer assistance or seek redress from the foreign government. On diplomatic protection see, *ex multis*, J. DUGARD, "Diplomatic Protection", in *Max Planck Encyclopedia of Public International Law*, 2021.

corresponding State obligation to readmit its own citizens[89]. It is therefore necessary to examine in detail this "hypothesis" – *i.e.*, the one that sees the legal foundation of a State's obligation to readmit its nationals in the human right to return – as well as its relationship with international human rights law.

a) The human right to return and its relationship with the right to leave

In international law, the right of freedom of movement includes three essential individual rights: *(i)* the right to leave any country, including his/her own; *(ii)* the right to return to one's own country and *(iii)* the right of everyone lawfully within the territory of a State to liberty of movement and the freedom to choose own residence[90]. In this regard, the freedom of movement has a twofold "dimension": an internal dimension, which is linked to the freedom of movement *within* a country; an external dimension, concerning the freedom of movement *between* different States. The latter dimension is usually referred to as the right to leave and to return[91].

The right to return was originally seen as a means of reinforcing the right to leave, rather than as a "separate" individual right. Interestingly, during the drafting process of the Universal Declaration on Human Rights (UDHR) – whose Art. 13(2) can be seen as the cornerstone or fundamental principle of the right of return in human rights law – discussions took place in various working Committees and Commissions without any mention of a right of return[92]. It was not until debates in the Third Committee of the General Assembly in 1948 that an amendment proposing this right was introduced. The representative of Lebanon argued for its inclusion, claiming that while unrestricted entry to any country was the ideal in

[89] N. COLEMAN, *op. cit.*, p. 29.

[90] Ö. GÜRAKAR SKRIBELAND, "Revisiting and Further Exploring the Human Right to Leave", in *EJIL:Talk! Blog of the European Journal of International Law*, 9 September 2022.

[91] S. A. F. JAGERSKIOLD, "The Freedom of Movement", in L. HENKIN (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights*, New York, Columbia University, 1981, p. 167. Cited in D. KOCHENOV, "The Right to Leave Any Country including Your Own in International Law", in *Connecticut Journal of International Law*, Vol. 28, No. 1, 2012, p. 47.

[92] United Nations General Assembly, Universal Declaration of Human Rights, New York, 1948 (UDHR): "Everyone has the right to leave any country, including his own, and to return to his country". The UDHR is not an international treaty and therefore does not directly impose legal obligations on States. However, it embodies the core values shared internationally and has been instrumental in shaping the development of international human rights law.

theory, practical considerations had to be recognised. He stressed the importance of the right of return and suggested that it would strengthen the already recognised right to leave[93].

Despite its initial "non recognition", the right to return soon become a consistent feature of all major human rights texts, gaining its own distinct validation and rationale. Indeed, the right to return to one's country, together with the right to leave, has been largely recognised both by international and regional instruments. Among others: Art. 12(3) of the International Covenant on Civil and Political Rights (ICCPR), which provides that "[n]o one shall be arbitrarily deprived of the right to enter his own country"[94]; Art. 5(d)(ii) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which acknowledges "[t]he right of everyone […] to equality before the law […] in the enjoyment of the right to leave any country, including one's own, and to return to one's own country"[95]; Art. 2(2) of Protocol No. 4 of the ECHR affirms that "[n]o one shall be deprived of the right to enter the territory of the State of which he is a national"; Art. 5 of the Declaration on the Human Rights of Individuals Who are Not Nationals of the Country in Which They Live; the Strasbourg Declaration on the Right to Leave and Return[96].

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[93] J. D. INGLÉS, *Study of Discrimination in Respect of the Right of Everyone to Leave any Country, Including His Own, and to Return to His Country*, Geneva, UN, 1963, UN Sales no. 64.XIV.2, UN Doc E/CN.4/Sub.2/220/Rev.1, p. 87. S. AGTERHUIS, *The right to Return and its Practical Application,* Master's Degree Thesis, Aristotle University of Thessaloniki, 2004, p. 5.

[94] United Nations General Assembly, International Covenant on Civil and Political Rights, resolution 2200A (XXI), 16 December 1966. The ICCPR stands out as the primary global human rights treaty focusing on the right of return. As such, its interpretation may be the most effective way to determine the current scope of the right to return in international law. H. HANNUM, *The Right to Leave and Return in International Law and Practice*, Martinus Nijhof, Dordrecht, 1987, p. 27.

[95] United Nations General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, resolution 2106 (XX), 21 December 1965.

[96] United Nations General Assembly, Declaration on the Human Rights of Individuals who are not nationals of the country in which they live, resolution 40/144, 13 December 1985; for the full text of the Strasbourg Declaration, see H. HANNUM, "The Strasbourg Declaration on the Right to Leave and Return", in *The American Journal of International Law*, Vol. 81, No. 2, 1987, pp. 434 ff. While these two instruments – like the UDHR, see previous footnotes – do not have the force of law of a treaty or convention, they carry considerable moral and political weight, reflecting the international consensus on the rights of TCNs and on the right to leave and return. They can influence the development of customary international law, where consistent state practice may eventually render some of their principles legally binding. Overall, their legal value lies in their ability to shape norms, influence legal interpretation and support advocacy for the rights of the persons concerned.

The right to leave and the right to return are closely related but serve different individual purposes: while returning is often motivated by a desire to return to the place where one belongs, leaving a country might be driven by a desire to travel, find refuge or "simply" emigrate. Within this remit, the right to leave may be also deemed as a right to emigrate or depart from a country[97]. The right to leave ensures that individuals are free to leave any country, including their own, without undue interference or restriction by the State. However, the right to leave, as it is not accompanied by a corresponding right to enter, is sometimes disregarded in international law because it is considered an "incomplete" right[98]. This is often based on the argument that the right to leave – considered as "a right to emigrate" – does not inherently imply "a right to immigrate", creating a significant divide between emigration and immigration[99]. This division is characterised by direct conflict between the recognised human right to leave any country, as a right to emigrate, and States' sovereign right to prevent (*i.e.*, not to grant permission to) aliens from entering their territories[100]. The situation thereof shows thus the umpteenth "legal asymmetry": while international law seems to recognise "the right to emigrate", it does not do the same for the right to immigrate[101].

As for the right to return, it ensures that individuals have the opportunity to return to their own country, regardless of the reasons for their departure or any changes in their circumstances. It is discussed whether the right to return could be simply understood as a right *vis-à-vis* the country of origin or whether it could extend to all countries[102]. With regard to the wording of Art. 12(3) ICCPR, the Human Rights Committee (HRC) affirmed that:

[97] S. AGTERHUIS, *op. cit.*, p. 5.

[98] Ö. GÜRAKAR SKRIBELAND, cit.

[99] D. VITIELLO, "Comprehensive Approaches in the Global Compact for Migration and the EU Border Policies: A Critical Appraisal", in *Laws*, 11, No. 5, 2022.

[100] *Ibid.*

[101] T. MOLNÁR, "(Ab)normality of international migration law: normative and structural asymmetries and contradictions", in *Blog symposium of the European Society of International Law Interest Group on Migration and Refugee Law*, 2015. In this sense, see also, V. CHETAIL, "Droit international des migrations: fondements et limites du multilatéralisme", in H. GHERARI, R. MEHDI (eds.), *La société internationale face aux défis migratoires*, Editions A. Pédone, Paris, 2012, p. 38.

[102] G. NOLL, *Rejected asylum seekers: the problem of return*, UNHCR Centre for Documentation and Research, Working Paper No. 4, May 1999, p. 23.

"The scope of "his own country" is broader than the concept "country of his nationality". It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, [...], cannot be considered to be a mere alien. This would be the case, for example, of nationals of a country who have been stripped of their nationality in violation of international law, and of individuals whose country of nationality has been incorporated in or transferred to another national entity, whose nationality is being denied to them. The right of a person to enter his or her own country recognizes the special relationship of a person to that country [...] It includes not only the right to return after having left one's own country; it may also entitle a person to come to the country for the first time if he or she was born outside the country"[103].

However, the right of return as set out, *inter alia*, in both the ICCPR and Art. 2(2) of Protocol No. 4 ECHR seems to refer primarily to the relationship between *the individual* and *his/her own country or country of nationality*. In essence, these international human right treaties do not seem to guarantee a broad right of return that can be invoked against any State that impedes or obstructs return, but rather a right of entry that can be invoked against one's own country or country of citizenship. Neither the preparatory documents nor the detailed commentary suggests otherwise[104]. Moreover, the wording of the provisions, in particular the use of the word "*enter*" rather than "*return*", supports this interpretation. It is also worth acknowledging that the lack of relevant case law on this issue leaves room for alternative interpretations[105].

Therefore, an important difference between the two rights is also evident in the wording of the international instruments in which they are enshrined: while in most cases international instruments affirm the right to leave *any country*, including one's own, the right to return is mainly conceived in terms of reconnecting with one's *homeland*. From a human rights perspective, this is where the State's

[103] Human Rights Committee, *CCPR General Comment No. 27: Article 12 (Freedom of Movement)*, Office of the High Commissioner for Human Rights, adopted at the Sixty-seventh session of the Human Rights Committee, on 2 November 1999, CCPR/C/21/Rev.1/Add., para. 20.

[104] G. NOLL, *Rejected asylum seekers: the problem of return*, cit., p. 23.

[105] Ö. GÜRAKAR-SKRIBELAND, "Exploring freedom of movement in the context of forced return to transit countries", in *EU Migration Law Blog*, 17 April 2023.

obligation to readmit its nationals comes into play. A State has a legal obligation to readmit its citizens because this obligation derives directly from the individual's nationality. In essence, being a citizen of a country gives a person the right to return, and the State is obliged to fulfil this right by allowing the individual to re-enter his or her home country[106].

Another interesting aspect is that while the right to leave is subject to some limitations, the right to return as enshrined in Art. 12(4) of ICCPR (like Art. 13 UDHR) appears to have a *more absolute* nature than the other rights described in Art. 12 ICCPR, *i.e.*, the right to freedom of movement and the right to leave any country. Indeed, Art. 12(3) ICCPR allows States to impose limitations on the right to leave, even though these restrictions must be narrowly interpreted, and they must meet specific criteria related to the limitations that States have to respect when restricting fundamental rights[107]. Conversely, the term "arbitrary" seems to be the only *specific* limitation of the right of return in Art. 12(4) of the ICCPR: this term refers primarily to the prohibition of using exile as a criminal punishment. Otherwise, this right can only be restricted under Art. 4(1) of the ICCPR, which allows for exceptions that are not in conflict with other international obligations and do not involve discrimination based on race, colour, sex, language, religion or social origin[108]. In addition, under the UDHR, the right of return is subject to such limitations as may be prescribed by law for the protection of the rights of others, public order, morals and general welfare in a democratic society[109].

[106] G. NOLL, *Rejected asylum seekers: the problem of return*, cit., p. 23; R. JENNINGS, A. WATTS, *Oppenheim's International Law,* 9th Edition, Harlow, Longman, 1992, p. 857.

[107] More in detail, they must be established by law, necessary to safeguard national security, public order ("*ordre public*"), public health, or morals, or the rights and freedoms of other people. Furthermore, these restrictions must be consistent with the other rights acknowledged by the Covenant (See, Art. 13 ICCPR). Still within the context of the ICCPR, in General Comment No. 27 the HRC warns that any restrictions adopted in compliance with Art. 12(3) "must not impair the essence of the right [to emigrate]" and that "the relation between right and restriction, between norm and exception, must not be reversed". Cfr. Human Rights Committee, cit., para. 13. The Human Rights Committee has also clarified that "[t]he laws authorizing the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution". Furthermore, para. 15 of the General Comment adds that the principle of proportionality must be respected not only by all legal provision that frame these restrictions but also by the administrative practices and judicial authorities in applying such law.

[108] S. AGTERHUIS, *op. cit.*, pp. 6 ff.

[109] UDHR, Art. 39. *Ibid.*

Nonetheless, certain States have effectively restricted the right of return beyond the legitimate restrictions set out in the above provisions. For example, while the UN reaffirmed the status of the right of return for Palestinian refugees in General Assembly Resolution No. 194, Israel – the sole "State of origin" and consequently the only State with a binding obligation under international law to receive back the 1948 Palestinian refugees – refused to allow the latter to exercise their right of return[110]. Similarly, the former kings of the Italian House of Savoy, their wives and their male descendants were banned from returning and residing on Italian territory by the XIII transitional and final provision of the Italian Constitution, a provision that was only repealed in 2002[111]. Nevertheless, whether absolute or not, most scholars have argued that the right to leave and the right to return constitute an integral part of customary international law, supported by a *diuturnitas* and *opinio juris* of States[112]. Moreover, the plethora of treaties affirming both the right to leave any countries and to return one's country, their consistent language across different treaties, their widespread acceptance through ratification, the minimal or no restrictions, all point to the recognition of these rights in the realm of customary international law[113].

Consequently, the right to leave and the right to return are deemed as fundamental human rights enshrined in customary international law, and their deliberate obstruction by States would violate international law and be considered inherently unlawful. From this "human rights-based perspective", the customary obligation of States to readmit their own citizens – as in the case of the "State rights-based perspective" – also seems to be linked to a *customary norm*: the sovereign right of States to regulate the entry, stay and exit of TCNs within their territories,

[110] United Nations General Assembly, resolution no. 194, 3rd Session, UN Doc. A/810, 1948. G. J. BOLING, *Palestinian Refugees and the Right of Return: An International Law Analysis*, BADIL, Information & Discussion Brief, Issue No. 8, January 2001.

[111] Italian Constitutional Law no. 1 of 23 October 2002 ("Constitutional Law for the termination of the effects of the first and second paragraphs of the XIII transitional and final provision of the Constitution"), in the Official Gazette of the Italian Republic, No. 252, of 26 October 2002, Art. 1.

[112] Among others, E. MCDONNELL, "Realising the Right to Leave during Externalised Migration Control", in *EJIL:Talk!*, 27 September 2021; V. CHETAIL, "The Transnational Movement of Persons Under General International Law – Mapping the Customary Law Foundations of International Migration Law", in V. CHETAIL, C. BAULOZ (eds.), *Research Handbook on International Law and Migration*, Edward Elgar Publishing, Cheltenham, 2014, pp. 9 ff.; W.T. MALLISON, S. MALLISON, "The Right to Return", in *Journal of Palestine Studies*, Vol. 9, No. 3, 1980, p. 125.

[113] V. CHETAIL, "The Transnational Movement of Persons Under General International Law – Mapping the Customary Law Foundations of International Migration Law", *op. cit.*, p. 20.

from the "State-rights-based perspective"; the human right to return, from the "human rights-based perspective". Locke also believes that everyone was granted with "natural rights" upon birth, and these rights should be legitimately limited under individuals' consent only. When applied to migration-related issues, the universal rights to leave and return arises from the recognition of a "natural right" to move freely, followed by a formal declaration by States recognising the rights of their respective citizens. In this regard, if a country does not allow its own citizens to leave or to return, other States should make every effort to protect these inherent and natural rights. This means that individuals can seek international support even if their own countries deny them certain rights[114].

In summary, under a "human rights-based perspective", the legal foundation for the obligation to readmit under international law derives from the right to return. Examining this right, alongside its key differences and connections with the right to leave – often discussed together – reveals that the State's obligation to readmit falls squarely within the framework of international human rights law. This is because the beneficiaries of the obligation are individuals protected under such law. The obligation to readmit, stemming from the right of return, is primarily owed to the individual holding this right. As a result, under international law, the country of return cannot deprive the individual of their right to return. This obligation exists to ensure that the individual's right is upheld by their country of nationality[115].

b) The issue of voluntary returns

The question of the customary international obligation to readmit is also linked to another area of uncertainty, which stems directly from its legal foundation. Indeed, the customary international norm requiring States to readmit their own nationals does not clearly distinguish between two different situations: on the one hand, when individuals return to their country of origin voluntarily; on the other

[114] J. M. PURCELL, "A Right to Leave but Nowhere to Go: Reconciling an Emigrant's Right to Leave with the Sovereign's Right to Exclude", in *Inter-American Law Review*, Vol. 39, No.1, 2007, p. 181 ff. Purcell refers expressly to the right to leave, but in our opinion the discourse can also be conducted in terms of the right to return.

[115] C. M. F. MOMMERS, *op. cit.*, p. 70.

hand, when individuals are forced to return because they have been removed from another State[116].

The concept of voluntary return refers to return of migrants to their home country when they consider it safe and appropriate to do so. According to the IOM, voluntariness is assumed to exist if two conditions apply: "(a) freedom of choice, which is defined by the absence of physical or psychological pressure [...]; and (b) an informed decision which requires the availability of timely, unbiased and reliable information upon which to base the decision[117]". Voluntary return therefore disrupts the conventional framework of return, which is typically examined through the lens of State coercion, manifested as "forced return" or "removal"[118]. In contrast, voluntary return shifts attention away from the *State's action* and towards *individual action*. Rather than being the mere object of a State obligation under international law, voluntary return places the individual as the key actor and component of that obligation[119]. From this perspective, the relationship between the individual and the State – defined by the right to voluntary return and the State's corresponding obligation to readmit – appears to prioritise the individual's interests over the State's prerogatives.

Indeed, if it is argued that the readmission obligation falls within the framework of the protection of human rights, it follows logically that this obligation should only concern the voluntary will of the individual to return. Indeed, only in case of voluntary return the obligation of the State to readmit its nationals is complementary to the individual right to return to one's own country: if States do not fulfil their readmission obligations, nationals of these States would not be able to exercise their right. This viewpoint, as also highlighted by Noll, suggests that the right to return to one's own country would be *prima facie* hampered by the application of customary norms requiring States to readmit involuntary returnees[120].

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[116] *Ivi*, p. 53.

[117] International Organization for Migration (IOM), *Glossary on Migration*, cit., p. 13

[118] Removal has been defined as "the act, following a deportation, expulsion or removal order by which a State physically removes a non-national from its territory to his or her country of origin or a third country after refusal of admission or termination of permission to remain". *Ivi*, p. 180.

[119] *Ivi*, p. 2.

[120] G. NOLL, "The Non-Admission and Return of Protection Seekers in Germany", in *International Journal of Refugee Law*, Vol. 9, No. 3, 1997, p. 417. Moreover, according to part of scholarship, the meaning of the requirement of voluntariness is linked not only to the right of return, but also to the right to leave any country, understood as including the right to choose destination.

This view seems to be shared and *explicitly* expressed by some States: Iraq and Iran, for example, seem to consistently support the idea that their citizens should only be readmitted on a voluntary basis[121].

According to this "human right-based perspective", readmissions implying forced returns should thus lay on different theoretical and legal foundations. The State obligation to readmit its own nationals, irrespective of their will, would be an obligation established solely by *treaty law* and not by *customary international law*. In other words, only readmission agreements may create a legal framework for forced returns: States' readmission obligations related to forced returnees can only be "synallagmatic" in nature, as they may only arise from treaty law. Therefore, notwithstanding the prevailing *preference* of States to advocate voluntary return, from a purely international customary law perspective, the *readmission obligation* may leave no room for anything other than voluntary return, in contrast to the "State rights-based perspective" described above[122].

From these considerations, it may be emphasised that the customary readmission obligation from the "State-based right perspective" is conceptually and substantively distinct from the readmission obligation according to the "human rights-based perspective". In practice, however, when a State readmits one of its nationals, it is almost impossible for an outside observer to determine whether this action was taken because of an inter-state obligation or to uphold the individual's

Indeed, the latter is deemed as essential to the broader right to leave any country. When one thinks about leaving a place, it inherently suggests a journey towards a particular destination. In essence, the right to leave does not only concern physically leaving, but also about having the freedom to decide where to go. While this aspect is often taken for granted, it is crucial if the right to leave is to have any real meaning and impact. Without the ability to elect destination alongside the right to leave, the practical value of this right would be considerably diminished. Cfr. Ö. GÜRAKAR SKRIBELAND, cit. However, Gürakar also clarifies that "[the] "right to elect destination" is not intended to imply a right to enter any state of the person's choice; what is meant here is a right to choose the state of return from options that may be legally available to the person". This perspective appears to be endorsed also by the HRC which stated that the right to leave any country encompasses the right to select one's destination, and that this option is accessible to all, even in case of expulsion: "an alien being legally expelled from the country is likewise entitled to elect the State of destination, subject to the agreement of that State". Human Rights Committee, cit., para. 8.

[121] European Commission, Secretary-General, Report to the Council, Assessment of third countries' level of cooperation on readmission in 2022, RESTREINT UE/EU RESTRICTED 11941/23, Brussels, 24 July 2023, pp. 59–61.

[122] V. CHETAIL, "The Global Compact for Safe, Orderly and Regular Migration: A Kaleidoscope of International Law", in *International Journal of Law in Context*, No. 16, 2020, p. 265.

right to return. After all, the result is the same: the person is readmitted. However, the impact of these two "perspectives" on voluntary return is quite different[123].

In this regard, the "State rights-based perspective" seems to support the view that interstate obligations to readmit nationals exist also *independently* of an individual's willingness to return. On this point, it seems not possible to conclude that the practice of international law makes the obligation to readmit dependent on the willingness of the individual. In modern State practice, many examples of readmission can be found where it was executed with differing degrees of pressure on the individual concerned. Consequently, "the right to return does not constitute the right of the individual to choose not to return to his home state if the state of residence withdraws the right of residence"[124]. Furthermore, there is no indication in the international law literature that the idea of voluntary return limits the otherwise existing international obligation to readmit: the return of individuals is only limited by the respect by States of the relevant provisions and limitations under international law. Hailbronner argues that an analysis of return operations shows that, despite the explicit preference for voluntary return, States have not abandoned their practice to forcibly return those who are not in need of international protection[125].

In our view, the analysis of voluntary return in the context of the international readmission framework further suggests that the *opinio juris* of States tends to lean towards the "State-rights-based perspective" with regard to the legal basis of readmission obligations under international law. States assert their sovereign authority to determine the conditions under which they accept readmitted persons. By treating readmission as a State-centric obligation, States "selfish" security concerns and to frame it not as an obligation linked to an individual human rights, but rather as a necessary mechanism to protect national interests and to effectively manage irregular migration flows.

[123] C. M. F. MOMMERS, *op. cit.,* p. 70.
[124] K. HAILBRONNER, *op. cit.*, p. 42.
[125] *Ivi*, pp. 41 ff.

c) The question and implications of a possible recognition of the right to dignified return and sustainable reintegration in one's country

If instead, according to the "human rights-based perspective", the right to return to one's own country constitutes the basis of the readmission obligation under international law, there is still considerable debate as to whether this individual right can also encompass a *right to dignified return* and *sustainable reintegration in one's country.* As many international agreements emphasise a State's responsibility to ensure dignified return and effective reintegration, the question arises as to whether such obligations can also lead to the recognition of an individual right in this regard. This in turn raises the question of whether individuals can claim a potential right to dignified return and successful reintegration in the context of the readmission process. If such a right were to be recognised, this would imply that States would have an additional responsibility to ensure that returnees are not only readmitted voluntarily, but also that they are provided with the necessary conditions for a dignified return and sustainable reintegration. Thus, the recognition of a right to dignified return and sustainable reintegration could indeed impose further obligations on States, requiring them to adhere to higher standards in the readmission process.

Since the late 1980s, the notion of voluntary return "with dignity" has been consistently emphasised, particularly in the context of refugee protection[126]. The 1989 Declaration and Concerted Plan of Action in Support of Central American Refugees, Returnees and Displaced Persons, adopted by the International Conference on Central American Refugees (CIREFCA), stands out as one of the first important documents to include provisions on the safety and dignity of returnees[127]. In this declaration, the signatories expressed their commitment to

[126] Dignity is often described as a fundamental value that is widely recognised and is often invoked to protest against mistreatment. However, despite its deep historical roots in legal discourse, neither document explicitly states what dignified return means in practice, and debates continue about the conditions necessary for dignified return. Probably, this difficult in defining the concept is due to its inherent complexity, which encompasses legal, moral and psychological dimensions that make it difficult to define precisely. Cfr. K. HOLLOWAY, "Repatriation with dignity", in *Forced Migration Review*, No. 69, 2019, p. 43.

[127] United Nations General Assembly, Office of the United Nations High Commissioner for Refugees, *International Conference on Central American Refugees: Report of the Secretary-General, Corrigendum 2. Annex: Declaration and Concerted Plan of Action in Favour of Central*

facilitating the return of refugees "under conditions that guarantee personal security and dignity and are conducive to the resumption of normal life" (Art. 3). Following the 1989 CIREFCA Declaration, references to return in conditions of safety and dignity increased significantly in international agreements, declarations and UN resolutions[128]. The Guiding Principles on Internal Displacement launched in 1998, for example, state that Internally Displaced Persons (IDPs) should be allowed "to return voluntarily, in safety and with dignity, to their homes or places of habitual residence". Moreover, in 2005 the Principles on Housing and Property Restitution for Refugees and Displaced Persons (the so-called "Pinheiro Principles") clearly recognised that "[a]ll refugees and displaced persons have the right to return voluntarily to their former homes, lands or places of habitual residence, in safety and dignity[129]. The Pinheiro Principles also clarified that "[v]oluntary return in safety and dignity must be based on a free, informed, individual choice. Refugees and displaced persons should be provided with complete, objective, up-to-date, and accurate information, including on physical, material and legal safety issues in countries or places of origin"[130]. Furthermore, in its General Recommendation 22 on Art. 5, the Committee on the Elimination of Racial Discrimination (CERD) claimed in para. 2 (a) that "[a]ll such refugees and displaced persons have the right

American Refugees, returnees, Returnees and Displaced Persons, A/44/527/Corr.2, 31 October 1989. Cited in M. BRADLEY, *Return in Dignity: A Neglected Protection Challenge*, Refugee Studies Center Working Paper No. 40, June 2007, p. 2.

[128] M. BRADLEY, *op. cit.*, p. 2.

[129] United Nations Economic and Social Council, Commission on Human Right, United Nations Sub-Commission on the Promotion and Protection of Human Rights, *Principles on Housing and Property Restitution for Refugees and Displaced Persons (the Pinheiro Principles)*, E/CN.4/Sub.2/2005/17, 28 June 2005. The Pinheiro Principles on Housing and Property Restitution for Refugees and Displaced Persons, often referred to simply as the Pinheiro Principles, are a set of guidelines developed to address the rights of refugees and Internally Displaced Persons (IDPs) to housing, land and property restitution. They are named after Paulo Sérgio Pinheiro, the Brazilian expert who led the team that developed them. These principles aim to provide guidance to governments, international organisations and other stakeholders on how to ensure that the housing, land and property rights of refugees and IDPs are respected, protected and fulfilled during and after situations of conflict or displacement. They cover various aspects such as legal frameworks, restitution mechanisms and the participation of affected individuals and communities in decision-making processes. The Pinheiro Principles emphasise the importance of restoring housing, land and property rights as a fundamental component of peacebuilding, reconciliation and the promotion of durable solutions for displaced populations. They have been widely recognised and endorsed by international bodies, including the UN, and are frequently referred to in efforts to address displacement-related issues around the world. See also, Office of the UN High Commissioner for Human Rights (OCHCR), *Handbook on Housing and Property Restitution for Refugees and Displaced Persons: Implementing the "Pinheiro Principles"*, 1 July 2007.

[130] Pinheiro Principles, Art. 10(1).

freely to return to their homes of origin under conditions of safety"[131]. The latter provisions seem reflect an intention to establish the existence of a right to voluntary and safe return for refugees and IDPs[132].

As for reintegration, although without a precise and unanimous definition, it is generally understood as a multifaceted process that helps returnees to rebuild the economic, social and psychological links that are essential for sustaining their lives, livelihoods, dignity and participation in civic life[133]. Indeed, socio-economic reintegration is a relevant incentive for migrants to return voluntarily due to the fact that it provides returnees with livelihood prospects, and so makes their returns dignified and more sustainable. Return and reintegration are indeed closely connected with the concept of sustainability. According to the IOM, "[r]eintegration can be considered sustainable when returnees have reached levels of economic self-sufficiency, social stability within their communities, and psychosocial well-being that allow them to cope with (re)migration drivers. Having achieved sustainable reintegration, returnees are able to make further migration decisions a matter of choice, rather than necessity"[134]. In recent years, the concept of dignified return and sustainable reintegration has been used to refer not only to context-related refugees and IDPs, but also to the broader phenomenon of migration as a whole, including a link with readmission. The most relevant example is the GCM, which aims in particular to assist States and other stakeholders in the implementation of Objective 21, focusing on cooperation to ensure safe and respectful return and readmission processes and to promote sustainable reintegration, in conjunction with other relevant GCM objectives[135].

However, it appears that these kinds of programmes aimed at reintegrating migrants, along with the commitment of dignified return, mainly only serve the interests of States, as they often prioritize the overall removal of migrants.

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[131] United Nations Committee on the Elimination of Racial Discrimination (CERD), *General Recommendation No. 22: Article 5 and refugees and displaced persons*, 24 August 1996. K. HASSINE, S. LECKIE, *The United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons: A Commentary*, Brill | Nijhoff, The Netherlands, 2016, p. 48.

[132] K. HOLLOWAY, *op. cit.*, p. 43.

[133] International Organization for Migration (IOM), *Glossary on Migration*, cit., p. 176.

[134] International Organization for Migration (IOM), *Reintegration Handbook – Practical guidance on the design, implementation and monitoring of reintegration assistance. Module I: An Integrated Approach to Reintegration*, 2019, p. 11.

[135] See also, *infra*, SECTION 3.

Emphasis is indeed placed on *the individual act of leaving a country*, rather than the potential *outcomes for returnees after departure*[136]. Successful reintegration of migrants in their countries of origin is undoubtedly an essential element contributing to the sustainability of return: however, together with the State commitment to ensure dignified return, it can be seen primarily as a means of ensuring that the returnee *does not re-emigrate*. Perhaps partly for this reason, there appears to be a significant lack of studies (due to lack of interest by governments) that focus on evaluating the actual effectiveness of reintegration programmes for migrants on their own countries[137]. In addition, non-state actors are also increasingly involved in both the pre- and post-return phases of the implementation of assisted return: however, it has been shown that these actors have been "responsibilised and professionalised in order to align with the exclusionary design of national sovereignty"[138]. In other words, non-state actors are also being "shaped" to suit the objectives of States. In our view, commitments to ensure dignified return and sustainable reintegration of returnees seem to be mainly a matter of States' interests, are mostly expressed in non-binding instruments, in vague terms and not effectively monitored. While recognising the "noble intentions" of States on paper, there are insufficient elements to conclude that readmitted individuals have a right to dignified return and sustainable reintegration under international human rights law.

The debate over the uncertain recognition of an individual right to dignified return plays an interesting role in the broader analysis of international legal norms related to readmission. This uncertainty in fact further complicates the existing ambiguities in international legal norms on readmission already identified above. As such, it adds a layer of complexity to the international legal framework outlined above and illustrates that the issue of readmission is complex and divisive, largely due to the legal basis of the State's obligation to readmit its own nationals and the

[136] M. CASELLI, A. A. KADIO, C. RIZZO, "Assisted Voluntary Return & Reintegration Policies and Programmes in Four EU Countries: France, Germany, Italy and Spain", in *Italian Sociological Review*, Vol. 12 (2), 2022, p. 412.

[137] *Ibid.*

[138] R. MARINO, *Re-making it here: Returnees and non-state actors in the (European) externalisation of return migration management to The Gambia*, Ph.D. Thesis, University of Ghent, 2023, p. 26.

relevance to be ascribed to individual rights. If this obligation is considered to derive from the right to return, as explained in this SECTION, States would be obliged to readmit only those citizens who explicitly express a desire to return to their country of origin. This approach emphasises the protection of individual rights and recognise the primacy of freedom of choice. If, on the other hand, the obligation to readmit is seen as deriving from State sovereignty, the authority of the State becomes the dominant principle, allowing the forced return of irregular migrants regardless of their consent. This does not mean that the "State rights-based perspective" as a legal basis for the readmission obligation exempts States from their responsibilities under human rights law and regulations. Rather, the concern is that the coercive enforcement of such policies may undermine the legal protections available to the individuals concerned. However, what we argue is that in both cases and from both perspectives, a right to a dignified return and sustainable reintegration does not appear to be discernible.

Furthermore, despite their differences, both "perspectives" also agree on the existence of a customary norm that obliges States to readmit *their own nationals*. Having analysed this obligation and its nuanced nature, it is essential to examine the obligation of States to readmit TCNs from both a customary international law and a treaty law perspective. This examination seems necessary for a proper understanding of readmission obligations within the international legal framework and their implications.

2. The international obligation on States to readmit third country nationals (TCNs)

Whether the State obligation to readmit own nationals is deemed as a customary norm, it cannot be likewise assuredly argued that there is a customary norm requiring States to readmit TCNs. Nevertheless, scholarship has done several attempts to bring this case back to international customary law.

According to Hailbronner, this obligation may arise from the application of the general principle of good neighbourliness, specifically applied in the context of international migration flow. This principle – considered as globally accepted today

– is also enshrined in Art. 74 of the UN Charter, which claims that UN Members "agree that their policy in respect of the territories [...] must be based on the general principle of good-neighbourliness, due account being taken of the interests and well-being of the rest of the world"[139]. The principle under consideration requires States to try to align their interests with those of neighbouring countries[140]. In the view of Hailbronner, this principle requires States to control irregular migration in order to prevent unauthorised entry into neighbouring countries. As a result, readmission serves as a form of "atonement" for failing to prevent such unauthorised crossings. In this sense, in cases involving TCNs or stateless persons, a State's failure to effectively administer its territory and immigration processes may violate the principle of effectiveness, a cornerstone of international law[141]. Consequently, this violation may impose an obligation on the State to readmit TCNs as a form of compensation for the lack of effective control over its borders.

In addition, Hailbronner believes that a customary norm in *statu nascendi* would be implied from the increasing conclusion of readmission agreements relating to the return of both nationals and TCNs. As for the case of readmission agreements, Hailbronner affirms that most of times neighbouring States view the conclusion of agreements as unnecessary. Indeed, the readmission of TCNs – who have irregularly entered a country – is a common practice between neighbouring States, despite the lack of a real legal basis, or because the issue seldom arises in practice[142].

By contrast, Lammers claims that:

"[N]eighborship law [...] purports to enable neighbouring States to coexist by setting certain limits to the exercise and enjoyment of their territorial sovereignty

[139] K. HAILBRONNER, *op. cit.*, pp. 31 ff.

[140] For further details, see, among others, L. BOISSON DE CHAZOURNES, D. CAMPANELLI, "Neighbour States", in *Max Planck Encyclopedia of Public International Law*, 2006; E. BASHESKA, "The Position of Good Neighbourliness Principle in International and EU Law", in D. KOCHENOV, E. BASHESKA, *Good Neighbourliness in the European legal context*, Leiden, Brill Nijhoff, 2015, pp. 1–23; D. FLOREA, N. GALEȘA, "Affirming the Principle of Good Neighborliness in International Relations", in *Logos Universality Mentality Education Novelty: Law*, 2020, Vol. 8, Issue 2, pp. 1–10.

[141] M. CASAS-CORTES, S. COBARRUBIAS. J. PICKLES, "Changing Borders, Rethinking Sovereignty: Towards a Right to Migrate", in *Revista Interdisciplinar da Mobilidade Humana*, Vol. 23, No. 44, 2015, p. 53.

[142] K. HAILBRONNER, *op. cit.*, p. 33.

and it does not in principle compel them to undertake positive action for the benefit of other States or to improve their mutual condition through cooperation"[143].

This passage shows that, because of reciprocal relations between States, – which include rights and obligations – the principle of neighbourliness cannot be interpreted as to impose a positive responsibility on countries to control borders, since it would easily lead to an unequal distribution of obligations between countries[144]. Indeed, accepting the readmission of TCNs requires a delicate balance between enforcing immigration policy and upholding human dignity, making it a challenging and nuanced commitment in the field of migration governance. In addition, ensuring the successful reintegration of returnees in their home countries requires comprehensive support systems covering areas such as housing, employment and social services.

However, while it is true that States have an obligation under general international law to readmit their own nationals, and that they also have the power to decide whether or not to admit TCNs, it is not possible to infer from this assertion an obligation under customary international law to readmit the latter. This is because there is no *opinio juris* that exists independently of the conclusion of an international agreement. In fact, there are no documents establishing the readmission of TCNs as part of customary international law, unlike the readmission of one's own citizens, which, as mentioned above, is repeatedly affirmed as a customary obligation. Moreover, at the bilateral treaty level, the inclusion of TCNs in readmission agreements seems to be predominantly an EU practice[145]. Indeed, outside the EU framework, it appears that only Norway, Russia, Switzerland and the United States of America (U.S.) have included such obligations in their readmission agreements (the so-called "TCNs clause"), without in any case recognising the existence of such an obligation under customary international law[146]. Furthermore, the fact that States are willing to include in readmission

[143] J. G. LAMMERS, *Pollution of international watercourses*, Martinus Nijhoff Publishers, The Hague, 1984, p. 568.

[144] M. GIUFFRÉ, *op. cit.*, p. 270.

[145] *Infra*, CHAPTER II, SUB–SECTION 3.1.

[146] See, as a sample, Agreement between Norway and Latvia on readmission of persons, 9 May 1997, Art. 3, the text in English available here:

agreements a clause obliging the Parties to readmit not only their nationals but also TCNs only in return for incentives such as technical and financial assistance, visa facilitation or development aid also suggests that there is no customary norm in this regard[147]. For example, the readmission agreements between Switzerland and Serbia and Bosnia and Herzegovina were concluded taking into account the interests of the Parties involved in areas such as visa policy, development cooperation, debt relief measures and support in the fight against and trafficking in

https://lovdata.no/dokument/TRAKTATEN/traktat/1997-05-15-1; Agreement between the Government of the Kingdom of Norway and the Council of Ministers of the Republic of Albania on the readmission of persons residing without authorisation, 12 September 2008, Art. 3, the text in English available here: https://lovdata.no/dokument/TRAKTATEN/traktat/2008-09-12-46/KAPITTEL_11; Agreement between the Government of the Kingdom of Norway and the Government of the United Republic of Tanzania on the readmission of persons, 5 April 2011, Art. 3, the text in English available here: https://lovdata.no/dokument/TRAKTATEN/traktat/2011-04-05-8/KAPITTEL_1. Cfr. M. JANMYR, Ö. GÜRAKAR SKRIBELAND, "Human Rights References in Norway's Readmission Agreements: (How) Do They Protect?", in *Nordic Journal of Human Rights*, Vol. 38, No.1, 2020, Table 1. Agreement between the Government of the Russian Federation and the Government of the Republic of Lithuania on acceptance and return of persons which illegally are in the territory of the Russian Federation and the territories of the Republic of Lithuania, 12 May 2003, Art. 3; Agreement between the Government of the Russian Federation and Government of the Republic of Belarus, 15 November 2013, Art. 2; Agreement between the Government of the Russian Federation and Government of the Republic of Uzbekistan, 15 April 2013, Art. 3. The text of these agreements was consulted using a version translated by an Artificial Intelligence translator. Abkommen zwischen dem Schweizerischen Bundesrat und der Regierung der Republik Estland über die Rückübernahme von Personen mit unbefugtem Aufenthalt (Readmission agreement between Switzerland and Estonia, consulted in the text translated into Italian), 29 January 1998, Art. 2; Abkommen zwischen der Schweizerischen Eidgenossenschaft und der Republik Serbien über die Rückübernahme von Personen mit unbefugtem Aufenthalt (Readmission agreement between Switzerland and Serbia, consulted in the text translated into Italian), 30 June 2009, Art. 3; Abkommenczwischen dem Schweizerischen Bundesrat und der Regierung der Republik Aserbaidschan über die Rückübernahme von Personen mit unbefugtem Aufenthalt (Readmission agreement between Switzerland and Azerbaijan, consulted in the text translated into Italian), 10 October 2016, Art. 3. Joint Declaration and Supplementary Agreement Between the United States of America and Mexico, signed at Washington June 7, 2019, entered in force June 7, 2019. While it is not an agreement focused solely on readmission, it can be seen as an important formal agreement in which Mexico agreed to accept the return of non-Mexican migrants from the U.S.: "[s]uch agreement would include, consistent with each party's domestic and international legal obligations, a commitment under which each party would accept the return, and process refugee status claims, of third-party nationals who have crossed that party's territory to arrive at a port of entry or between ports of entry of the other party". This agreement marked a significant turning point in U.S.-Mexico border cooperation. M. CHISHTI, C. PUTZEL-KAVANAUGH, "The Limits of the Go-It-Alone Approach: U.S. Migration Management Increasingly Requires Other Countries' Cooperation", in *Migration Policy Institute* (MPI), 27 March 2024. A disclaimer is required: this is a reflection based on currently available sources. The Author of this thesis acknowledges that there may be additional readmission agreements in this area, but they are not accessible and have therefore not been consulted. It is also important to note that both Switzerland and Norway are part of the Schengen area, which strengthens their ties with the EU. As a result, they are particularly influenced by the EU. *Infra*, CHAPTER II.

[147] For an examination of how the EU uses such conditionality to encourage third countries to cooperate on readmission, and its impact on international law, see *infra*, CHAPTER IV.

human beings[148]. Moreover, even in international treaty law – *i.e.,* beyond bilateral relations – the *only* universal obligations regarding the readmission of TCNs are those set out in Art. 8(4) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children" and in Art. 18 of the "Protocol against the Smuggling of Migrants by Land, Sea and Air", which are two of the three Palermo Protocols adopted together with the UN Convention against Transnational Organised Crime during the Palermo Conference of 12–15 December 2000[149]. These provisions establish that the obligation lies with the State in which the victim of smuggling or trafficking had the right of permanent residence, even if he or she was not a national of that State.

It can be concluded that the existence of a State obligation under international law to readmit TCNs cannot be justified by the principle of good neighbourliness, nor can it be argued that such an obligation constitutes an emerging norm of international law. Although Hailbronner suggested years ago that a regional practice of extending readmission obligations to TCNs may be developing in Europe – which may hypothetically lead to the affirmation of the emergence of a customary regional norm in the European continent –, the evidence to support such an assertion remains insufficient[150]. Indeed, there are still significant

[148] Swiss Parliament, *Accordi di riammissione. Quo vadis?,* 11 December 2009, deposited by Moret Isabelle, available here: https://www.parlament.ch/it/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20094265. As for Norway, see M. JANMYR, "Norway's Readmission Agreements: Spellbound by European Union Policies or Free Spirits on the International Field?", in *European Journal of Migration and Law*, Vol. 16, 2014, pp. 181–208.

[149] United Nations General Assembly, United Nations Convention against Transnational Organized Crime and the Protocols thereto, resolution 55/25, 15 November 2000. United Nations General Assembly, Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, resolution 55/25, 15 November 2000, Art. 8(4): "[i]n order to facilitate the return of a victim of trafficking in persons who is without proper documentation, the State Party of which that person is a national or in which he or she had the right of permanent residence at the time of entry into the territory of the receiving State Party shall agree to issue, at the request of the receiving State Party, such travel documents or other authorization as may be necessary to enable the person to travel to and re-enter its territory"; United Nations General Assembly, Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime, resolution 55/25, 15 November 2000, Art. 18(1): "[e]ach State Party agrees to facilitate and accept, without undue or unreasonable delay, the return of a person [...] who is its national or who has the right of permanent residence in its territory at the time of return." Cfr. F. NEGOZIO, *Gli accordi internazionali di riammissione dei migranti irregolari: Profili giuridici delle politiche dell'Unione europea e dell'Italia in materia di rimpatri*, Edizioni Accademiche Italiane, 2018, London, p. 6.

[150] K. HAILBRONNER, *op. cit*., pp. 31 ff. In international law, a regional custom is a practice or behaviour that is consistently followed by States within a particular region and is generally accepted

inconsistencies in both State practice and the recognition of such an obligation as legally binding. As for the requirement of *diuturnitas*, this practice is not *uniformly* applied. For instance, Switzerland's readmission agreements with Vietnam and Botswana do not contain a TCN clause: the same applies to Norway regarding to the readmission agreements concluded with Vietnam and Pakistan[151]. In addition, for such practices to solidify into customary international law, States would need to recognise them as legally binding (*opinio juris*). Official statements indicate that European states – including EU Member States and non-EU States alike – view TCN readmission provisions as arising from specific agreements, rather than as expressions of international customary norms. Consequently, in our opinion, the readmission of TCNs remains a political issue rather than a legal obligation governed by customary international law[152].

While thus the State obligation to readmit its own nationals finds its legal basis in customary law, the obligation to readmit TCNs seems to be grounded *only* in treaty law, *i.e.*, in the form of readmission agreements. If there is uncertainty as to whether the State obligation to readmit one's own citizens is linked to a human right or a State prerogative, it can be argued that the obligation to readmit TCNs is clearly tied to a State prerogative established by treaty law. This prerogative enables requesting States to cooperate with others through readmission agreements to

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as legally binding among those States. Regional custom may develop in different geographical areas and is often influenced by common cultural, historical, political or economic factors among the States in that region. While international law consists primarily of general customs that are universally recognised, regional customs have significance within their specific geographical contexts. C. FOCARELLI, *op. cit.*, pp. 124 –126.

[151] Abkommen zwischen dem Schweizerischen Bundesrat und der Regierung der Sozialistischen Republik Vietnam über die Rückübernahme vietnamesischer Staatsangehöriger mit unbefugtem Aufenthalt (Readmission agreement between Switzerland and Vietnam, consulted in the text translated into Italian), 11 November 2005; Abkommen zwischen dem Schweizerischen Bundesrat und der Regierung der Republik Botsuana über die Rückübernahme von Personen mit unbefugtem Aufenthalt, (Readmission agreement between Switzerland and Botswana, consulted in the text translated into Italian), 2 July 2019. Agreement between the Government of the Kingdom of Norway and the Government of the Socialist Republic of Vietnam on readmission of citizens, 4 July 2007, the text in English is available here: https://lovdata.no/dokument/TRAKTATEN/traktat/2007-07-04-12. Agreement between the Government of the Kingdom of Norway and the Government of the Islamic Republic of Pakistan on the readmission of persons residing without authorization, 21 October 2016, the text in English is available here: https://lovdata.no/dokument/TRAKTATEN/traktat/2017-01-25-1/KAPITTEL_1-2. All the readmission agreements concluded by Russia (referring to those that can be freely consulted) contain instead the "TCNs clause".

[152] A. İÇDUYGU, *The Irregular Migration Corridor between the EU and Turkey: Is it Possible to Block it with a Readmission Agreement?*, European University Institute, EU-US Immigration Systems, 2011/14, p. 11; N. COLEMAN, *op. cit.*, p. 44.

"protect" their borders, not just from the counterpart State's citizens, but also from TCNs.

2.1. The scope and content of the obligation on States to readmit TCNs under treaty law

Since the early 90s, readmission agreements have been considered as key instruments in States' migration management strategies and policies[153]. Indeed, these agreements have been used for a long time as one of the main tools to tackle irregular immigration. Readmission agreements set out in detail the mutual obligations between the contracting Parties, the methods and timeframes in order to establish precise procedures that simplify and speed up the process of returning irregular migrants[154]. Readmission agreements facilitate the implementation of State return decisions by ensuring that the country of origin (or a third country in the case of the inclusion of the TCNs clause) accepts the return of its nationals or other specified persons. Readmission agreements are triggered when the requesting State issues a removal order, usually following a breach by TCNs of national rules on regular entry or residence in that country[155]. This reflects a common approach in readmission agreements, where responsibility for readmission is linked to specific legal procedures and violations of immigration or residence rules. Readmission can therefore be seen as an administrative procedure requiring cooperation to combat irregular migration and to enforce the removal measures adopted by the requesting States, *i.e.*, to enforce return[156]. It can also be argued that readmission agreements set out the general procedural conditions for readmission

[153] Council of Europe, Parliamentary Assembly, cit., para. 2.

[154] See, *inter alia*, European Commission, Communication on a Community Return Policy on illegal residents, cit., p. 26; M. BENCHICK, "Les accords de réadmission", in V. CHETAIL (ed.), *Mondialisation, migration et droits de l'homme: le droit international en question*, Volume II, Bruxelles, Bruylant, 2007, pp. 665 ff.; J. P. CASSARINO, "Informalising Readmission Agreements in the EU Neighbourhood", in *International Spectator*, 2007, Vol. 42, No. 2, p. 179.

[155] *Supra*, INTRODUCTION.

[156] F. GRAZIANI, *Gli accordi di riammissione*, in U. LEANZA (ed.), *Le migrazioni: una sfida per il diritto internazionale comunitario e interno*, IX Conference SIDI, Rome, 17-18 June 2004, Editoriale Scientifica, Naples, 2005, p. 250; J.P. CASSARINO, "Dealing with Unbalanced Reciprocities: Cooperation on Readmission and Implications", in *Middle East Institute*, 19 July 2012.

before a specific return decision is adopted and then enforced[157]. In this regard, they can bring transparency to the process and ensure that both sending and receiving countries understand the conditions. By speeding up the enforcement of return decisions, readmission agreements can help to reduce the period of uncertainty or detention experienced by irregular migrants. This can also be beneficial for individuals awaiting a decision on their migration status.

The rule should be that first the requesting State issues a return decision and then the person concerned is readmitted by the requested State in accordance with the procedures laid down in readmission agreements. However, a particularly worrying trend has recently emerged, particularly in relation to Italy and Spain. In the case of Italy, the Court of Rome has confirmed the illegitimacy of the readmission procedure applied at Italy's Eastern border on the basis of an agreement signed between Italy and Slovenia in 1996, which was never ratified by the Italian Parliament[158]. The purpose of this agreement is to facilitate the readmission of TCNs at the common border between the Republic of Slovenia and the Republic of Italy (Art. 2). However, these procedures were carried out informally, *i.e.*, without a formal expulsion order issued by the competent authorities. While Art. 6 of the Italy–Slovenia readmission agreement provides that persons who have irregularly crossed the common border may be readmitted "without formalities", the latter

[157] Council of Europe, Parliamentary Assembly, cit., para. 2.

[158] Court of Rome, Section on Human Rights and Immigration, Order 18 January 2021, N. R.G. 56420/2020. See also, Court of Rome, Section on Human Rights and Immigration, Order 9 May 2023, N.R.G. 3938/2022. Accordo tra Italia e Slovenia sulla riammissione delle persone alla frontiera, signed in Rome on 3 September 1996. The text of the bilateral agreement is available on the website of the Italian Ministry of Foreign Affairs and International Cooperation in the Archive of International Treaties. According to the report, the agreement was notified between 16 June 1997 and 10 July 1997 and published in the Italian Official Journal No. 241 on 15 October 1997. Cfr. M. ASTUTI et AL., "Per quanto voi vi crediate assolti siete per sempre coinvolti: i diritti umani fondamentali alla prova delle frontiere interne ed esterne dell'Unione europea", in *Diritto, Immigrazione e Cittadinanza*, Fasc. 1/2022, p. 7. It should be noted that while Slovenia has ratified the Convention (Uradni list Republike Slovenije, Official Journal of the Republic of Slovenia, Zakon o ratifikaciji Sporazuma med Vlado Republike Slovenije, in Vlado Republike, No. 001-22-52/97, 4 June 1997), Italy has limited itself to a simplified form of ratification, without therefore ratification by the Italian Parliament. It should be also recalled that Art. 80 of the Constitution requires prior authorisation for ratification by the Italian Parliament by means of a law if international agreements are of a political nature, provide for arbitration or judicial rules, involve territorial changes, financial burdens or amendments to laws. Such a situation has been criticised by Italian constitutionalists, who have highlighted aspects of incompatibility with Art. 80 of our Constitution. See, *ex multis*, E. OLIVITO, "Accordi in forma (semi)semplificata, istanze di accesso civico e vulnus alla Costituzione", in *Questione Giustizia*, 2019. For a comment of this decision, see, *inter alia*, A. PASCALE, "Riammissioni informali e violazione del diritto di asilo", in *Questione Giustizia*, 2021.

expression should be interpreted as meaning that the procedure may be simplified, with a decision that is briefly substantiated in fact and in law. However, it cannot mean that the procedure can be carried out *without the adoption of an administrative act*, which must be notified to the TCN concerned and can be challenged before the courts[159]. Although the Court of Rome ruled that these procedures were unlawful because they contravened international, EU and national law, the Italian government, after suspending them following the Court's ruling, decided to reinstate them from November 2022, albeit formally excluding those seeking international protection[160].

In the case of Spain, the Spanish Supreme Court recently ruled on the return of Moroccan minors from Ceuta to Morocco, which was carried out by the Spanish authorities in August 2021 on the basis of the 2007 readmission agreement with Morocco[161]. However, the Supreme Court ruled that the 2007 agreement alone did not provide a sufficient legal basis for the decision to return the minors. The agreement lacks specific procedural steps or requirements for carrying out such returns – requirements that are crucial, especially when fundamental rights are at stake. Consequently, the Spanish authorities should have followed the appropriate administrative procedures to ensure the legality and correctness of their decision and to protect the interests of the persons concerned. The Court emphasised that the

[159] C. CARDINALI, "Riflessioni sulla illegittimità delle riammissioni informali in Slovenia alla luce di una loro possibile riattivazione", in *Questione Giustizia*, 2023. See also, Association for Juridical Studies on Immigration (ASGI), *La riammissione informale dall'Italia alla Slovenia sulla base dell'Accordo bilaterale Italia-Slovenia e le riammissioni a catena verso la Slovenia e la Croazia*, 5 June 2020.

[160] According to the Court, the expulsions carried out by the Italian State, in the absence of guarantees of respect for the fundamental rights of the persons expelled – starting with their right to seek international protection, guaranteed by Art. 10 of the Italian Constitution – are unlawful because they violate Arts. 3 and 13 of the ECHR, Art. 4 of Protocol No. 4 to the ECHR, and Arts. 4 and 19 of the Charter of Fundamental Rights of the EU (CFR) (Charter of Fundamental Rights of the European Union, OJEU, C 326/02, 26 October 2012). These rights include the right not to be subjected to inhuman and degrading treatment and not to be sent to places where there is a risk of being subjected to such practices. See, Court of Rome, Section on Human Rights and Immigration, Order 18 January 2021. cit., p. 5. F. TONACCI, *Migranti, al confine sloveno tornano i respingimenti bocciati dal tribunale*, LaRepubblica, available here: https://www.repubblica.it/cronaca/2022/12/10/news/migranti_al_confine_sloveno_tornano_i_respingimenti_bocciati_dal_tribunale-378314858/.

[161] Tribunal Supremo de España, Sala de lo Contencioso, Judgement 22 January 2024, no. 86/2024; Acuerdo entre el Reino de España y el Reino de Marruecos sobre la cooperación en el ámbito de la prevención de la emigración ilegal de menores no acompañados, su protección y su retorno concertado, signed in Rabat on 6 March 2007, in Boletín Oficial del Estado, no. 70, 22 March 2013.

2007 agreement between Spain and Morocco was not in itself sufficient to justify the return of the minors to Morocco. It was also necessary to comply with the procedures laid down in Art. 35 of Organic Law 4/2000 on Aliens and Arts. 191 et seq. of Royal Decree 557/2[162]. These procedures include carrying out an individual administrative procedure, providing information about the minor's situation, giving the minor a hearing if he or she is of sufficient age, and involving the Public Prosecutor's Office[163].

The current practice of Spain and Italy with regard to readmission agreements seems to deviate significantly from what should be the "standard procedure". Readmission agreements are intended to serve as a practical guide for the effective implementation of return decisions, but such decisions must still respect all judicial and administrative safeguards afforded to the person to be readmitted, especially if the person is a TCNs, *i.e.*, a person of a nationality different from that of the country with which the readmission agreement is concluded. These safeguards should not be circumvented, nor should readmission agreements be directly applied without a proper return decision by the competent authorities. It is true that as far as EU Member States are concerned, Art. 6 of Directive 2008/115/EC (the "Return Directive") potentially allows countries not to take a return decision if bilateral readmission agreements on the return of irregular TCNs were concluded with third countries before the entry into force of the Directive[164]. However, as the Court of Rome also pointed out, this provision must still be in line with international, EU and national laws that protect the person concerned. In the Italian case reported

[162] Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social, in Boletín Oficial del Estado, no. 10, 12 January 2000; Real Decreto 557/2011, de 20 de abril, por el que se aprueba el Reglamento de la Ley Orgánica 4/2000, sobre derechos y libertades de los extranjeros en España y su integración social, tras su reforma por Ley Orgánica 2/2009, in Boletín Oficial del Estado, no. 103, 30 April 2011.

[163] Tribunal Supremo de España, cit., pp. 7 ff. Cfr. Poder Judicial, *El Tribunal Supremo confirma que la devolución de menores desde Ceuta a Marruecos en agosto de 2021 fue ilegal al no seguir el procedimiento previsto en la Ley de Extranjería*, 22 January 2024, available here: https://www.poderjudicial.es/cgpj/es/Poder-Judicial/Tribunal-Supremo/Noticias-Judiciales/El-Tribunal-Supremo-confirma-que-la-devolucion-de-menores-desde-Ceuta-a-Marruecos-en-agosto-de-2021-fue-ilegal-al-no-seguir-el-procedimiento-previsto-en-la-Ley-de-Ext.

[164] Directive 2008/115/EC of the European Parliament and the Council, of 16 December 2008, on common standards and procedures in Member States for returning illegally staying third-country nationals. *Infra,* CHAPTER II, SUB–SECTION 3.1. In this regard, C. BELCASTRO, "L'illegittimità dei respingimenti verso la Slovenia secondo la giurisprudenza nazionale e i precedenti della Corte europea dei diritti dell'uomo", in *Ordine internazionale e diritti umani,* Osservatorio l'Italia e la CEDU 1/2021, 2021, p. 195.

above, for example, the Court of Rome has ruled that the absence of a formal return decision is contrary to national administrative procedures, which require that any administrative act affecting the legal status of a person must be concluded with a reasoned administrative decision[165]. This decision must be notified to the person concerned and may be challenged before a judicial authority. A similar argument was put forward by the Spanish Supreme Court. This shows that national governments are using these practices to speed up the readmission process at any cost by circumventing existing regulations and laws with regard to legal and judicial safeguards[166].

As for the analysis of the main features of readmission agreements, when it comes to States' own nationals, such agreements seem to reaffirm – as well as integrate – the international customary obligation described above in SECTION 1. In other words, readmission agreements do not establish the State's obligation to readmit its citizens but merely *facilitate* this process. Such conventions set forth in fact operational and procedural techniques to effectively implement State customary obligation to readmit its own citizens[167]. To sum up, while the customary norm under consideration only obliges States to readmit their own nationals, without specifying practical measures to be taken in this regard, readmission agreements address the main technical-operational issues to *facilitate* the fulfilment of such an obligation under international law[168].

This is, of course, the case when readmission agreements only cover the readmission of the Parties' own nationals. However, in addition to the obligation to readmit own nationals, as mentioned before, readmission agreements may also

[165] In this regard, see the Italian Law N. 241 dated 7th August 1990, also known as the "New Administrative Procedure Law", which is a key piece of legislation in Italy that governs the procedures of public administration.

[166] In this sense, see also the considerations made by M. MORARU, C. LÓPEZ ESQUITINO, "The Impact of the 2024 CEAS Reform on the EU's Return System: Amending the Return Directive Through the Backdoor", in *EU Immigration and Asylum Law and Policy Blog*, 25 September 2024.

[167] K. HAILBRONNER, *op. cit.,* pp. 15 and 45.

[168] Nevertheless, it is also worth noting that the effective and timely implementation of readmission agreements often meets practical problems, resulting from administrative obstacles as well as the lack of cooperation of the State requested to readmit. As a sample, several countries of origin and transit of migrants foresee longwinded and complicated administrative procedures in assessing a returnee's nationality. In these cases, States may in fact defer or even deny the issuance of all necessary travel documents due to the lack of evidence or reliable information in relation to migrants' citizenship and/or identity, significantly slowing down the whole process. M. GIUFFRÉ, *op. cit.*, p. 253.

include the obligation to readmit TCNs in addition to the nationals of the Parties. As mentioned above, the readmission of TCNs is not covered by customary international law, and therefore more incentives and compensation are needed on the part of requesting States to persuade the other Party to accept such an obligation[169]. Indeed, requesting States mainly aim to curb transit migration, where migrants use one country as a transit point to reach another destination: this situation can be problematic for both the transit country and the destination country.

The reasons why States may benefit and be compensated for the insertion of the TCNs clause are clear. As a sample, the admission and processing of TCNs can impose significant financial burdens on States. These costs may include transportation, detention, legal representation, and administrative expenses. Without adequate compensation, States may be reluctant to agree to readmit TCNs, especially if they perceive the financial burden as disproportionate to the benefits. Indeed, the conclusion of a readmission agreement may not have a direct impact on a State's asylum system, but it has the potential to exert a significant influence. The insertion of a TCNs clause in readmission agreements could in fact lead to an additional burden on the asylum system of the requested country. Moreover, inclusion of the TCNs clause in readmission agreements may be also politically sensitive for some States: governments may face domestic opposition to such agreements, particularly if they are perceived as compromising national sovereignty or if there are concerns about the treatment of returned individuals[170]. Incentives can help governments justify and "sell" these agreements domestically by demonstrating tangible benefits. Moreover, some States may lack the necessary capacity and resources to effectively manage the admission and processing of TCNs. Incentives can thus provide these States with the means to enhance their infrastructure, build institutional capacity, and improve their ability to comply with the terms of the agreements[171].

Advocates of readmission agreements that include TCN clauses claim that these legal instruments are "neutral in terms of human rights and are merely a tool

[169] As for the EU context, see, more in detail, *infra*, CHAPTER II, SUB–SECTION 3.1.

[170] In this regard, see also, European Court of Auditors, *EU readmission cooperation with third countries: relevant actions yielded limited results*, Special Report No. 17, para. 39.

[171] However, as the previous SECTION has shown, this seems to be mainly an EU practice which is observed outside the Union only in a few countries.

for the removal of irregular migrants"[172]. According to this view, when concluding and implementing readmission agreements, States are bound by their international obligation, same as otherwise[173]. They argue that human rights concerns should be addressed at the earlier stage of the return decision, where national authorities are expected to apply relevant human rights and refugee protection standards. Thus, in this view, readmission agreements are designed to streamline the removal of irregular TCNs without violating States' obligations under international law[174]. However, this perspective overlooks the potential risks that these agreements may pose, directly or indirectly, to the human rights of irregular migrants and asylum seekers. Therefore, in order to fully understand the issue of readmission from an international law perspective, it is essential to analyse the relevance of international human rights and refugee law, in particular as it relates to the readmission of TCNs[175].

2.2. The relevance of international human rights law and refugee law in the context of readmission of TCNs

The readmission of individuals must be carried out in strict compliance with international law, with particular emphasis on respect for international human rights and refugee law. While, as noted above, proponents of readmission agreements often argue that human rights concerns are primarily relevant at the earlier stage of the return decision, it is crucial to recognise that the entire process should be considered holistically. It is therefore essential that the human rights of the returned person are consistently respected throughout the whole process[176]. The purpose of this SECTION is to examine the scope and content of the main international human

[172] Council of Europe, Parliamentary Assembly, cit., para. 2.
[173] N. COLEMAN, *op. cit.*, p. 316.
[174] *Ibid.*
[175] This analysis helps to clarify how international law imposes limitations on States in the context of readmission agreements; moreover, it also sets the stage for the subsequent discussion of how the EU navigates these international obligations in dealing with readmission. *Infra*, CHAPTERS II. and III.
[176] IOM's Immigration and Border Management Division, *Readmission*, cit; Council of Europe, Parliamentary Assembly, cit., para. 2.

rights and refugee law norms in the context of readmission, with a particular focus on how these norms may address the situation of the readmission of TCNs.

Central to this discussion is *right to seek asylum*, which is often considered as the "gold standard" in international human rights and refugee law, particularly when it comes to readmission. It plays a critical role in situations where there may be pressure to readmit individuals quickly, sometimes without fully assessing their protection needs. Historically, the *right to asylum* in general terms has been enshrined in many national constitutions and recognised in a wider range of legal frameworks governing the treatment of aliens[177]. However, these frameworks often highlight the tension between the sovereign discretion of the State to grant asylum and the absence of a subjective right of the individual to receive it. This tension was evident during the drafting of the UDHR, where Art. 14(1) eventually recognised the right to seek asylum. Nonetheless, the original draft had proposed a *broader interpretation*, asserting the right to both seek and be granted asylum in cases of persecution, but this was rejected by many delegates[178]. In the end, the plenary version of Art. 14 UDHR omitted references to the "right to asylum" and the definition of persecution. It became clear that the right to asylum was not seen as an individual right, but as a sovereign prerogative of States to grant asylum or resist extradition requests[179]. Nevertheless, the drafters of the UDHR deserve credit for including the "right to seek asylum from persecution" in Art. 14(1), thus laying the foundation for the enduring link between refugee law and human rights[180].

[177] The list of all national constitutions from the mid-20th century that contain a provision regarding asylum is found in G. FERRARI, *L'asilo nel diritto internazionale*, UNHCR, 2005, p. 6. Cited in D. VITIELLO, *Il divieto di refoulement nel diritto internazionale*, Ph.D. Thesis, University of Sapienza, 2014, p. 15.

[178] See, *inter alia*, R. PISILLO MAZZESCHI, "Il diritto di asilo 50 anni dopo la Dichiarazione Universale dei Diritti dell'Uomo", in *Rivista internazionale dei diritti dell'uomo*, Vol. 12, 1999, pp. 694–703.; M. PEDRAZZI, "Il diritto di asilo nell'ordinamento internazionale agli albori del terzo millennio", in L. ZAGATO (ed.), *Verso una disciplina comune del diritto d'asilo*, CEDAM, Padova, 2006, pp. 13–37; S. HEUSER, "Is There a Right to Have Rights? The Case of the Right of Asylum", in *Ethic Theory Moral Prac*, Vol. 11, Issue 3, 2008, pp. 3–13. United Nations General Assembly, Draft International Declaration of Human Rights: Amendment to the Draft Declaration (E/800) /Egypt, UN DOC A/C.3/264, 12 October 1948; United Nations General Assembly, Draft International Declaration of Human Rights: Recapitulation of Amendments to Article 12 of the Draft Declaration (E/800), DOC A/C.3./285, REV.1, 30 October 1948.

[179] D. VITIELLO, *Il divieto di refoulement nel diritto internazionale*, *op. cit*., p. 16.

[180] *Ibid.*

As for the 1951 Geneva Convention, although it does not *explicitly* recognise the right to asylum, it *implicitly* supports this right by establishing the rights and duties of refugees once asylum is granted[181]. This "implicit" recognition is further supported by the United Nations High Commissioner for Refugees (UNHCR)'s 2010 Introductory Note, which links the Geneva Convention to Art. 14 of the UDHR mentioned above[182]. In addition, although the Convention does not explicitly recognise this right, the ECtHR has developed case law ensuring that asylum-seekers have the right of access to procedures for the determination of their protection needs, which applies to all persons under the jurisdiction of a State, even outside its territory[183]. The right to seek asylum is, instead, *expressly* recognised in other key regional instruments, such as the American Convention on Human Rights and the Inter-African Convention on Human Rights[184]. Furthermore, Art. 18 of the EU Charter of Fundamental Rights (CFR) recognises that "the right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees", and in accordance with the Treaties. In any case, the right to seek asylum does not guarantee the right to be granted asylum, nor does it oblige States to grant asylum.

Regarding the application of the right to seek asylum to the framework of readmission, since the early 1990s, the UNHCR has consistently stressed the importance of readmission agreements in providing a "safe haven" for refugees, asylum-seekers, and other individuals in need of protection. The UNHCR has advocated for bilateral agreements that specifically address the unique needs of these vulnerable groups, ensuring that key safeguards – such as the determination of refugee status – are in place in the country of return[185]. In this context, the

[181] See Arts. 12 ff. of the Convention.

[182] United Nations High Commissioner for Refugees (UNHCR), *Introductory note to the Convention Relating to the Status of Refugees by the Office of the UNHCR*, December 2010. See, C. MOLINARI, *Going All Out to Manage Migration: A Constitutional Analysis of the EU Readmission Policy*, Ph.D. Thesis, Katholieke Universiteit Leuven, Faculty of Law, 2022, p. 359.

[183] *Ex multis*, European Court of Human Rights (ECtHR), Grand Chamber, Judgement of 21 January 2011, *M.S.S. v. Belgium and Greece*, Application no. 30696/09, paras 265–322; European Court of Human Rights (ECtHR), First Section, Judgment of 15 March 2018, *A.E.A. v. Greece*, Application no. 39034/12, para. 85. C. MOLINARI, *op. cit.*, p. 363.

[184] Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969, Art. 22(7); Organization of African Unit, African Charter on Human and Peoples' Rights, "Banjul Charter", 27 June 1981, Art. 12(3).

[185] See, *inter alia*, United Nations High Commissioner for Refugees (UNHCR), *Position on Readmission Agreements, Protection 'Elsewhere' and Asylum Policy*, 1 August 1994; United

UNHCR considered agreements such as the former Dublin Convention and the Schengen Implementation Agreement as forms of readmission agreements[186]. As both instruments refer to obligations under the 1951 Refugee Convention and its 1967 Protocol, the Agency believes they contain sufficient safeguards to uphold core international refugee protection standards[187].

However, despite these long-standing recommendations, the reality today is that many readmission agreements do not adequately address the *specific* needs of protection-seekers and refugees, often treating them as unauthorised migrants and facilitating their return without distinction[188]. The absence of explicit references to protection-seekers and refugees in readmission agreements has raised significant protection issues, particularly as these agreements are often concluded without consideration of the general safety of the requested States for protection-seekers[189] This omission has led to serious protection concerns, especially since these

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Nations High Commissioner for Refugees (UNHCR), *Executive Committee, Conclusion on the Return of Persons Found Not to Be in Need of International Protection*, Document No. 96 (LIV), 2003; United Nations High Commissioner for Refugees (UNHCR), *The 10-Point Plan in Action, 2016 Update, Chapter 8: Addressing Onward Movements*, December 2016, section 8.5; United Nations High Commissioner for Refugees (UNHCR), *Guidance on Responding to Irregular Onward Movement of Refugees and Asylum-seekers*, September 2019, pp. 11 ff. Indeed, as mentioned before, readmission agreements do not provide a legal basis for the rejection of asylum seekers, nor a legal basis for expulsion either. The transfer of a protection seeker by the requesting State under readmission agreement with a requested country must always be preceded by a decision of national law to reject and expel that protection seeker.

[186] Convention implementing the Schengen Agreement, of 14 June 1985, between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJEU, L 239, 22 September 2000; Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities (Dublin Convention), OJEU, C 254, 19 August 1997 (no longer in force); The Dublin Convention was replaced by the Dublin Regulations (Dublin II in 2003 and Dublin III in 2013). Council Regulation 343/2003, of 18 February 2003, establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJEU, L 50, 25 February 2003 (no longer in force); Regulation (EU) 604/2013 of the European Parliament and of the Council, of 26 June 2013, establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJEU, L 180, 29 June 2013. See, more in detail and *ex multis*, G. MORGESE, "Dublin system, "scrooge-like" solidarity and the eu law: are there viable options to the never-ending reform of the Dublin III regulation?", in *Diritto, Immigrazione e Cittadinanza*, Fasc. 3/2019, pp. 86–101.

[187] United Nations High Commissioner for Refugees (UNHCR), *Position on Readmission Agreements, Protection 'Elsewhere' and Asylum Policy*, cit.

[188] See, for instance, the readmission agreement between Russia and Belarus, the readmission agreement between Norway and Vietnam and all readmission agreements concluded by the EU with third countries. M. RAIS, "European Union readmission agreements", in *Forced Migration Review*. *Infra,* CHAPTER II, SECTION 3.

[189] N. COLEMAN, *op. cit*. pp. 223 ff.

agreements are frequently concluded with countries that may not be signatories to key international refugee protection conventions, such as the 1951 Geneva Convention and its 1967 Protocol. For example, Switzerland concluded readmission agreements with countries that are not parties to the Geneva Convention, such as Lebanon, Vietnam and Kuwait[190]. While Switzerland remains bound by its obligations under the Refugee Convention, these countries are only obliged to comply with human rights norms that are part of customary international law or treaties they have ratified.

As a result, the reality of many contemporary readmission agreements often fails to respect human rights standards, particularly when signed with countries outside the "proper" protection frameworks. In such contexts, *non-refoulement*, the prohibition against returning individuals to places where they face serious harm, becomes crucial[191]. The principle of *non-refoulement* is grounded in customary international law and applies not only to nationals but also to TCNs who are subject to readmission agreements. Since TCNs are often at greater risk when returned to third countries, particular attention must be paid to their safety and the potential violations they might face upon return[192].

The principle of *non-refoulement* clarifies that States must refrain from deporting or forcibly returning individuals to countries where their safety, personal freedom or human rights would be at risk. It is absolute and allows for no exceptions under any circumstances. The prohibition is universal, meaning that it applies to *all* individuals regardless of their nationality or immigration status: for the principle to apply, there must be substantial grounds for believing that the individual would be

[190] Abkommen zwischen dem Schweizerischen Bundesrat und der Regierung der Libanesischen Republik über die Rückübernahme von Personen mit unbefugtem Aufenthalt, 16 December 2004 (Readmission agreement between Switzerland and Lebanon, consulted in the text translated into Italian); Abkommen zwischen dem Schweizerischen Bundesrat und der Regierung des Staates Kuwait über die Rückübernahme von Personen mit unbefugtem Aufenthalt, 24 March 2016 (Readmission agreement between Switzerland and Kuwait, consulted in the text translated into Italian). United Nations High Commissioner for Refugees (UNHCR), *States parties, including reservations and declarations, to the 1951 Refugee Convention*, available at: https://www.unhcr.org/media/states-parties-including-reservations-and-declarations-1951-refugee-convention.

[191] Cfr. E. ROMAN, *Cooperation on Readmission in the Mediterranean Area and its Human Rights Implications*, Ph.D. Thesis, University of Palermo, 2017, p. 79; M. GIUFFRÉ, *op. cit.*, pp. 263–287.

[192] Council of Europe, Parliamentary Assembly, cit., para. 6.1.

in danger of serious harm, including torture or ill-treatment[193]. Building on the previous discussion about the right to seek asylum, it is therefore essential to recognise that the principle of *non-refoulement* not only ensures the protection of asylum seekers but also remains a crucial safeguard for all individuals under readmission agreements. This principle, as an integral part of the prohibition against torture and other forms of inhuman and degrading treatment, has an absolute nature, without any exceptions[194]. The extent of this prohibition, as outlined in many human rights treaties, is broader than what is found in international refugee law, where it was first recognised by Art. 33 of the 1951 Refugee Convention[195]. Hence, some courts have interpreted the principle of *non-refoulement* as to extend its application to different severe violations of human rights[196]. In particular, the ECtHR has interpreted Art. 3 of the ECHR as a rule prohibiting removal whether reasonable grounds have been shown for believing that an individual, if expelled in the destination country, would face a "real" risk of being subjected to treatment contrary to Art. 3 of the Convention[197].

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[193] F. L. GATTA, *Il divieto di espulsione collettiva di stranieri nel diritto internazionale e dell'Unione europea*, Editoriale Scientifica, Naples, 2023. On the principle on *refoulement* see, *ex multis*, V. CHETAIL, "Le Comité des Nations Unies contre la torture et l'expulsion des étrangers: dix ans de jurisprudence", in *Revue Suisse de droit international et européen*, n. 26, 2006, pp. 63–104; A. SACCUCCI, "Espulsione, terrorismo e natura assoluta dell'obbligo di non-refoulement", in *I diritti dell'uomo. Cronache e battaglie*, 2/2008, pp. 33 ff.; S. TREVISANUT, "The Principle of Non-Refoulement and the De-Territorialization of Border Control at Sea", in *Leiden Journal of International Law*, No. 27, 2014, pp. 661–675; C.W. WOUTERS, *International Legal Standards for the Protection from Refoulement*, Cambridge University Press, Cambridge, 2009.

[194] More in detail, S. SMET, "The 'Absolute' Prohibition of Torture and Inhuman or Degrading Treatment in Article 3 ECHR: Truly a Question of Scope Only?", in E. BREMS, J. GERARDS (eds), *Shaping rights in the ECHR: the role of the European Court of Human Rights in determining the scope of Human Rights*, Cambridge University Press, Cambridge, 2013, pp. 273–293.

[195] "No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion". However, para. 2 affirms that the previous provision does not refer to "a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country".

[196] As a sample, risks of violations to the right to life, sexual and gender-based violence, individual integrity and/or freedom, death penalty or death row, demeaning living conditions, etc. Office of the UN High Commissioner for Human Rights (OCHCR), *The principle of non-refoulement under international human rights law*, available here: https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf.

[197] See, *ex multis*, European Court of Human Rights (ECtHR), Grand Chamber, Judgement of 23 August 2016, *J.K. and Others v. Sweden*, Application no. 59166/12, paras. 77–105; European Court of Human Rights (ECtHR), Grand Chamber, Judgement of 29 April 2022, *Khasanov and Rakhmanov v. Russia*, Applications no. 28492/15 and 49975/15, paras. 93–116. More in depth,

In order for the requesting State to rely on a readmission agreement, it should therefore have reasonable grounds for believing that the readmitted alien would not be in danger of being subjected to torture or inhuman treatment in the country of destination. The prohibition of *refoulement* thus plays a central role in linking two different State obligations in relation to readmission. On the one hand, it concerns the obligation of the requested State to readmit its own nationals, under customary law, and/or TCNs under treaty law. On the other hand, it calls for an obligation on requesting States not to return (*rectius*, to admit temporarily to their territory) individuals, in particular those seeking international protection, to a country where their life or freedom would be threatened or where they would be at risk of persecution, with particular attention to TCNs readmitted to a country other than their own. However, this admission is different from a genuine right of residence. In practice, States often grant these individuals, who cannot be readmitted for reasons of *refoulement*, no more than a status of *mere tolerance* (so-called "tolerated persons"). This status restricts their freedom of movement and their access to social services, sometimes even to basic services. Unable to obtain a residence permit, these people find themselves in a state of limbo unless their situation is regularised[198].

The principle of *non-refoulement* thus implies for the person concerned the corresponding right to *temporary* admission in the requesting State in order to ensure that the necessary procedures can be carried out to confirm that removal to a third country is safe[199]. In other words, "whatever are the different options available to States for implementing their obligation, due respect for the principle of *non-refoulement* implicitly requires a *de facto* duty of admission"[200]. From a

Registry of the ECtHR, *Guide on the case-law of the European Convention on Human Rights: Immigration*, 31 August 2022, paras. 41 ff. For example, Judge Pinto de Albuquerque, in his concurring opinion related to the *Hirsi* case, pointed out that "the act of refoulement may consist in expulsion, extradition, deportation, removal, informal transfer, "rendition", rejection [or] refusal of admission. European Court of Human Rights (ECtHR), *Hirsi Jamaa and Others v. Italy*, cit., Concurring opinion of Judge Pinto de Albuquerque.

[198] D. VITIELLO, *Il divieto di refoulement nel diritto internazionale*, *op. cit.*, p. 89. On this issue, see also, European Court of Human Rights (ECtHR), Court (Chamber), Judgement of 17 December 1996, *Ahmed v. Austria*, Application no. 25964/94.

[199] V. MORENO-LAX, "Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea", in *International Journal of Refugee Law*, Vol. 23, No. 2, 2011, p. 218.

[200] V. CHETAIL, "The Transnational Movement of Persons Under General International Law", *op. cit.*, p. 41. In this perspective, the prohibition of *refoulement* has also been defined as "a piece

procedural and treaty law perspective, therefore, respect for the principle of *non-refoulement* should be considered as the *conditio sine qua non* for States to conclude and implement readmission agreements – and to rely on their treaty obligations – in accordance with human rights law and standards. In this regard, there is a concern that in their efforts to speed up and simplify the readmission process, States may overlook the need to protect individuals, potentially violating the prohibition of *refoulement*. Indeed, some readmission agreements include accelerated border procedures, which may discourage migrants from applying for asylum or result in assessments of poor quality[201]. As a matter of fact, in this way States may easily avoid democratic and judicial oversight, leading thus to a lack of proper monitoring over return and readmission practices. Hence, these circumstance not only weaken countries' ability to ensure the safety of returnees, but also notably increase the risk of indirect *refoulement, i.e*., "an expulsion to a State from where migrants may face further deportation without a proper assessment of their situation"[202].

For these reasons, States must provide for efficient solutions to prevent potential breaches of the *non-refoulement* principle. For example, as the risk of *refoulement* is inherently individual, State authorities should always consider an individual case-by-case assessment of the risk of *refoulemen*t in all readmission decisions. The risk of *refoulement*, in fact, should be always evaluated regardless of any previous assessments, considering all different objectives and factors that should be taken into account[203]. Indeed, in order to determine whether there has been a sufficiently individualised examination, it is necessary to consider the circumstances of the case and to verify whether the removal decisions have taken into account the specific situation of the persons concerned. In addition, readmission procedures in the case of the inclusion of readmission of TCNs should consider the need to establish the existence of a *genuine link* between the persons to be readmitted and the States

in the international struggle for the enforcement of fundamental rights". Cfr. W.A. SCHABAS, *Non-refoulement.* Paper presented at the Technical Workshop on Human Rights and International Cooperation in Counter-Terrorism, Liechtenstein, 15–17 November 2007, p. 47. Cfr. D. VITIELLO, "Comprehensive Approaches in the Global Compact for Migration and the EU Border Policies", *op. cit.*

[201] T. STRIK, cit., para. 4. See, among others, Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation, 16 December 2013, art. 7(4).

[202] European Court of Human Rights (ECtHR), *Asylum*, COURTalks, 2016, p. 2.

[203] O. SUNDBERG DIEZ, *op. cit.*, pp. 16 ff.

requested of readmission, avoid sending persons to countries with which they have no connection, and ensure the protection of the fundamental rights of the persons to be removed[204].

As has been discussed, the principle of *non-refoulement* stands as an absolute prohibition against returning individuals to situations where they face grave risks to their rights and safety, including torture and ill-treatment. It is therefore clear that States are obliged to respect the prohibition of *refoulement*, both when readmitting TCNs to a country other than their own and when returning them to their countries of origin, especially where the latter are party to readmission agreements. Nonetheless, when a State cannot readmit a TCN to his or her home country because of the risk of *refoulement*, an alternative practice has emerged: transfer to a third country that is considered "safe". This practice is based on the "safe third country" (STC) concept, which allows States to send TCNs to a country that meets safety standards and where they have previously transited, resided or sought asylum. The rationale behind this approach is that the third country can provide sufficient protection, ensuring compliance with the prohibition of *refoulement*[205].

Legislative implementation of the STC concept allows States to reject certain asylum claims outright, without assessing their merits. Instead, they can transfer these applicants to the designated STC for protection[206]. Originating in Western Europe in the 1980s, the concept of STC has increasingly been used to deter and prevent the arrival of irregular migrants. Initially, States focused on "first countries of asylum", where individuals had already found protection. However, this has evolved to include STCs, where migrants could potentially find protection in the future[207]. While the STC concept is often associated with the risk of *refoulement*,

[204] In this sense, D. VITIELLO, "L'azione esterna dell'Unione europea in materia di immigrazione e asilo", in *Diritto, Immigrazione e Cittadinanza*, Fasc. 3–4/2016, p. 17.

[205] A. HURWITZ, *The Collective Responsibility of States to Protect Refugees*, Oxford Monographs in International Law, Oxford, Online Edition, 2010, p. 45; Council of Europe, Parliamentary Assembly, *Safe third countries for asylum seekers*, 7 July 2022, para. 3.1.

[206] B. N. OSSO, "Unpacking the Safe Third Country Concept in the European Union: Borders, Legal Spaces, and Asylum in the Shadow of Externalization", in *International Journal of Refugee Law*, Vol. 35, 2023, p. 273.

[207] D. THYM, *Expert Opinion on Legal Requirements for Safe Third Countries in Asylum Law and Practical Implementation Options*, University of Konstanz, Research Centre Immigration & Asylum Law, 3 April 2024, p. 8. Thym also points out that the EU, Canada, the U.S. and some other countries, such as Germany, operate "safe third country" schemes. See, for example, Canada-US Safe Third Country Agreement, Washington, 5 December 2002, Canada Treaty Series 2004/2. Government of Canada, *Canada-US Safe Third Country Agreement*, available here:

as noted above, its application is not limited to such a scenario. Instead, the concept suggests that certain applicants for international protection should not be granted asylum in the country where they have sought refuge if they could reasonably have been granted protection in another safer country[208]. The STC approach allows readmission without a thorough and standard assessment of the individual's claim to protection, relying instead on a relative presumption of safety for the TCN concerned. This presumption is linked to the existence of readmission agreements with the country concerned, which ensure that the State of removal receives the necessary administrative cooperation for the removal procedure.

Nevertheless, the use of STC practices raises serious concerns about the potential for hasty and ill-considered rejections of asylum claims, which can undermine the fundamental right to seek asylum. A key criticism of the STC approach is the assumption that the designated country is, in fact, safe for those to be returned. Numerous academic studies and human rights reports have highlighted cases of inhumane treatment of irregular migrants in these so-called "safe" countries, especially in detention centres, border fences and informal settlements[209]. Moreover, the reliance on readmission agreements complicates international cooperation on refugee protection by shifting responsibility for processing and housing inadmissible asylum seekers to countries deemed "safe", often without ensuring that these States can provide adequate protection. This risk is particularly pronounced in agreements that do not clearly distinguish between asylum seekers and other migrants, as they can lead to violations of international protection standards if individual circumstances and vulnerabilities are not carefully assessed.

In our opinion, while destination States are undoubtedly responsible for potential human rights violations, it however is crucial to recognise the disparity in power and resources between destination States and designated STCs, which often lack the capacity to adequately process and protect large numbers of asylum

https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/agreements/safe-third-country-agreement.html.

[208] A. RADJENOVIC, *Safe third country concept in the EU pact on migration and asylum*, EPRS | European Parliamentary Research Service, December 2024, p. 2.

[209] H. CARON, "Refugees, Readmission Agreements, and "Safe" Third Countries: A Recipe for Refoulement?", in *Journal of Regional Security*, Vol. 12, Issue 1, 2017, p. 30. Among these countries, Caron identifies Morocco and Türkiye. See also, *infra*, CHAPTER IV, SECTION 6.

seekers[210]. Readmission agreements, which involve sending asylum seekers back to these transit countries, exacerbate the North-South divide identified by Betts when dealing with refugee protection, and more broadly, with migration issues: "[a] North−South impasse may be defined as a situation in which a problem primarily originates in and remains relatively confined to the South while the economic and political means to address the problem are largely held by the North"[211]. These agreements effectively shift the burden of refugee protection from wealthier, more developed countries to less equipped, less developed countries. This not only places an unfair burden on transit countries but also undermines international cooperation on refugee protection by creating an imbalance of responsibilities[212].

The Grand Chamber of the ECtHR has also recently ruled on the application of the STC concept in the case of *Ilias and Ahmed v. Hungary*[213]. In this judgment, the Strasbourg Court clarified that a State which intends to return an asylum-seeker to a third country other than his or her country of origin under the STC concept must first ensure that the individual, once returned to the country of destination, will be sufficiently protected from the risk of a violation of his or her rights under Art. 3 ECHR on two fronts. First, the country of destination must guarantee effective access to an asylum procedure and protection against *refoulement* (including indirect *refoulement*). Secondly, the conditions of detention or the standard of living of asylum-seekers in the country of destination must not be inhuman or degrading. The Court further emphasised that such an assessment cannot be based solely on the abstract existence of safeguards in national legislation or obligations derived from supranational or international instruments, including the ECHR. Instead, the sending State must examine "how the authorities of that country apply their legislation on asylum in practice"[214].

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[210] H. CARON, *op. cit.*, p. 30.

[211] A. BETTS, *Protection by Persuasion: International Cooperation in the Refugee Regime*, Cornell University Press, Ithaca, U.S., 2009, p. 8.

[212] H. CARON, *op. cit.*, p. 30. In this sense, see also S. F. NICOLOSI, "Externalisation of Migration Controls: A Taxonomy of Practices and Their Implications in International and European Law", in *Netherlands International Law Review*, Vol. 71, 2024, pp. 19–20.

[213] European Court of Human Rights (ECtHR), Grand Chamber, Judgement of 21 November 2019, *Ilias and Ahmed v. Hungary*, Application no. 47287/15.

[214] *Ivi*, para. 141.

To complete the analysis of key human rights protections under international human rights and refugee law in the context of the readmission of TCNs, the right to an effective remedy stands as a critical safeguard. This right was first recognised in the UDHR (Art. 8) and reaffirmed, *inter alia*, in the ECHR (Art.13), which requires national authorities – not necessarily judicial authorities – to provide effective remedies for violations. When read in conjunction with Art. 3 of the ECHR and Art. 4 of Protocol No. 4, this right serves as a cornerstone for safeguarding TCNs against potential human rights violations in the context of readmission processes. The ECtHR has emphasised that an effective remedy must be practical and meaningful, requiring it to be accessible, sufficient, appropriate, and capable of addressing the alleged violation effectively[215]. For TCNs, this includes access to adequate information to challenge decisions, an independent and thorough examination of their claims by a competent authority, and procedural safeguards such as a prompt review procedure and the suspensive effect of removal measures[216]. These guarantees are essential to prevent irreparable harm, in particular violations of the principle of *non-refoulement* or the prohibition of collective expulsions, which disproportionately affect TCNs subject to readmission, due to their often-vulnerable status[217].

Readmission-related issues are also addressed by the GCM, which, while emphasising the need for States to respect their obligations under international human rights law, also explores the relationship between these obligations and refugee law, making the GCM a particularly relevant instrument in this context. Although there is no comprehensive global codification regulating *all* legal aspects of international migration, the development of the non-legally binding Global

[215] See, among others, European Court of Human Rights (ECtHR), Second Section, Judgement of 26 March 2013, *Zorica Jovanović v. Serbia*, Application no. 21794/08.

[216] European Court of Human Rights (ECtHR), Fourth Section, Judgement of 11 July 2000, *Jabari v. Turkey*, Application no. 40035/98, para. 50; European Court of Human Rights (ECtHR), Third Section, Judgement of 5 February 2002, *Čonka v. Belgium*, Application no. 51564/99, paras 79-83; European Court of Human Rights (ECtHR), *M.S.S. v. Belgium*, cit., para 293; *Hirsi Jamaa and Others*, European Court of Human Rights (ECtHR), *Hirsi Jamaa and Others v. Italy*, cit., paras 198–199. See also, ECtHR, *Guide on Article 13 of the European Convention on Human Rights: Right to an effective remedy*, 29 February 2024, pp. 35 ff.

[217] The question of the right to an effective remedy is of particular interest in the discussion of the main human rights challenges posed by "informal" readmission arrangements. *Infra*, CHAPTER III, SUB–SECTION 3.3.

Compact represents a significant effort in this regard[218]. Therefore, in order to provide an in-depth look at addressing readmission obligations from an international perspective, the next SECTION seeks to analyse how the GCM has contributed to the development of international legal norms on readmission cooperation. This analysis also highlights the impact that the GCM may have had on the application, interpretation and development of international legal norms related to readmission. To underline the importance of this issue, it is worth noting that one issue that could have jeopardised the GCM process and severely damaged relations between groups of States is the issue of return and readmission[219]. This discussion also examines whether the GCM has provided answers to the legal uncertainties on readmission described above.

3. The evolution of international legal norms on cooperation over readmission: insights from the Global Compact for Safe, Orderly and Regular Migration (GCM)

The GCM was adopted at an intergovernmental conference on migration in Marrakech, Morocco. It follows on from the landmark New York Declaration on Refugees and Migrants, which committed States to enhancing the security of migrants and refugees and to supporting "host" countries[220]. UN Member States recognised the need for a global approach to human mobility in order to ensure global and effective governance of migration. In this context, several thematic discussions, consultations and intergovernmental negotiations have led to the adoption of two Global Compacts, the Global Compact on Refugees (GCR) and the GCM given the two different legal regimes for the protection of refugees and migrants[221]. The GCM was adopted by 164 UN Member States and subsequently

[218] T. MOLNÁR, *The Interplay between the EU's Return Acquis and International Law, op. cit.,* p. 148.

[219] *Ivi*, p. 76

[220] UN General Assembly, *New York Declaration for Refugees and Migrants*, A/RES/71/1, 19 September 2016.

[221] United Nations General Assembly, Global Compact on Refugees, resolution 73/151, 17 December 2018. The Global Compact on Refugees is described as "a framework for more predictable and equitable responsibility-sharing, recognizing that a sustainable solution to refugee situations cannot be achieved without international cooperation". United Nations High Commissioner for Refugees (UNHCR), *The Global Compact on Refugees*, available here:

endorsed by the UN General Assembly with 152 votes in favour, 5 against (Czechia, Hungary, Israel, Poland and the U.S.) and 12 abstentions. A further 24 States did not take part in the vote[222]. The GCM clearly enjoyed less consensus than its "twin", the GCR, which was indeed endorsed by the General Assembly in a resolution that received 181 votes in favour, 2 against (the U.S. and Hungary) and 3 abstentions (Eritrea, Liberia and Libya)[223]. However, it is significant that the GCM was in any case endorsed by a large majority in a respected body such as the UN General Assembly, even if it was not "formally" adopted by the Assembly itself. This endorsement prevented the lack of consensus and the clear opposition of some States from weakening the potential legal impact and significance of the GCM[224].

In this respect, despite its non-legally binding nature, the GCM has the potential to influence existing international legal norms and affect the legal rights of migrants under international law. Peters has succinctly described the roles and potential legal effects of the GCM as "pre-law" (acting as a precursor to hard law, setting the stage for a future formal treaty) and "para-law" (filling gaps where hard law is lacking). In addition, the GCM could act as a guide to the interpretation of hard law, extending and clarifying existing legal obligations, a function Peters refers to as the "law-plus function"[225]. It is clear that the text of the document strongly reflects the commitment of States to international law, with respect for international law in general and human rights law in particular being referred to 56 times throughout the text[226]. Therefore, despite its soft law character, the GCM attaches particular importance to the main legal norms governing international migration and refugee law[227]. It is also important to stress that the Compact was adopted through formal

https://www.unhcr.org/about-unhcr/overview/global-compact-refugees. See also, Intersos.org, *Migranti e rifugiati: un Global Compact che impegna tutti*, 30 October 2016, available here: https://www.intersos.org/migranti-rifugiati-un-global-compact-impegna-tutti/.

[222] United Nations, Digital Library, *Global Compact for Safe, Orderly and Regular Migration: resolution / adopted by the General Assembly*, available here: https://digitallibrary.un.org/record/1656414.

[223] M. GIAMPAOLO, A. IANNI, *The Global Compact on Migration: a worldwide opportunity for a common governance of migrations*, FOCSIV, Background Document No. 5, April 2020, p. 7. United Nations General Assembly, Global Compact on Refugees, cit., para 2.

[224] A. BUFALINI, *op. cit.*, p. 10.

[225] A. PETERS, "The Global Compact for Migration: to sign or not to sign?", in *EJIL: Talk!*, 21 November 2018.

[226] Counted by V. CHETAIL, *International Migration Law, op. cit.*, p. 334.

[227] T. MOLNÁR, *The Interplay between the EU's Return Acquis and International Law*, *op. cit.*, p. 183. Furthermore, one of the big changes introduced by the Compact concerns the use of the term

and inclusive procedures, suggesting that the parties did not intend for it to remain an instrument without substance or practical impact indefinitely. It is no coincidence that some scholars refer to the GCM as a form of "enhanced soft law"[228].

More specifically, the GCM can be seen as the first non-binding global UN agreement on a common and holistic approach to international migration, with the aim of promoting safe, orderly and regular migration in all its facets[229]. The GCM in fact "recognizes that a cooperative approach is needed to optimize the overall benefits of migration, while addressing its risks and challenges for individuals and communities in countries of origin, transit and destination"[230]. It establishes a cooperative framework that builds on the commitments agreed by Member States in the New York Declaration for Refugees and Migrants. Furthermore, it promotes international cooperation among all relevant actors in the field of migration, recognising that no State can manage migration alone[231]. Overall, the GCM calls on UN Member States to respect and protect the rights of migrants, regardless of their migrant status and at all stages of their "migration cycle"[232]. The Compact intends thus to demonstrate that enhancing international cooperation to facilitate safe, orderly, and legal migration may improve the governance of migration flows on a global scale[233].

The GCM sets 23 clear Objectives: in particular, Objective 21 ("Cooperate in facilitating safe and dignified return and readmission, as well as sustainable

"irregular" referring to migration flows, in lieu of "illegal", since the latter may carry a criminal connotation. In fact, the irregular entry in a country (or residing there with an irregular status) should be regarded as a breach of national administrative regulations rather than a criminal offence. See also, European Commission, DG HOME, *Definition of irregular migrant*, EMN Asylum and Migration Glossary.

[228] D. VITIELLO, "Il contributo dell'Unione europea alla governance internazionale dei flussi di massa di rifugiati e migranti: spunti per una rilettura critica dei Global Compacts", in *Diritto, Immigrazione e Cittadinanza*, Fasc. 3/2018, p. 3. Cfr. F. FERRI, *I patti globali su migrazioni e rifugiati tra vecchie e nuove dinamiche multilivello: alcune considerazioni di natura giuridica*, ASGI, 1 April 2019, available here: https://www.asgi.it/asilo-e-protezione-internazionale/immigrazione-rifugiati-global-compact/.

[229] IOM, *Global Compact for Migration*, available here: https://www.iom.int/global-compact-migration.

[230] GCM, para. 39.

[231] *Ivi*, para. 7.

[232] *Ivi*, paras. 15(f) and 16.

[233] D. VITIELLO, "Comprehensive Approaches in the Global Compact for Migration and the EU Border Policies", *op. cit.*

reintegration") deals with return, readmission, and reintegration[234]. In order to achieve its commitments, Objective 21 foresees nine sets of actions, described in para. 37, lett. (a)-(i). This Objective establishes that all States "commit to facilitate and cooperate for safe and dignified return" and "*to ensure that [their] nationals are duly received and readmitted*, in full respect for the human right to return to one's own country and the obligation of States to readmit their own nationals"[235]. In other words, the GCM appears to reaffirm the obligation of States to readmit their nationals and serves as a (semi)legal framework through which countries can work together to address readmission issues in a manner that respects the rights and dignity of migrants.

Apparently the GCM moves towards a more "human rights-based approach" on readmission, return and reintegration. The GCM in fact emphasises the prominence of sustainable reintegration for migrants returning to their home countries. Moreover, it specifies that States should determine "clear and mutually agreed procedures that uphold procedural safeguards, guarantee individual assessments and legal certainty [...] they [should] also include provisions that facilitate sustainable reintegration". Measures aimed to sustainable reintegration may include, among others, fostering economic empowerment, ensuring personal safety, enhancing social cohesion as well as promoting inclusion: however, while the GCM reaffirms the importance of sustainable reintegration, it does not provide detailed information on specific policies or programmes in this regard. The GCM also aspires to guarantee a *dignified return* of migrants in their countries of origin, in full respect of international human rights law and in compliance with the principle of *non-refoulement*. Regarding the latter, the GCM only recalls the "legal quintessence" of this principle without ever mentioning it explicitly. The Compact in fact requires States to endorse "the prohibition of collective expulsion" and abstain "from returning migrants when there is a real and foreseeable risk of death, torture, or other irreparable harm"[236]. The fact that the Compact merely "recalls" this provision may, as some scholars have suggested, potentially undermine the

[234] I. MAJCHER, "GCM Commentary: Objective 21: Cooperate in facilitating safe and dignified return and readmission, as well as sustainable reintegration", in *RLI Blog on Refugee Law and Forced Migration*, 1 November 2018.

[235] GCM, para. 37(b).

[236] See A. BUFALINI, *op. cit.*, p. 16.

normative strength of international migration rules and principles[237]. The absence of an explicit mention of the principle of *non-refoulement* may be due, *inter alia*, to China's refusal to recognise this principle as applicable only to refugees and not to migration issues in general, as migrants and refugees are categorised under different legal frameworks[238]. In contrast, several other countries, including Liechtenstein, Switzerland, Canada, Chile, New Zealand, the African Group and Tuvalu, stressed that the principle of *non-refoulement* was not only upheld by international refugee law, but also by human rights law[239].

Moreover, as mentioned before, States also commit to guarantee that individuals are duly received and readmitted, in full respect for both the *human right to return to one's own country* and *the obligation of States to readmit their own nationals*. Nevertheless, when looking at the full text of the Compact, the right to return remains in the background compared to the obligation of States to readmit. The GCM thus appears to place more emphasis on the importance of the return/readmission dimension in relation to the duty of States "to mitigate the adverse drivers and structural factors that [...] compel [people] to seek a future elsewhere" (Objective 2 of the GCM)[240]. By prioritising efforts to mitigate the drivers of migration, the GCM arguably places greater emphasis on creating conditions that can "keep" people in their countries of origin, rather than ensuring their right to return if they so choose. By largely addressing the root causes of migration, there is a risk of neglecting the inherent right of individuals to choose whether or not to return to their country of origin, regardless of external factors. In this regard, in the earlier draft of the Compact, Objective 21 placed a greater emphasis on voluntary rather than forced return, a position strongly supported by the African Group. However, as the draft was revised, this emphasis was gradually removed. While the final text – as noted above – encourages States to promote voluntary return programmes and reintegration, it does not require them to prioritise

[237] *Ibid.*

[238] International Institute for Sustainable Development (IISD), *Governments Debate Irregular, Regular Migrants, Refugee Rights*, 15 March 2018, available here: https://sdg.iisd.org/news/governments-negotiate-on-irregular-regular-migrants-refugee-rights/.

[239] *Ibid.* This view, as outlined in the previous SECTION, is also the one most widely supported by international legal scholarship (and also by the Author of this work).

[240] GCM, para. 12. Cfr. D. VITIELLO, "Comprehensive Approaches in the Global Compact for Migration and the EU Border Policies", *op. cit.*

voluntary return over forced return under the GCM[241]. The final decision was probably influenced by certain reservations – or even outright opposition – expressed by some States during the negotiations on the GCM. In particular, Hungary representative described one of the earlier drafts of the document as unbalanced, calling it a "pro-migration" text. It argued that migration was harmful and should be stopped, and that the focus of States and international organisation should not be limited to the mere management of migration. Hungary also stressed that the role of the UN should be to prioritise the protection of the sovereignty and security of its Member States, which it said were under significant threat from migration. It further stated that the "illegal" crossing of a country's borders is a serious crime that warrants severe punishment, stressed that migration is not a fundamental human right, and argued that multiculturalism is not inherently valuable, asserting that a homogeneous society is no less desirable[242].

In this vein, the GCM appears to endorse a potential "evolution" in readmission cooperation that has emerged. Indeed, a closer look reveals that such cooperation is increasingly linked to the commitment of States to address and reduce the negative factors and structural conditions that force people to leave their home countries. Development cooperation has indeed been identified as one of the main leverages to ensure cooperation in dealing with return and readmission[243]. States seem thus commit to develop a right "not to migrate" (*jus manendi*), under the binomial individual human right/interstate duty to cooperate over readmission. Within this context, in his message for the 99th World Day of Migrants and Refugees celebrated in 2013, Pope Benedict XVI acknowledged that every human being must be ensured the *jus manendi,* which should be deemed as a right not yet codified but of fundamental importance[244]. Migration should never be driven by desperation, but it should be the result of a conscious, free, and voluntary choice. Some key concepts

[241] T. MOLNÁR, *The Interplay between the EU's Return Acquis and International Law*, *op. cit.*, p. 199.

[242] International Institute for Sustainable Development (IISD), cit.

[243] Especially in the EU context, as is further highlighted *infra,* CHAPTER IV.

[244] Message of his Holiness Pope Benedict XVI for the World Day of Migrants and Refugees, *Migrations: pilgrimage of faith and hope*, 2013, available here: https://www.vatican.va/content/benedict-xvi/en/messages/migration/documents/hf_ben-xvi_mes_20121012_world-migrants-day.html#:~:text=Dear%20brothers%20and%20sisters%20who,during%20your%20pilgrimage%20of%20migration.

that seem to have been operationalised at the GCM level, leaving aside any kind of religious or "ethical" considerations.

Within the Compact, the right "not to migrate" seems to take the form of a *de contrahendo* obligation for States to create conditions that enable individuals to stay in their home countries in safety and dignity (*rectius*, to prevent migration flows), rather than a *true individual right.* In other words, "while cooperation on ensuring the right not to migrate is theoretically linked to individual choice about migration, in practice, this freedom of choice may be pre-empted by cooperation on migration containment and border security"[245]. As Vitiello points out, by linking the obligation to assist migrants at home with the obligation to readmit, the GCM appears to emphasise the responsibility of migrant-sending countries for large movements of migrants and refugees[246]. From a legal perspective, it may allow migrant-receiving States to argue in negotiations for rules that help to reduce the reasons why people are forced to leave their homes. This suggests an effort "to streamline international cooperation on readmission by advancing an *opinio necessitatis* – if not yet *juris* – to making countries of origin accountable for unauthorised departures and difficult returns"[247]. Under the binomial "duty help migrant at home/obligation to readmit" designated by the GCM, it can be asserted that States seem to support a view which frame cooperation on readmission as claiming the obligation on the so called "Global South" to support the right "not to migrate" of their citizens – an obligation that does not seem to fully respect either the right to leave or the right to return –, to which corresponds a duty on the "Global North" to "help migrants at home".

[245] D. VITIELLO, "Comprehensive Approaches in the Global Compact for Migration and the EU Border Policies", *op. cit.* And most of the time, with very poor results. While addressing negative migration drivers may decrease forced migration, it could also lead to an increase in voluntary departures. Indeed, the more financial support countries of origin receive, the more the local labour force tends to migrate to the "supporting countries". This would be a direct consequence of the financial/economic assistance, which is usually characterised by the establishment of new business relations between the "supporting countries" and companies and/or governments of the "beneficiary countries". Such situation would, on the one hand, encourage local populations to migrate in search of better living conditions, that seem to be "within reach". On the other hand, it would easily provide some migratory channels towards the "supporting countries". In this sense, F. BELLOC, A. NICITA, *L'equazione sbagliata degli aiuti allo sviluppo: la migrazione incompresa*, ISPI Commentary, 9 May 2011.

[246] D. VITIELLO, "Comprehensive Approaches in the Global Compact for Migration and the EU Border Policies", *op. cit.*

[247] *Ibid.*

On closer examination, however, the GCM does not significantly alter the current state of customary international law, particularly in the area of readmission[248]. Its normative content is not groundbreaking, as it largely reiterates existing principles and rules found in customary and treaty law. For example, obligations such as the prohibition of collective expulsion, the protection of migrants from being returned to situations where they would face a real risk of serious harm, and the obligation of States to readmit their own nationals are already well established in international law and are not newly introduced by the GCM, as also explained in this CHAPTER[249]. For this reason, while some authors argue – as mentioned above – that the mere "recall" of these provisions could somehow weaken their legal essence, in the view of the Author of this work this is simply a reaffirmation of their status as universally recognised norms of international law. It acknowledges their existence without diminishing their value and leaves their status unchanged.

What stands out, however, is the Compact's tendency to adopt a "State-rights-based perspective" in the context of readmission. It seems to prioritise the needs of States, focusing on safeguarding State sovereignty and reinforcing an international legal framework on migration that appears to be "trapped in an outdated contained mobility approach"[250]. This approach emphasises state authority and control over migration, potentially at the expense of more progressive or rights-based considerations that would prioritise the protection of migrants, particularly those subject to readmission. While modern international law has generally tended to emphasise individual rights and responsibilities beyond state sovereignty, the GCM appears to revert to a more "classical" view of international law in which the individual migrant is largely marginalised. In this traditional framework, the needs of sovereign States are paramount. The principle of state sovereignty, highlighted as a key tenet of the GCM, has significant implications as it limits the extent to which the Compact's obligations can interfere with the prerogatives of States to

[248] V. CHETAIL, "The Global Compact for Safe, Orderly and Regular Migration: A Kaleidoscope of International Law", *op. cit.*, p. 265; T. MOLNÁR, *The Interplay between the EU's Return Acquis and International Law*, *op. cit.*, p. 201.

[249] A. BUFALINI, *op. cit.*, p. 23.

[250] D. VITIELLO, "Comprehensive Approaches in the Global Compact for Migration and the EU Border Policies", *op. cit.*

determine their national migration policies and to manage migration within their jurisdiction[251]. The only limits to State sovereignty in the area of migration seem to derive from the range of international norms and principles, including human rights law, to which States have already voluntarily committed themselves. In this context – and in the light of our earlier discussion of the right to dignified return and sustainable reintegration – one might conclude that States are more likely to justify their readmission obligations on the basis of their sovereign right to regulate the exit of aliens from their territory. However, this perspective risks overshadowing the right of individuals to be readmitted, reducing them to a mere indirect "object" of this obligation, rather than recognising their rights as central to the process.

These initial observations suggest that international rules on readmission lack clarity in their precise details, leading to potential ambiguities and divergent interpretations. This CHAPTER has examined the issue of readmission in the broader context of international law, analysed the existing norms governing readmission under general international law and identified key uncertainties. This legal background is essential for understanding the dynamics of readmission cooperation within the EU legal framework. The next CHAPTER aims to explore how the EU's "formal" cooperation on readmission – through the conclusion of readmission agreements with third countries and the inclusion of readmission clauses in broader agreements – relates to the international law considerations set out in this CHAPTER and to assess whether the Union aligns itself with the international norms discussed.

[251] GCM, para. 15.

CHAPTER II

READMISSION COOPERATION AT THE EU LEVEL

TABLE OF CONTENTS: 1. Readmission cooperation at the EU level: setting the legal framework. – 2. The evolution of readmission clauses. From the origins to the "post–Cotonou era". – 3. EU readmission agreements (EURAs). – 3.1. Readmission obligations. – 3.2. Human rights–related clauses and issues. – 4. The EU–Member States' interplay in readmission cooperation. – 4.1. The nature of the EU and Member States' competence in concluding readmission agreements. – 4.2. Competences overlap and criteria for coordination. – 4.3. The role of the EU and Member States in implementing EURAs. – 5. The autonomy of EU law and its relevance in shaping readmission cooperation.

1. Readmission cooperation at the EU level: setting the legal framework

Readmission has always been a "vital component" of EU migration law and policy and has played a significant role for at least the last thirty years[252]. Indeed, the removal of irregular migrants and the issue of readmission has been a longstanding priority for the EU since the early 1990s. In this regard, as the "former" EC increasingly emphasised the need to address irregular migration, cooperation with third countries on this issue became a top priority in the EU's external relations agenda. Art. K.1(3)(c) of the TEU, as outlined in its Maastricht version, had in fact already recognised the fight against irregular migration as a "matter [...] of common interest". However, at that period the EU had no *explicit external competence* in the area of return and readmission. Indeed, the competence to conclude readmission agreements (Art. 79(3) TFEU) has been granted to the EU only by the Lisbon Treaty[253]. In the absence of such an external competence, the

[252] Council Document no. 14673/02, Proposal for a return action programme, Brussels, 25 November 2002, p. 2. Cfr. S. CARRERA, *Implementation of EU Readmission Agreements: Identity Determination Dilemmas and the Blurring of Rights*, *op. cit.*, p. 1.

[253] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 13 December 2007: "[t]he Union may conclude agreements with third countries for the readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States."

EU's initial readmission policy was limited to encouraging the conclusion of bilateral readmission agreements between Member States and third countries and to standardising the content of these agreements[254]. However, recognising the limits of bilateral efforts, Member States began to acknowledge that the former EC's political and economic power would enhance the prospects for successful negotiations of readmission agreements. Indeed, the Member States expected that the political and economic weight of the Community would increase the eagerness of third countries to enter into readmission agreements[255]. For these reasons, in 1998, during the Austrian Presidency, negotiations commenced on a draft standard readmission agreement involving all Member States and a third country, marking a collective commitment to addressing irregular migration[256].

The Treaty of Amsterdam was pivotal in this process, giving the EC explicit powers to deal with irregular migration[257]. In particular, Art. 63(3)(b) of the Treaty establishing the EC (TEC), as amended by the Treaty of Amsterdam, empowers the Council to adopt measures relating to migration policy, including issues such as irregular immigration and the readmission of irregular residents[258]. The legal basis for the EC to conclude readmission agreements – *i.e.,* an external competence on readmission – was therefore *implicitly* found in Art. 63(3)(b) TEC, in conjunction with Art. 300 TEC, which sets out the procedure for the EC to conclude agreements with other States or international organisations[259]. In addition, the Tampere Programme, adopted in October 1999, contributed to implement the provisions of the Treaty of Amsterdam on asylum and migration[260]. Its main objectives were to establish a common EU asylum system, to ensure fair treatment of TCNs, to build partnerships with countries of origin and to manage migration flows effectively, including the fight against irregular immigration. Consequently, the Council was

[254] E. ROMAN, *op. cit.,* p. 41.
[255] *Ivi*, pp. 42 ff.
[256] N. COLEMAN, *op. cit.,* p. 24.
[257] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, 2nd October 1997.
[258] *Ivi*, para. 37. "The Council [...] shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt [...] [m]easures on immigration policy within the following areas: [...] (b) Illegal immigration and illegal residence, including repatriation of illegal residents." See also, A. ADINOLFI, "Commento all'art. 63 TCE", in F. POCAR (ed.), *Commentario breve ai Trattati della Comunità e dell'Unione europea*, Padua, 2001, pp. 303 ff.
[259] M. PREVIATELLO, *op. cit.*, p. 92. See, more in detail, *infra,* SUB-SECTION 4.1.
[260] European Council, Presidency Conclusions, Tampere, 15 and 16 October 1999.

urged to conclude readmission agreements or to include standard readmission clauses in other agreements between the former EC and relevant third countries. This recommendation was based on the understanding that such instruments generally serve as valuable tools in an active readmission policy[261]. Throughout the 2000s, the EU institutions produced a series of action plans and policy documents that played a key role in shaping the overarching principles of the EU return and readmission policy. For example, the Laeken European Council in December 2001 underlined the importance of a robust return and readmission policy in the fight not only against irregular migration but also against human trafficking. It advocated the implementation of EURAs in order to streamline the prompt removal of unauthorised migrants[262]. Subsequently, the Commission released a "Green Paper on a Community return policy on Illegal Residents", in which it undertook to take forward the ongoing negotiations on readmission agreements and to continue to include standard readmission clauses in all future association or cooperation agreements[263].

However, it also is worth noting that the EU's readmission and return policy is only one *component* of a broader policy framework that integrates migration and asylum into the EU's external policy. This broader framework, referred to as the "external dimension of the EU's migration and asylum policies", encompasses a range of policy and legal instruments aimed at addressing migration and asylum challenges through cooperation with third countries of origin and transit[264]. With the Global Approach to Migration (GAM), the EU's external action on migration and asylum has evolved towards broader forms of partnership with different countries[265]. The EU has thus started to use different instruments to pursue its migration policy objectives in different areas: the idea was to address the phenomenon with a more coordinated and comprehensive strategy. From 2011 onwards, with the Global Approach to Migration and Mobility (GAMM), this aim

[261] *Ivi*, para. 26.

[262] European Council Meeting in Laeken, Presidency Conclusions, 14 and 15 December 2001, N 300/1/01 REV 1, para. 40.

[263] European Commission, Green Paper on a Community Return Policy on Illegal Residents, Brussels, 10 April 2002, COM (2002) 175 final, para 4.

[264] E. ROMAN, *op. cit.*, p. 19.

[265] European Council, Presidency Conclusions, 15/16 December 2005, Brussels, Doc. 15914/05, para. 8.

was made explicit[266]. Indeed, the GAMM has been defined as an "overarching framework" of the EU external action in the field of migration and asylum "based on genuine partnership with non-EU countries", which seeks to address "migration and mobility issues in a comprehensive and balanced manner"[267]. This "global approach" involves the use of various instruments, some of which are purely legal in nature, while others have a more political focus[268]. Readmission clauses in broader agreements, as well as EURAs, represent the "first phase" of the EU's external migration and asylum policy. This early approach, under the GAMM, focused on formal legal instruments and binding solutions derived from EU primary law[269].

It is therefore easy to understand that readmission clauses included in broader agreements, as well as EURAs, can be considered as the oldest "formal" instruments within this framework[270]. This CHAPTER addresses the issue of "formal" cooperation on readmission at the EU law, first examining one of these key instruments of the EU legal framework on readmission, *i.e.*, readmission clauses, from their origins to the most recent developments (SECTION 2). These clauses have been in fact included since the 1990s in international agreements of a broader scope, establishing privileged relations between the EU, its Member States

[266] European Commission, Communication COM (2011) 743 final to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, The Global Approach to Migration and Mobility, Brussels, 18 November 2011.

[267] *Ivi*, p. 5. The renewed GAMM focuses on four "pillars": improving the organisation of legal migration and facilitated mobility, preventing and reducing irregular migration in an efficient, yet humane way, strengthening the synergies between migration and development, and strengthening international protection systems and the external dimension of asylum. See also, European Commission, *Global Approach to Migration and Mobility (GAMM)*, EMN Asylum and Migration Glossary, available here: https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/global-approach-migration-and-mobility-gamm_en.

[268] C. MILANO, "La dimensione esterna delle politiche UE di immigrazione e asilo oltre l'approccio globale e l'informalizzazione: alcune questioni giuridiche legate agli sviluppi più recenti", in *Quaderni AISDUE*, No. 35, 19 July 2023, pp. 827 ff.

[269] The GAMM remains formally active, but its importance has diminished over time. While the core principles of GAMM continue to influence some EU policies and interactions with third countries, the framework appears to have been largely overshadowed by more recent "strategies", such as those outlined in the New Pact on Migration and Asylum. Cfr. P. GARCÍA ANDRADE, "EU cooperation on migration with partner countries within the New Pact: new instruments for a new paradigm?", cit.

[270] A. ROIG, T. HUDDLESTON, "EC Readmission Agreements: A Re-evaluation of the Political Impasse", in *European Journal of Migration and Law*, Vol. 9, Issue 3, 2007, p. 366.

and third countries[271]. In addition to the analysis of readmission clauses, this CHAPTER explores the main features of EURAs (SECTION 3). The analysis focuses not only on the legal nature and scope of the EURAs, but also on their core content and how they interplay with the international norms discussed in CHAPTER I. However, not only the EU but also individual Member States can conclude readmission agreements with third countries. While the Lisbon Treaty grants the EU an explicit competence to conclude readmission agreements, today it is undisputed that this competence is shared between the Union and its Member States, – even if the Treaties do not explicitly clarify this issue. As a result, "formal" readmission cooperation between individual Member States and third countries continues to operate alongside the EURAs[272]. After addressing the prickly debate about EU and Member States' competences over readmission, this CHAPTER aims also at exploring how bilateral readmission agreements between individual Member States and third countries interact with, and potentially challenge, the EU's legal framework on readmission, in order to understand whether or not there is a "peaceful coexistence" between the respective patterns of cooperation. In addition, SUB-SECTION 4.3 of the dissertation focuses on the role that both the EU and the Member States play in the implementation process of EURAs. This analysis examines the complex dynamics between Member States and the EU in relation to readmission policy, with the aim of clarifying how the legal frameworks of the two interact. By examining this relationship, the study seeks to highlight how these legal structures influence the EU's role in shaping international law on readmission. Understanding this interplay is pivotal for assessing the EU's role on readmission within the broader international legal context.

In this regard, a key preliminary aspect to be considered in order to fully understand the extent of this interplay and to answer the research question of the thesis is the EU's position on readmission obligations under international law, as

[271] These are mainly association, partnership or cooperation agreements which contain clauses setting out the conditions for the readmission of persons found irregularly present on the territory of one of the Parties to the agreements.

[272] M. PANIZZON, *op. cit.*, p. 103.

outlined in the previous CHAPTER[273]. Firstly, the EU seems to support the existence of a customary obligation under international law to readmit States' own nationals. In this regard, in *Duyn* (1974) the Court of Justice of the European Communities (CJEC) affirmed that "it is a principle of international law [...] that a State is precluded from refusing its own nationals the right of entry or residence"[274]. Moreover, the EU institutions have also emphasised the clear obligation on States to readmit their nationals, in accordance with general international law. On this point, the Commission has recently reaffirmed that "every State has the obligation to readmit its own nationals under international customary law [...] regardless of the existence of specific instruments structuring readmission cooperation"[275]. This statement has also been recalled by the EU in secondary law instruments: for examples, recital (7) of the Regulation 2016/1953, concerning EU travel document for the return of irregularly staying TCNs, clarifies that "[t]he readmission of own nationals is an obligation under international customary law, with which all States are required to comply[276]". It is thus clear that the EU officially supports the existence of such customary obligations, which States, including Member States, must fulfil[277]. The EU also reiterated its position in the context of the GCM, consistently emphasising the responsibility of States under international law to readmit their own nationals unconditionally. For example, the EU's General Statement on the "Zero Draft" of the GCM underlined the need to reaffirm this obligation unequivocally in the final text of the Compact[278]:

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[273] We thought it appropriate to address this issue in this CHAPTER, which is specifically dedicated to the EU and its "formal" policies on readmission, rather than in the previous CHAPTER, which is dedicated to the international legal framework on this issue.

[274] Court of Justice of the European Communities (CJEC), Judgement 4 December 1974, Case C–41/74, *Yvonne van Duyn v Home Office*, ECLI:EU:C:1974:133, para. 22.

[275] European Commission, Communication COM (2021) 56 final to the European Parliament and the Council, Enhancing cooperation on return and readmission as part of a fair, effective and comprehensive EU migration policy, Brussels, 10 February 2021, p. 7.

[276] Regulation 2016/1953 of the European Parliament and of the Council, of 26 October 2016, on the establishment of a European travel document for the return of illegally staying third country nationals and repealing the Council Recommendation of 30 November 1994. C. M. F. MOMMERS, *op. cit.*, p. 116. See also, European Commission, DG HOME, *European travel document for return*, EMN Asylum and Migration Glossary.

[277] C. M. F. MOMMERS, *op. cit.*, p. 165.

[278] United Nations, Global Compact for Safe, Orderly and Regular Migration, Zero Draft, 5 February 2018; European External Action Service (EEAS), *EU Statement – United Nations Global Compact for Migration: General Statement on the Zero Draft*, 20 February 2018, available here: https://www.eeas.europa.eu/node/40981_en.

"[An] aspect that should be better reflected in the text is the responsibility of states towards their own citizens [...] This responsibility also entails the obligation of States – under international law – to take back their nationals without any conditions and actively cooperate to facilitate returns and readmission."

Therefore, the EU does not hesitate to invoke international law in this context, in particular with regard to the legal obligation of States to readmit their nationals. As shown above, the EU's influence on return and readmission policy is clearly reflected in the final text of the GCM, in some cases even shaping the language that was finally adopted[279].

Secondly, on the question of whether there is an international legal obligation to readmit involuntary returnees, the Legal Service of the Council affirmed that "[i]t is doubtful whether, in the absence of a specific agreement [to readmit] between the concerned States, a general principle of international law exists, whereby these States would be obliged to readmit their own nationals when the latter do not wish to return to their State of origin"[280]. The Legal Service thus seems to support the view that if the obligation to readmit is based on the exercise of a human right, there can be no doubt that it must be the will of the individual and that it depends solely on that will. Although only this excerpt is available in the public domain, the subsequent argumentation was never released. However, it is important to remember that this remains a statement by the Legal Service of the Council, which is not only quite old, but is not backed up by any other documents or statements from the EU institutions. Consider, for example, the Commission's proposal for a New Pact on Migration and Asylum, which states that "return is more effective when it is voluntary and accompanied by strong reintegration measures", and that "the promotion of voluntary return is a key strategic objective". Nonetheless, there

[279] T. MOLNÁR, *The Interplay between the EU's Return Acquis and International Law*, *op. cit.*, p. 197; See also, E. GUILD, K.T. WEATHERHEAD, "Tensions as the EU negotiates the Global Compact for Safe, Orderly and Regular Migration", in *EU Migration Law Blog*, 6 July 2018; *Supra*, CHAPTER I, SECTION 3.

[280] Council's Legal Service Opinion, Council Doc. 6658/99, cit., para. 6; Cfr. N. COLEMAN, *op. cit.*, p. 31.

is no explicit reference to an international legal obligation to readmit only those citizens who wish to return to their country voluntarily[281].

Moreover, the Directive 2008/115/EC (hereinafter, the Return Directive) offers a different perspective on the concept of voluntary return itself[282]. Indeed, the Return Directive uses the term "voluntary return" in a way that is clearly distinct from its common use *outside the scope* of the Directive, *i.e*. when individuals freely choose to return and make informed decisions based on unbiased and reliable information. The Directive uses the term "voluntary departure", which is defined in Art. 3(8) as departure in "compliance with the obligation to return within the time-limit fixed for that purpose in the return decision." While the term "voluntary" thus typically suggests an action taken out of free will or choice, an examination of its use in the Directive emphasises the fulfilment of a *mandatory* duty rather than a *voluntary* decision[283]. Despite attempts to define it more precisely, the term remains controversial because of its association with both choice and coercion[284]. Indeed, within the Return Directive the concept of voluntary return does not necessarily reflect the true will of migrants, as they are *legally* obliged to return once it is enforced by Member States. Various alternative terms – such as "mandatory" or "accepted" return – have been also proposed to better reflect the reality of what the Return Directive claims[285]. However, the term still has political advantages as it

[281] COM (2020) 609 final, cit., para. 2.5.

[282] Directive 2008/115/EC of the European Parliament and the Council, of 16 December 2008, on common standards and procedures in Member States for returning illegally staying third-country nationals. The Directive is a key piece of legislation in the EU governing the procedures and standards for the return of TCNs staying irregularly on the territory of Member States. The Directive sets out common rules and principles to ensure a more consistent and effective approach to immigration enforcement across the EU. It lays down, *inter alia*, procedures for issuing return decisions, specifies the rights of migrants subject to return and outlines the conditions under which coercive measures, such as detention, may be used.

[283] C. M. F. MOMMERS, *op. cit.*, p. 85.

[284] As a sample, in 2002 the Commission tried to provide a definition of voluntary return read in these terms: "return to the country of origin or transit based on the decision of the returnee and without use of coercive measures". COM (2002) 175 final, cit., Annex I. Less than six months later, a proposed definition surfaced, seemingly adopting a markedly distinct, if not entirely contradictory stance. This definition speaks of "assisted or independent departure to the country of origin, transit, or another third country based on the will of the returnee". COM (2002) 564 final, cit., p. 26. It shifts the focus to the process of departure, emphasising whether it is assisted or unassisted and whether it is voluntary. This departure-centred definition moves away from the previous emphasis on compliance with obligations and instead emphasises the individual's agency and intentionality in the act of leaving for home, transit or another third country. *Ibid.*

[285] I. MAJCHER, *The European Union Returns Directive and its Compatibility with International Human Rights Law: Analysis of Return Decision, Entry Ban, Detention, and Removal*, Brill | Nijhoff, Leiden, The Netherlands, 2019, p. 547.

combines coercion with the appearance of voluntariness[286]. In addition, the proposals reaffirm the EU's long-standing position that voluntary departure should be preferred to forced return, although it does not impose a specific obligation on Member States to do so[287]. Currently, the directive requires a minimum period of seven days for voluntary departure, but the Commission's recast proposal proposes to remove this requirement, arguing that few Member States adhere to the minimum period[288]. Critics, however, argue that less than seven days is usually insufficient to ensure a proper return process and that this change could lead to arbitrary decisions by States[289]. The ECJ has clarified that the seven-day period is mandatory, with exceptions allowed only in limited circumstances, such as a risk of absconding or a threat to public security. These exceptions must be applied restrictively and in accordance with the principle of proportionality[290]. The recast proposal also introduces an automatic refusal of the voluntary departure period in certain cases, which may undermine the framework for voluntary return. While the Commission and Member States have not formally abandoned voluntary departure as the preferred option, it remains just that – an option, not an obligation. However, the proposed changes are perceived as undermining this preference[291].

[286] C. M. F. MOMMERS, *op. cit.*, pp. 85 ff.

[287] COM (2020) 609 final, cit., para. 6.5. See also, European Commission, Pact on Migration and Asylum: A common EU system to manage migration, 11 April 2024, available here: https://home-affairs.ec.europa.eu/policies/migration-and-asylum/pact-migration-and-asylum_en.

[288] Directive 2008/115/CE, cit., Art. 7. See also, M. DIAZ CREGO, *Recasting the Return Directive*, EPRS | European Parliamentary Research Service, March 2021.

[289] I. MAJCHER, T. STRIK, "Legislating without Evidence: The Recast of the EU Return Directive", in *European Journal of Migration and Law*, Vol. 23, 2021, p. 114.

[290] European Court of Justice (ECJ), Case C–554/13, *Z. Zh. v Staatssecretaris voor Veiligheid en Justitie and Staatssecretaris voor Veiligheid en Justitie v I. O*., Judgement 11 June 2015, paras. 47–49 and 69. For more on the principle of proportionality as a limit on the discretion of Member States in the protection of fundamental rights within the Union, see, R. PALLADINO, *Il principio di proporzionalità nel diritto dell'Unione europea. Natura, funzioni e controllo*, Cacucci Editore, Bari, 2024, pp. 81 ff.

[291] I. MAJCHER, T. STRIK, *op. cit.*, p. 115. Furthermore, the proposal to recast the Return Directive in the New Pact introduces a specific cooperation obligation aimed at establishing clear responsibilities for TCNs in an irregular situation. Indeed, Art. 7 sets out a number of obligations for TCNs, in particular: the obligation to provide all necessary elements for establishing or verifying their identity; the obligation to provide information on the third countries they have crossed; the obligation to remain present and available throughout the procedures; and the obligation to submit a request to the competent authorities of the third countries in order to obtain a valid travel document. Cfr. R. PALLADINO, "Efficacia dei rimpatri e tutela dei diritti fondamentali e della dignità dei migranti: quale equilibrio nelle prospettive di riforma della direttiva rimpatri?", in A. BUFALINI et AL. (eds.), *Annuario ADiM, Editoriale Scientifica*, Naples, 2021, p. 447. See also, R. PALLADINO, "Patto sulla migrazione e l'asilo: verso nuove regole sui rimpatri", in *Annali AISDUE*, 2020, pp. 63–77.

The "schizophrenia" of the EU system is thus evident in this case: although the Legal Service of the Council has officially recognised that – albeit only once – the readmission obligation under international law covers only voluntary returns, at the same time the EU legislators have opted for a vision of voluntary return that diminishes the role of the individual's "true will" *vis-à-vis* the State's readmission obligation. This debate shows that the assumption that the State's readmission obligation only covers voluntary return is not uncontroversial, nor is the concept of voluntary return itself – at least as far as the EU legal framework is concerned. These uncertainties certainly pose a significant challenge to the legal definition of the nuanced readmission obligations, and the EU legal framework adds to this complexity[292].

2. The evolution of readmission clauses. From the origins to the "post–Cotonou era"

As mentioned above, readmission clauses were one of the first "tools" of the EU's readmission policy. Indeed, the EU has included readmission clauses in agreements with third countries, mainly association and cooperation agreements, which have different and broader content. While readmission clauses do not in themselves constitute EURAs, they may serve as a first step for negotiating such agreements in the future[293]. In terms of their legal nature, readmission clauses generally consist of two parts: the first is an obligation to readmit nationals and TCNs; the second is a *de contrahendo* obligation, requiring the conclusion of a readmission agreement between the EU (or individual Member States) and the third country concerned[294].

The origins of these clauses can be traced back to the 1990s. Indeed, in 1995 the Council adopted the first standard draft for a readmission clause, designed for inclusion in the former EC agreements with third countries on a case-by-case

[292] Refer to the analysis presented *supra*, CHAPTER I, SECTION 2.

[293] European Commission, Readmission Agreements, MEMO/02/271, Brussels, 27 November 2002, p. 2.

[294] *Ibid*. D. VITIELLO, "L'azione esterna dell'Unione europea in materia di immigrazione e asilo: linee di tendenza e proposte per il futuro", in *Diritto, Immigrazione e Cittadinanza,* Fasc. 3–4/2016, p. 14.

basis[295]. One year later, the Council additionally approved another standard readmission clause, specifically intended for inclusion in mixed agreements[296]. Again, in 1999 the Council introduced a new standard model for readmission clauses to be included in all future EU and mixed agreements[297]. However, while the 1995–1996 standard clause was not very precise in terms of content, the one introduced in 1999 was more detailed. On the one hand, this clause required the third country concerned to conclude an EURA[298]. On the other hand – pending the conclusion of such an agreement – the third country involved also undertook to conclude future readmission agreements with individual Member States on a bilateral basis[299].

Nevertheless, since 2002, this "standard" and "traditional" readmission model has been replaced by the introduction of so-called "post-Seville" clauses. In fact, in Seville the Council advocated for the inclusion of clauses in all future cooperation and association agreements aimed at addressing the migration phenomenon *as a whole.* The European Council urged that "any future cooperation, association or equivalent agreement which the European Union or the European Community concludes with any country should include a clause on joint management of migration flows"[300]. The commitment was therefore to develop a more constructive dialogue on migration in all its facets.

These clauses encompass different elements, including but not limited to commitments to promote the economic and social development of the regions from which migration originates; cooperation to combat irregular immigration and trafficking in human beings; promotion of equal treatment of legal residents in the territories of the parties involved[301]. In this way, the EU would have achieved a

[295] Council Document no. 12509/95, Brussels, 8 December 1995.

[296] Council Document no. 4272/96, Brussels, 22 January 1996. Cfr. N. COLEMAN, *op. cit*., p. 212.

[297] Council Document No. 13409/99, Brussels, 25 November 1999.

[298] *Ivi*, Art. B.

[299] *Ivi*, Art. C; cited in C. MILANO, *op. cit*., p. 833–834. On this specific point, see also *infra*, SECTION 3 of this CHAPTER.

[300] "[A]nd on compulsory readmission in the event of illegal immigration". Seville European Council, 21 and 22 June 2002, Presidency Conclusions, SN 200/02, para. 33. Therefore, even in the case of these "second generation" clauses, it is possible to affirm that the main objective remained the return of migrants residing irregularly on EU territory.

[301] P. GARCÍA ANDRADE, I. MARTÍN, *EU cooperation with third countries in the field of migration*, Study of the European Parliament, 2015, p. 35.

"double positive" result: while strengthening economic, diplomatic, and political cooperation with strategic third countries, the Union would be able to secure commitments from the latter to curb irregular migration flows.

After Seville, the EU introduced one of the most important examples of a readmission clause in the so-called "Cotonou Agreement"[302]. The Agreement, signed in Cotonou, Benin, in 2000, was a comprehensive partnership agreement concluded by the African, Caribbean, and Pacific (ACP) Group of States and the EU. This legal instrument covered a wide range of issues, *e.g.*, trade, human rights, international investment, and poverty reduction. More in detail, Art. 13 holds particular significance for the purpose of this analysis, as it emphasised the need for a prevention system to fight irregular migration. In this respect, Art. 13(5)(c)(i) establishes the obligation to readmit any nationals of a Contracting State who are illegally present in the territory of another Contracting State. Furthermore, Art. 13(5)(c)(ii) called for future negotiations to be initiated, at the request of one of the Parties, as to conclude bilateral readmission agreements in good faith and in accordance with the relevant rules of international law[303]. The Cotonou Agreement thus provided an important impetus for the development of the EU's return and readmission policy[304].

However, it is worth noting in recent years the EU has gradually lost interest in including "standard" readmission clauses in cooperation or partnership agreements *lato sensu*: in short, readmission clauses no longer seem to be one of the most attractive options. All in all, in the EU's experience readmission clauses have indeed proved to be somewhat limited in their effectiveness in subsequent EURAs negotiations. As a sample, while EURAs are mentioned extensively in the GAMM, there is no *explicit* call for the inclusion of such clauses as an appropriate tool to encourage third countries to cooperate on readmission[305]. The examples of

[302] 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 (the "Cotonou Agreement"), Art. 13(5)(c)(i)–(ii).

[303] F. NEGOZIO, *Gli accordi internazionali di riammissione dei migranti irregolari: Profili giuridici delle politiche dell'Unione europea e dell'Italia in materia di rimpatri*, 2018, Edizioni Accademiche Italiane, London, pp. 7 ff.

[304] *Ibid.*

[305] However, as the GAMM seeks to "address migration and mobility issues in a comprehensive and balanced manner", it does not exclude any instrument to achieve its objectives.

readmission clauses that can be found date from a few years before the GAMM and relate mainly to the Stabilisation and Association Agreements with the Western Balkans, which were concluded with a view to eventual EU membership[306]. Moreover, readmission clauses alone may not be sufficient to secure a full and satisfactory EURA, leading to further demands by third countries for compensation in subsequent negotiations[307]. An emblematic case is Algeria, with which the EU had concluded a Euro-Mediterranean association agreement containing a readmission clause (Art. 84): indeed, despite the official mandate from the Council, negotiations on the conclusion of a EURA with this country have never started[308]. It seems that these readmission clauses have only achieved the "desired" result with regard to Macedonia, with the signing of an EURA in 2007, following the

[306] European Commission, *Stabilisation and Association Process*, available here: https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/glossary/stabilisation-and-association-process_en. See, *inter alia*, Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the former Yugoslav Republic of Macedonia, of the other part, 9 April 2001, OJEU, L 84, 20 March 2004, Art. 76; Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Montenegro, of the other part, 15 October 2007, OJEU, L 108, 29 April 2010, Art. 83; Stabilisation and Association Agreement between the European Communities and their Member States of the one part, and the Republic of Serbia, of the other part, 29 April 2008, OJEU L 278, 18 October 2013, Art. 83; Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part, 16 June 2008, OJEU, L 164, 30 June 2015, Art. 81; Stabilisation and Association Agreement between the European Communities and their Member States of the one part, and the Republic of Albania, of the other part, 12 June 2006, OJEU, L 107, 28 April 2009, Art. 81. Beyond the Balkans, see for example Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Arab Republic of Egypt, of the other part, 25 June 2001, OJEU, L 304, 30 September 2004, Art. 68; Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the People's Democratic Republic of Algeria, of the other part, 22 April 2002, OJEU, L 265/2, 10 October 2005, Art. 84; Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the Republic of Lebanon, of the other part, 17 June 2002, 17 June 2002, OJEU, L 143, 30 May 2006, Art. 68. Cfr. C. MOLINARI, *Going All Out to Manage Migration: A Constitutional Analysis of the EU Readmission Policy, op. cit.*, p. 47.

[307] N. COLEMAN, *op. cit*., p. 219.

[308] Council of the European Union, Forwarding of a Letter from Mr Nigel Sheinwald, Ambassador of the United Kingdom to the European Union, to Mr Per Stig Moller, President of the Council, on the Adoption of Decisions authorising the Commission to negotiate readmission agreements between the European Community and – the Republic of Albania – the People's Democratic Republic of Algeria – the People's Republic of China – the Republic of Turkey, ST 14835/02 RESTREINT UE, 26 November 2002 Council of the European Union, Council Decisions authorising the Commission to negotiate readmission agreements between the European Community and – the Republic of Albania – the People's Democratic Republic of Algeria – the People's Republic of China – the Republic of Turkey, ST 14835/02 RESTREINT UE, 26 November 2002; P. GARCÍA ANDRADE, I. MARTÍN, cit., p. 35. However, the Author of this thesis was unable to obtain the official document of this mandate and therefore has only indirect knowledge of it, through consultation of both official institutional documents and scholarly sources.

Stabilisation and Association Agreement concluded in 2001, which contains a readmission clause in Art. 76[309].

The weak "persuasive power" of readmission clauses may also be due to the fact that they do not have the same legal value as EURAs, as they are only "enabling clauses"[310]. In fact, readmission clauses only contain a general obligation for the parties to accept the return of irregular migrants. Even more interesting is the fact that in almost all these clauses the readmission obligation only applies to the citizens of the parties involved[311]. Instead, for the readmission of TCN and stateless persons, the clauses defer to the conclusion of *ad hoc* readmission agreements, both with the EU as a whole and bilaterally with individual Member States[312]. So far, only a few Member States seem to have implemented this clause, mainly in bilateral agreements with Balkan countries. For example, among the countries mentioned in the previous footnotes for which data are available up to 2020, Kosovo has concluded readmission agreements with 15 Member States, Bosnia and Herzegovina with 9 and Albania with 5. Outside the Balkans, Lebanon has concluded readmission agreements only with Cyprus and Bulgaria, while Algeria

[309] Agreement between the European Community and the former Yugoslav Republic of Macedonia on the readmission of persons residing without authorisation, 18 September 2007, OJEU, L 334/7, 19 December 2007. However, it is also interesting to note that in the case of Albania, Bosnia, Serbia and Montenegro, the EURAs were concluded with these countries before such readmission clauses were included in the respective Stabilisation and Association Agreements, which were consequently concluded after the readmission agreements. Consequently, these agreements were based on the procedures and rules contained in the readmission agreements themselves. See, Agreement between the European Community and the Republic of Albania on the readmission of persons residing without authorisation, 14 April 2005, 14 April 2005, OJEU, L 124/22, 17 May 2005; Agreement between the European Community and the Republic of Serbia on the readmission of persons residing without authorisation, 18 September 2007, OJEU, L 334/46, 19 December 2007; Agreement between the European Community and Bosnia and Herzegovina on the readmission of persons residing without authorisation, 18 September 2007, OJEU, l 334/6, 19 December 2007; Agreement between the European Community and the Republic of Montenegro on the readmission of persons residing without authorisation, 18 September 2007, OJEU, L 334/26, 19 December 2007.

[310] COM (2002) 175 final, cit., pp. 25–26.

[311] The Declaration of the EU on Art. 76 (*i.e.*, the readmission clause) of the Stabilisation and Association Agreement with Macedonia even states that "repatriation into the country of origin is the overriding principle".

[312] In addition, the Stabilisation and Association Agreement between the EU and Albania explicitly refers to the readmission agreement previously concluded with this country. See, art. 81(3): "[s]pecific procedures for the purpose of readmission of nationals and third country nationals and stateless persons are laid down in the Agreement between the European Community and Albania on the readmission of persons residing without authorisation, signed on 14 April 2005".

has concluded readmission agreements only with Germany and Spain[313]. This has led to limited success at EU level of these readmission clauses and a fragmented approach to the issue.

Nonetheless, a potential "exception" to this framework is the very recent "Samoa Agreement", the successor to the Cotonou Agreement, which expired in 2020[314]. In this regard, the term "post-Cotonou" refers to the ongoing negotiations and discussions between the EU and the Organisation of African, Caribbean and Pacific States (OACPS) on the successor agreement to the Cotonou Agreement. On 15 November 2023, after signature, the post-Cotonou agreement became the "Samoa Agreement". Title VI of this new agreements provides for "a comprehensive, coherent, pragmatic and balanced approach, in full respect of international law, including international human rights law and, when applicable, international refugee law and international humanitarian law"[315]. However, it does not explicitly refer to the UN GCM, which, as also shown in the previous CHAPTER, is an important, albeit non-binding, instrument in the governance of global migration[316]. Although we are aware that this agreement does not focus exclusively on migration issues, we believe that a reference to this instrument could have added value to the matter under discussion.

For the purposes of this work, it is noteworthy that, unlike the Cotonou Agreement, the new Samoa Agreement contains not only a single clause (namely, Art. 78) but an entire Annex (Annex I) specifically devoted to the issue of readmission and return. The framework for readmission cooperation with OACPS has thus evolved from a "simple" readmission clause in the old Cotonou Agreement to a legal context where readmission now plays a significant role. According to

[313] See data reported by European Migration Network (EMN), *Bilateral Readmission Agreements*, cit., pp. 9 ff.

[314] Partnership Agreement between the European Union and its Member States, of the one part, and the Members of the Organisation of the African, Caribbean and Pacific States, of the other part (the "Samoa Agreement"), OJEU, L 2023/2862, 28 December 2023. See also, *Samoa Agreement*, available here: https://www.consilium.europa.eu/en/policies/samoa-agreement/; Council of the European Union, *Samoa Agreement: EU and its Member States sign new Partnership Agreement with the Members of the Organisation of the African, Caribbean and Pacific States*, Press Release, available here: https://www.consilium.europa.eu/en/press/press-releases/2023/11/15/samoa-agreement-eu-and-its-member-states-sign-new-partnership-agreement-with-the-members-of-the-organisation-of-the-african-caribbean-and-pacific-states/.

[315] Samoa Agreement, cit., Art. 63. See also Art. 64.

[316] E. PICHON, *The Samoa Agreement with African, Caribbean and Pacific States*, EPRS | European Parliamentary Research Service, Briefing, 2024, p. 10.

Annex I, "the Parties shall, at the request of one of them, conclude both bilateral *agreements* or *arrangements* governing specific obligations for the return and readmission of nationals of the Member State of the [EU] and of the [Organisation of African, Caribbean and Pacific States (OACPS)]"[317]. It was also underlined that OACPS members initially sought to make returns voluntary. However, the EU pushed for a more binding legal obligation to ensure the readmission of irregular migrants regardless of the willingness of the individual and was ultimately successful. The final agreement confirms that both EU and OACPS countries have the right to return irregular migrants to their countries of origin and that these countries are obliged to accept the return of their nationals[318]. This decision underlines the EU's preference for the "State rights-based perspective" in defining the legal foundation of readmission obligation under international law, as discussed in the previous CHAPTER, requiring States to carry out readmission regardless of the consent of the individual. Furthermore, the agreement does not address the readmission of irregular migrants to a country other than their country of origin, even if they have transited through that country: this is an issue that should be addressed in specific and separate readmission agreements. It is noteworthy that this reinforces the customary nature of the obligation to readmit only one's own nationals, as the return of TCNs is deferred to the conclusion of separate treaties. In addition, Annex 1 of the agreement details the procedures for determining the nationality of irregular migrants and includes provisions to limit the return of unaccompanied minors, emphasising the best interests of the child. The negotiated text also establishes a notification procedure prior to the implementation of "proportionate measures" in response to non-compliance with return and readmission provisions[319]. However, the agreement does not clearly define what these measures would be in concrete terms.

A (brief) comparison between the Cotonou Agreement and the new EU–OACPS Agreement reveals significant developments in the approach to readmission negotiations. In fact, Annex I (5), not only reinforces the reciprocal obligations regarding the readmission of nationals in an irregular situation, but also introduces

[317] Emphasis added.
[318] E. PICHON, cit., p. 10.
[319] Samoa Agreement, cit., Art. 78(4); Samoa Agreement, cit., Annex I (1) and (2).

a provision according to which the Parties have the possibility to choose to regulate readmission through both "informal" readmission arrangements and readmission agreements. This explicit "informalisation recognition" represents in fact a noteworthy shift from Art. 13 of the Cotonou Agreement[320]. While the latter mainly focused on "standard" form of cooperation, the Samoa Agreement emphasises the importance of cooperation on readmission *per se*, whether based on formal or informal arrangements. Furthermore, the same paragraph provides for the inclusion of these agreements independently and without prejudice to the direct applicability of the provisions of the Agreement on readmission and of Annex I.

It can therefore be said that the EU's approach to migration management in the Samoa Agreement has prioritised the swift readmission of irregular migrants. However, this strategy has met with resistance first of all from African States which signed the Agreement, that see the EU model as out of touch with the complexities of migration in their regions. African governments have raised concerns about the social and human rights consequences of the proposed readmission mechanisms, in particular the potential violation of the rights of their citizens, as demonstrated by the issue of voluntary return mentioned above. These issues have become a key point of contention in the negotiations highlighting a disconnect between the EU's securitised migration policies and the development goals of African States[321].

Overall, this SECTION has shown that the comprehensive procedures and practical aspects related to readmission, including the readmission of TCNs, are in most cases defined and agreed separately in specific agreements concluded

[320] Cfr. J. P. CASSARINO, "Symposium on Reconceptualizing IEL for Migration: Framing Migration in the Post-Cotonou Agreement: Priorities and Challenges", in *afronomicslaw.org*, 21 February 2022. Cassarino also affirms that "it is questionable whether this major leverage will lead to more effective cooperation on readmission. On the one hand, all decision-makers (whether African or European) are well aware that the conclusion of a bilateral agreement on readmission, whether formal or informal, does not necessarily lead to its full implementation. For its implementation is the result of complex variables that are not systematically determined by the need or duty to "combat irregular migration", but by a broader field of cooperation and interdependences driven by other strategic priorities, be they explicitly or implicitly mentioned". See *infra,* CHAPTER III.

[321] A. P. VISCIOTTI, *Balancing Act: The Strategic Imperatives of the EU in the Samoa Agreement Era,* King's Think Thank, 18 December 2023, available here: https://kings-think-tank.com/2023/12/28/balancing-act-the-strategic-imperatives-of-the-eu-in-the-samoa-agreement-era/. In this sense, see also, M. CARBONE, "Beyond the Heaven–Hell Binary and the One-Way Traffic Paradigm: The European Union, Africa and Contested Human Rights in the Negotiations of the Samoa Agreement", in *Journal of Common Market Studies,* Vol. 62, Issue 5, 2024, pp. 1314–1331.

between the EU and third countries. Among these clauses, the Samoa Agreement marks a notable development in EU practice, as it contains updated readmission clauses that seem to allow for their direct application without the need for a separate readmission agreement. Nevertheless, it remains essential necessary to continue with the analysis of EURAs, as they have been mentioned several times so far and are central to this analysis.

3. EU readmission agreements (EURAs)

EURAs are international agreements concluded by the EU with third countries, which set out clear obligations and procedures on when and how to readmit persons residing irregularly on the territory of the Parties[322]. Therefore, these agreements seek to fight unauthorised immigration by facilitating the return of irregular migrants and residents to their country of origin or transit. Indeed, as mentioned, above EURAs are considered as crucial tools for an effective common EU readmission and return policy. To date, the EU has concluded eighteen EURAs, with: Hong Kong, Macao, Albania, Sri Lanka, Russia, Ukraine, Macedonia, Serbia, Montenegro, Moldova, Bosnia and Herzegovina, Pakistan, Georgia, Cape Verde, Armenia, Türkiye, Azerbaijan and Belarus[323]. In addition, for other countries –

[322] European Commission, "A humane and effective return and readmission policy", available here: https://home-affairs.ec.europa.eu/policies/migration-and-asylum/irregular-migration-and-return/humane-and-effective-return-and-readmission-policy_en.

[323] Agreement between the European Community and the Government of the Hong Kong Special Administrative Region of the People's Republic of China on the readmission of persons residing without authorisation, 27 November 2002, OJEU, L 17/25, 24 January 2004; Agreement between the European Community and the Macao Special Administrative Region of the People's Republic of China on the readmission of persons residing without authorisation, 13 October 2002, OJEU, L 143, 30 April 2004; Agreement between the European Community and the Republic of Albania on the readmission of persons residing without authorisation, 14 April 2005, OJEU, L 124/22, 17 May 2005; Agreement between the European Community and the Democratic Socialist Republic of Sri Lanka on the readmission of persons residing without authorisation, 4 June 2004, OJEU, L 124/43, 17 May 2005; Agreement between the European Community and the Russian Federation on readmission, 25 May 2006, OJEU, L 129/40, 17 May 2007; Agreement between the European Community and Ukraine on the readmission of persons, 18 June 2007, OJEU, L 332/48, 18 December 2007; Agreement between the European Community and the former Yugoslav Republic of Macedonia on the readmission of persons residing without authorisation, 18 September 2007, OJEU, L 334/7, 19 December 2007; Agreement between the European Community and the Republic of Serbia on the readmission of persons residing without authorisation, 18 September 2007, OJEU, L 334/46, 19 December 2007; Agreement between the European Community and the Republic of Montenegro on the readmission of persons residing without authorisation, 18 September 2007, OJEU, L 334/26, 19 December 2007; Agreement between the European Community and the Republic of Moldova on the readmission of persons residing without authorisation, 18 September

Algeria, China, Tunisia, Jordan, Nigeria – the Council has given the Commission a mandate to open negotiations[324].

The negotiation of EURAs follows the procedure laid down in Art. 218 TFEU, wherein the Council authorises the Commission to negotiate such agreements. In this respect, the Commission has a leading role – also in view of the fact that Art. 17 TEU entrusts the Commission with the external representation of the Union – in partnership with the European External Action Service (EEAS)[325]. The Council initiates the process by authorising the opening of negotiations on the basis of recommendations from the Commission. It also adopts negotiating directives, authorises the signature of agreements and formally concludes them. In addition, the entry into force of the Lisbon Treaty has given a stronger role to the European

2007, 18 September 2007, OJEU, L 334/149, 19 December 2007; Agreement between the European Community and Bosnia and Herzegovina on the readmission of persons residing without authorisation, 18 September 2007, OJEU, l 334/6, 19 December 2007; Agreement between the European Community and the Islamic Republic of Pakistan on the readmission of persons residing without authorisation, 26 October 2009, OJEU, L 287/52, 4 November 2010; Agreement between the European Union and Georgia on the readmission of persons residing without authorisation, 22 November 2010, OJEU, L 52/47, 25 February 2011; Agreement between the European Union and the Republic of Cape Verde on the readmission of persons residing without authorisation, 18 April 2013, OJEU, L 282/15, 24 October 2013; Agreement between the European Union and the Republic of Armenia on the readmission of persons residing without authorisation, 19 April 2013, OJEU, L 289/13, 31 October 2013; Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation, 16 December 2013, OJEU, L 134/3, 7 May 2014; Agreement between the European Union and the Republic of Azerbaijan on the readmission of persons residing without authorisation, 28 February 2014, OJEU, 128/17, 30 April 2014; Agreement between the European Union and the Republic of Belarus on the readmission of persons residing without authorisation, 8 January 2020, OJEU, L 181/3, 9 June 2020. Please, note that on 28 June 2021 Belarus decided to suspend the readmission agreement concluded with the EU. Cfr. Council of the European Union, *Belarus: Council suspends visa facilitation provisions for officials of the Belarus regime,* Press Release, 9 November 2021.

[324] Council of the European Union, Adoption of Decisions authorising the Commission to negotiate readmission agreements between the European Community and – the Republic of Albania – the People's Democratic Republic of Algeria – the People's Republic of China – the Republic of Turkey, ST14835/02 RESTREINT UE, Brussels, 26 November 2002; Council of the European Union, Decision authorising the opening of negotiations with the Republic of Tunisia for the conclusion of an Agreement between the European Union, of the one part, and the Republic of Tunisia, of the other part, on Readmission, Doc. 16063/14, Declassification, Brussels, 28 November 2014; Council of the European Union, Decision authorising the opening of negotiations with the Hashemite Kingdom of Jordan for an agreement between the European Union and the Hashemite Kingdom of Jordan on readmission, Doc. 6963/16, Brussels, 1 April 2016; Council of the European Union, Decision authorising the opening of negotiations with the Federal Republic of Nigeria for an agreement between the European Union and the Federal Republic of Nigeria on readmission, Doc. 11975/16, Brussels, 20 September 2016. Cfr. European Court of Auditors, cit., figure 3, p. 11. The European Court of Auditors has referred – among other EU institutional documents – to a 2000 Council mandate to the European Commission to negotiate a readmission agreement with Morocco. However, the specific document detailing this mandate does not appear to be publicly available or accessible through the Council's register.

[325] European Court of Auditors, cit., para. 11.

Parliament, thereby increasing the democratic legitimacy of the EURAs[326]. Indeed, according to Art. 218(10) TFEU, the Parliament "shall be immediately and fully informed at all stages of the procedure"[327]. Moreover, at the end of the EURAs negotiations, the Council can adopt the decision concluding the agreement only after the approval of the European Parliament (Art. 218(6)(a)(v))[328]. Furthermore, Art. 218(11) TFEU states that the Parliament may "obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties"[329].

Most EURAs have a high degree of similarity in both structure and wording, since the Commission has adopted a "standardised approach", similar to agreements concluded in other areas of EU law, trade or association agreements, where a common template is often used to ensure consistency of structure, language and obligations in different agreements with third countries[330]. This approach involves using a "common drafting framework" as a basis for negotiation. The main provisions of EURAs in order to regulate the technical and operational procedures for readmission concern, *inter alia*, the time limits within which the requested State shall issue the travel documents for the return of readmitted persons; the possible consequences of non-compliance; means of evidence of nationality and/or proof of citizenship for TCNs; protection and personal data; transport and transfer procedures; the statement reaffirming the signatories' commitment to respect international law obligations. However, all EURAs clarifies that "[n]othing [in the agreement] shall prevent the return of a person under other *formal* or *informal* arrangements"[331].

In order to understand the interplay between EURAs and international law in the context of readmission, as described in the previous CHAPTER, the following

[326] P. GARCÍA ANDRADE, I. MARTÍN, cit., p. 84.

[327] See, more in detail, European Parliament and the European Commission, Framework Agreement on relations between the European Parliament and the European Commission, OJEU, L 304, 20 November 2010, paras. 23–29; R. MAŃKO, *The European Parliament's role in concluding international agreements*, EPRS | European Parliamentary Research Service, June 2024, pp. 5 ff.

[328] "Agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required".

[329] Nevertheless, at the time of writing, no request was made to the ECJ on the compatibility of a EURA with EU primary law.

[330] M. SCHIEFFER, "Community Readmission Agreements with Third Countries: Objectives, Substance and Current State of Negotiations", in *European Journal of Migration and Law,* Vol. 5, Issue 3, 2003, p. 353; E. ROMAN, *op. cit.,* p. 50.

[331] See, among others, Art. 18(3) of the EURA concluded with Russia. I. OTTAVIANO, *op. cit.*, p. 110. Emphasis added.

SUB-SECTIONS analyse two key elements of these agreements: *(i)* the readmission obligations contained in the EURAs and *(ii)* the human rights–related clauses and issues, including the impact that EURAs may have on the international human rights standards analysed in the previous CHAPTER.

3.1. Readmission obligations

Regarding the issue of readmission obligations contained in the EURAs, these agreements include a provision obliging the parties to readmit not only their own nationals, but also TCNs[332]. Indeed, all EURAs concluded by the EU to date state an obligation to readmit, under certain conditions, TCNs who have passed through the territory of one of the contracting Parties. The TCN clause is thus a *standard* provision of EURAs, including those concluded with more remote third countries, *e.g.*, Pakistan[333]. In this way, the EU creates "a buffer zone of countries to which irregular migrants could be deported"[334]. Nevertheless, EURAs do not specify the conditions under which TCNs' entry or residence is considered to be irregular. These conditions are determined by Member States and third countries in accordance with their national legislation and, as far as Member States are concerned, also in accordance with EU law. The readmission procedure can only be initiated after the national authorities have adopted "an administrative or judicial decision or act, stating or declaring the stay of a third-country national to be illegal and imposing or stating an obligation to return"[335].

In "older" EURAs, like the ones with Hong Kong, Macao or Sri Lanka, the focus of the TCN clause is primarily on simplifying the process of readmitting TCNs or stateless persons. The third country concerned – or, in the case of Hong Kong and Macao, "Special Administrative Regions" – "shall readmit, upon application by a Member State and without any formalities other than those specified in the Agreement, all persons who do not, or who no longer, fulfil the conditions in force for entry to, presence in, or residence on, the territory of the

[332] E. ROMAN, *op. cit.*, pp. 50–51.
[333] European Court of Auditors, cit., Box 3.
[334] M. PANIZZON, *op. cit*., p. 110.
[335] Directive 2008/115/EC, cit., Art. 3(4). Cfr. M. PREVIATELLO, *op. cit.*, p. 82.

requesting Member State"[336]. In the very recent EURA with Belarus, the structure of the clauses remains similar, but there seems to be a greater emphasis on clarifying procedural details, particularly regarding travel documents like the abovementioned EU travel document for return, introduced in 2016: indeed, Art. 4(3) of the EURA with Belarus states that "after Belarus has given a positive reply to the readmission application, the Requesting State shall issue to the person whose readmission has been accepted the European travel document for return". This is a step up from previous EURAs, which only mentioned the need for a travel document without specifying particular models. In addition, the EURA with Belarus places more emphasis on exceptions related to document falsification or non-compliance with visa issuance conditions[337]. The main difference between the "older" and "newer" TCN clauses is not so much a shift in responsibilities, but rather a greater focus on procedural details and the formalisation of certain aspects, such as the issuance of specific return travel documents, partly due to the introduction of new legislation in this area.

For the EU, the inclusion of the TCN clause is undoubtedly important for controlling irregular migration. However, securing the cooperation of partner countries has proven to be a challenge, as the clause offers them little benefit and may even conflict with their national interests. Tunisia and Morocco, for example, both oppose the readmission of TCNs, seeing it as an unwelcome burden that undermines their sovereignty[338]. Morocco, which reformed its migration policy in 2013 and granted legal status to more than 40,000 migrants, is more focused on managing its current migrant population than on accepting TCNs rejected by Europe[339]. Similarly, Tunisia, with tight border controls and low levels of migrant transit, sees the clause as irrelevant. Both countries feel they have already made significant contributions to migration management and face similar challenges to

[336] See, for example, Art. 2(1) of the EURA concluded with Macao.

[337] Art. 4(2)(b) of the EURA concluded with Belarus.

[338] T. ABDERRAHIM, *A Tale of Two Agreements: EU Migration Cooperation with Morocco and Tunisia*, European Institute of the Mediterranean, EuroMeSCo Series, 41 Papers, May 2019, pp. 19 ff.

[339] See more in detail, K. KAISER, *EU-Morocco Negotiations on a Readmission Agreement: Obstacles to a Successful Conclusion*, College of Europe, EU Diplomacy Paper, No. 7, 2019, pp. 9 ff. On readmission negotiation regarding Morocco and Tunisia, see also *infra*, CHAPTER IV, SECTION 6.

the EU, making such agreements unpopular domestically. Civil society in both countries has consistently urged their governments to limit cooperation to the return of their own nationals and to reject the readmission of TCNs[340]. This is one of the factors that has effectively brought the negotiations on the EURAs with these third countries to a complete standstill.

The systematic inclusion of the TCN clause in all EURAs may in fact indicate an extension of the customary obligation, which traditionally only covers the readmission of a State's own nationals, to include TCNs and/or stateless persons. However, in our opinion, while it is true that the TCN clause is present in all EURAs there are no formal declarations by Member States or third countries confirming the existence of a customary rule requiring the readmission of TCNs. As discussed in the previous CHAPTER on the international context beyond the EU, this lack of confirmation remains a significant problem. As a result, TCNs who have passed through a country cannot be returned to that country unless it consents to their return by entering into a readmission agreement. This conviction is also reflected in the fact that, according to the Commission, the TCN clause is rarely included in Member States' bilateral agreements and, as mentioned above, has sometimes even led to the failure of negotiations for EURAs[341]. In the view of the Commission, the only successful implementation of the TCN clause was in the EURA with Ukraine[342]. In contrast to the frequent use of the TCN clause for returns to Ukraine, the Commission clarified that only 63 TCN requests were made by all Member States under all other EURAs. In addition, partner countries used the clause to return 32 TCNs to the EU. For EURAs with countries not bordering the EU, such as Sri Lanka, Montenegro, Hong Kong and Macao, the TCN clause was used only 28 times. Some Member States also indicated that their policy was to return individuals only to their country of origin[343]. However, it is also important to note that these conclusions and data are based primarily on the only available Commission report on the implementation of EURAs, which dates to 2011 – almost

[340] T. ABDERRAHIM, *A Tale of Two Agreements: EU Migration Cooperation with Morocco and Tunisia*, cit., p. 20.

[341] M. PANIZZON, *op. cit.*, p. 117.

[342] European Commission, Evaluation of EU Readmission Agreements, COM (2011) 76 final, 23 February 2011, p. 9.

[343] *Ibid.*

13 years ago. Unfortunately, there does not seem to be enough data specifically on the issue of implementation of EURAs to determine whether the situation has changed since then.

Anyway, according to the European Court of Auditors, the effective application of this type of clause often seems to be hampered by several factors, such as geographical proximity, common borders, legal issues and respect for human rights[344]. For these reasons, the Commission urges the EU "to focus its readmission policy much more towards important countries of origin, instead of transit, of irregular migration", which, at least until 2011, appear to have achieved better results in terms of returns[345]. According to the Commission, the assessment of whether to include the TCN clause should depend on the specific circumstances of the third country concerned, *e.g.*, the potential risk of irregular migration[346]. However, as also mentioned before, the approach advocated by the Commission has not really been implemented in the EURAs concluded after 2011 with Armenia, Türkiye, Azerbaijan, Cape Verde and Belarus[347]: indeed, these readmission agreements contain provisions on the readmission of TCNs and have been concluded with third countries that cannot reasonably be considered as "important countries of origin" of migratory flows towards the Union. Moreover, some EURAs, namely those concluded with Albania, Russia, Ukraine, Türkiye and Belarus include provisions allowing for a possible transition period of two or three years, as to allow the third countries concerned to improve their structural and institutional capacity to deal effectively with the readmission of TCNs[348]. With

[344] European Court of Auditors, cit., Box 3.

[345] COM (2011) 76 final, cit., p. 8: "[e]ven with incomplete data, some conclusions are possible on the scale of readmissions under the EURAs. It is clear that for own nationals, EURAs are an important tool when tackling irregular migration. Based on the data provided by the MS, there were substantial numbers of readmission applications to practically all relevant third countries. The recognition rate of those applications ranged from 50 % to 80-90 % and over (Ukraine, the Republic of Moldova, the former Yugoslav Republic of Macedonia), playing a major role in preventing irregular migration from those countries. This analysis is confirmed by EUROSTAT data showing that in 2009, 20.1 % of third country nationals apprehended in the EU were from countries with which the EU had a readmission agreement."

[346] *Ibid.*

[347] Art. 4. of the EURA concluded with Armenia; Art. 6 of the EURA concluded with Türkiye; Art. 4. of the EURA concluded with Azerbaijan; Art. 5 of the EURA concluded with Cape Verde; Art. 4 of the EURA concluded with Belarus.

[348] See Art. 22(3) of the EURA concluded with Albania; Art. 23(3) of the EURA concluded with Russia; Art. 20(3) of the EURA concluded with Ukraine; Art. 24(3) of the EURA concluded with Türkiye; Art. 23(3) of the EURA concluded with Belarus.

regard to Russia, Ukraine and Türkiye, an exception is made for TCNs which have already concluded bilateral treaties or readmission agreements with these countries of nationality. However, despite the negotiation of such periods, scholars have argued that subsequent improvements in the capacity-building programmes of the countries involved have been minimal[349].

3.2. Human rights–related clauses and issues

EURAs contain so-called "human-rights clauses", which generally refer to the Parties' commitment to respect international human rights standards and obligations under international human rights law. The wording of such clauses is more or less as follows:

"While strengthening cooperation on preventing and combating illegal migration, the Requested State and Requesting State shall, in the application of this Agreement to persons falling within its scope, ensure respect for human rights and for the obligations and responsibilities following from relevant international instruments applicable to the Parties, in particular from:

– the 1948 Universal Declaration of Human Rights;

– the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms;

– the 1965 International Convention on the Elimination of All Forms of Racial Discrimination;

– the 1966 International Covenant on Civil and Political Rights;

– the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

– the 1951 Geneva Convention relating to the Status of Refugees and its Protocol of 1967.

[349] J. P. CASSARINO, *Readmission Policy in the European Union*, cit., p. 14.

The Requested State shall in particular ensure, in compliance with its obligations under those international instruments, the protection of the rights of persons readmitted to its territory"[350].

"Human-rights clauses" are thus consistent with the idea that readmission agreements – which are part of the process of returning irregular migrants – should respect human rights standards at every stage of their practical implementation. In other words, the clauses are likely designed to ensure that the rights and well-being of migrants are protected throughout the entire return process, regardless of the circumstances that led to irregular migration[351].

However, the wording of the "human-rights clauses" present in each EURA may vary. On one hand, EURAs concluded, among others, with Balkan States contain extensive and explicit references to international human rights instruments and refugee protection standards[352]. This unambiguous reference indicates a commitment to uphold certain human rights and refugee protection standards when returning individuals to these countries. Moreover, the EURAs concluded with Azerbaijan and Armenia also contain a provision entitled "Fundamental Principles", which obliges the Parties to "ensure respect for human rights and for the obligations and responsibilities arising from the relevant international instruments applicable to [them]". The specific reference is to the 1948 Universal Declaration of Human Rights; the 1950 European Convention on Human Rights and Fundamental Freedoms and its protocols; the 1966 International Covenant on Civil and Political Rights; the 1984 UN Convention against Torture; the 1951 Geneva Convention relating to the Status of Refugees and its 1967 Protocol[353].

On the other hand, EURAs concluded with Hong Kong, Macao and Sri Lanka do not *explicitly* require compliance with human rights and refugee protection standards. Instead, the Preambles of these agreements merely state in general terms

[350] See, for instance, Art. 2 of the EURA concluded with Belarus. The text of EURAs refers to this type of clause as a "non-affection clause".

[351] M. GIUFFRÉ, "The European Union readmission policy after Lisbon", in *Interdisciplinary Political Studies*, Vol. 1, February 2011, pp. 14 ff.

[352] See, for example, Art. 17 of the EURAs concluded with Bosnia and Herzegovina and Montenegro.

[353] Cfr. E. CARLI**,** *op. cit.*, p. 21.

that they should not affect the rights, obligations and responsibilities of the EU, its Member States or the third countries involved under international law. This general language contrasts with other EURAs mentioned above that explicitly address such fundamental protections, leaving the interpretation of these principles more open in the context of these specific agreements. One might think that this is a peculiarity of the Union's previous and very early readmission agreements, but the same problem arose in the case of Pakistan, signed in 2010[354]. It can therefore be concluded that the process of negotiating EURAs with the above-mentioned "positive group" of third countries (*i.e.*, mainly Balkan countries) would not have been significantly hampered by the inclusion of explicit references. This suggests that these countries were more open, compared to other countries also interested by EURA negotiations, to recognising and incorporating such standards. In such cases, the inclusion of explicit references to international human rights and refugee protection standards may be due to the fact that these countries are parties to the 1951 Geneva Convention, unlike, for example, Sri Lanka or Pakistan[355].

While these "human-rights clauses" are undoubtedly a positive development, their inclusion in the EURAs remains uneven and there is no specific monitoring mechanism, to ensure that these standards are enforced in practice and not just on paper. The only existing mechanism that monitors the implementation of EURAs, without specifically focusing on human rights compliance, is the Joint Readmission Committee (JRC) for each individual EURA. The JRC is composed of experts and representatives from Member States and the third country and is co-chaired by the European Commission and the third country. It meets regularly, usually once or twice a year, to assess the implementation of the EURAs, review recent policy developments and discuss cooperation on other aspects of migration management[356]. However, the lack of dedicated human rights monitoring within

[354] See the Preamble of the EURA concluded with Pakistan.

[355] J. P. CASSARINO, *Readmission Policy in the European Union,* cit., pp. 21–22.

[356] European Court of Auditors, cit., paras. 13 and 78. See also, COM (2021) 56 final, cit., para. 3.2. "Informal" arrangements are instead monitored by Joint Working Groups (JWGs). European Court of Auditors, cit., para. 13. To date, the JWGs assess the "state of the art" of readmission cooperation between the EU and the following countries: Afghanistan, The Gambia, Guinea, Bangladesh, Ethiopia and Ivory Coast. See also, F. CASOLARI, "L'interazione fra accordi internazionali dell'Unione europea ed accordi conclusi dagli stati membri con stati terzi per il contrasto dell'immigrazione irregolare", *op. cit.*, p. 14. *Infra,* CHAPTER III.

this framework raises concerns about the enforcement of these standards beyond their formal inclusion in agreements. According to Carli, it would be beneficial to establish a monitoring mechanism in readmission countries, possibly overseen by an independent body. This mechanism would be tasked with collecting and analysing information on the treatment of persons readmitted under the EURAs, with a particular focus on ensuring that their human rights are respected. As a fact-finding body, it would report directly to the EU institutions and/or the States concerned. Within this framework, the JRC would retain a strictly technical role, while the supervisory body would deal with human rights issues related to EURAs and readmitted persons[357]. Of course, the mere inclusion of human rights references and monitoring mechanisms in readmission agreements may not always be sufficient to protect the rights of returnees in any case. Consider, for example, the cases of Russia and Türkiye, both members of the Council of Europe: although the EURAs concluded with these third countries include references to human rights protection standards, it is important to highlight that in 2023 Russia recorded the highest number of judgments for violations of the ECHR, while Türkiye ranked third. It is worth noting that Türkiye has consistently been one of the leading countries in terms of ECHR violations over the years[358].

In addition to concerns about the "human rights clause" contained in EURAs, other human rights issues may arise in relation to the TCN clause discussed in the previous sub-section. The existence of TCN clauses is a major challenge for the EU, especially when they are concluded with third countries of transit that may not respect the principle of *non-refoulement* or maintain effective asylum systems. This can easily put the EU and its Member States at risk of violating international human rights standards and norms, as discussed in the previous CHAPTER[359]. Indeed, this raises concerns about the risk of migrants being sent to a third country without guarantees of adequate protection[360]. Nor do "sop provisions", similar to those laid down in Art. 14(3) of the EURA concluded with Sri Lanka, seem appropriate to

[357] E. CARLI, *op. cit.*, p. 28.

[358] Council of Europe, *Violations of the ECHR by Article and by State*, 2023. M. JANMYR, Ö GÜRAKAR SKRIBELAND, *op. cit.*, p. 31.

[359] *Supra*, CHAPTER I, SECTION 2.2.

[360] M. PANIZZON, *op. cit*., p. 111 ff.

explicitly fill this gap. Indeed, Art. 14(3) of the EU–Sri Lanka readmission agreement states that:

"Transit *can* be refused by Sri Lanka or a Member State (a) if the third-country national or the stateless person runs the risk of persecution or could be subject to criminal prosecution or sanctions in another State of transit or in the State of destination or could be threatened by criminal prosecution on the territory of the requested State [...]."

The same provision can also be found in almost all EURAs, except for those concluded with Pakistan and Belarus[361]. The wording of this provision suggests that refusal of transit is only an *option* for States, and not an *obligation*[362]: while in this context it is also essential to consider the fundamental rights obligations that both Member States and the third country concerned have under customary and/or treaty law, with particular emphasis on the prohibition of *refoulement*, more precise wording on this point would probably have been preferable. It is also questionable how accurately the individual situation of TCNs can be assessed on a case-by-case basis and within a reasonable timeframe. This challenge is compounded by the fact that EURAs falls into the category of readmission agreements with no *specific provisions* for asylum seekers, as highlighted in the first CHAPTER. As a result, in the literal text of EURAs both asylum seekers and refugees are treated as irregular immigrants, even in recent agreements such as the one with Belarus.

Furthermore, failure to properly assess the situation of each asylum seeker can lead to a "domino effect", whereby individuals are transferred from one country to another, ultimately risking deportation to places where human rights protection is lacking, in violation of the principle of *non-refoulement*[363]. A crystal-clear example

[361] See, Art. 12(3)(a) of the EURAs concluded with Hong Kong and Macao (although in this case, the provision is not formulated as precisely: "[t]ransit can be refused by [Macao and Hong Kong] or a Member State if the person of another jurisdiction runs the risk of persecution"); Art. 13(3)(a) of the EURAs concluded with Albania, Cape Verde, Bosnia Erzegovina, Georgia and Serbia; Art. 10(4)(a) of the EURA concluded with Ukraine; Art. 14(3)(a) of the EURAs concluded with Russia, Azerbaijan, Türkiye and Armenia.

[362] I. OTTAVIANO, "Gli accordi di riammissione dell'UE", in F. CHERUBINI (ed.), *Le migrazioni in Europa: UE, Stati terzi e migration outsourcing*, Bordeaux, Rome, 2015, p. 118.

[363] M. RAIS, cit.

could be represented by the EURA concluded with Türkiye: despite the EU's persistent public concerns about minority rights, freedom of expression and other human rights issues in Türkiye, these "worries" were simply ignored when it came to sending people back to Turkish territory. These circumstances not only undermine the EU's human rights stance, but also puts those who are readmitted at considerable risk of a "domino effect" and a consequent violation of the principle of *non-refoulement*[364].

In this regard, the EURA approach of facilitating the return of TCNs to their country of origin or transit at all costs may expose them to the risk of inhuman or degrading treatment, in particular due to the high reliance on the STC concept. This concept – analysed in the previous CHAPTER from an international point of view – has become increasingly important in EU readmission policy and in relation to EURA, especially following the reforms introduced by the New Pact on Migration and Asylum. Indeed, Regulation 2024/1348 (the new "Asylum Procedures Regulation") introduces the STC concept as a ground for considering an asylum claim inadmissible[365]. More in detail, Art. 59(7) of this Regulation establishes a presumption of safety for countries that have signed agreements with the EU under Art. 218 TFEU. According to this provision, "[w]here the Union and a third country have jointly come to an agreement pursuant to Article 218 TFEU that migrants admitted under that agreement will be protected in accordance with the relevant international standards and in full respect of the principle of *non-refoulement*, the conditions of this Article regarding safe third-country status may be presumed fulfilled". This provision – which was not included in the 2020 Commission's proposal – may cover both "formal" EURAs, and other formal cooperation agreements, which include readmission schemes[366].

[364] M.H. ZOETEWEIJ, "Expulsion, Readmission Agreements and 'Non-Refoulement'", NCCR-On the move, 7 April 2016.

[365] Regulation 2024/1348 of the European Parliament and of the Council, of 14 May 2024, establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU. See also the "former" Asylum Procedures Directive, Directive 2013/32/EU of the European Parliament and the Council, of 26 June 2013, on common procedures for granting and withdrawing international protection (recast), OJEU, L 180, 29 June 2013.

[366] P. GARCÍA ANDRADE, "Cooperation with third countries within the EU legislative reform on migration and asylum", in *EU Immigration and Asylum Law and Policy Blog*, 9 September 2024. See, *infra*, CHAPTER III.

With regard to Art. 59, García Andrade points out that it is quite controversial to describe a third country as "safe" just because it has agreed to readmission commitments with the EU: as also mentioned in the previous CHAPTER, entering into readmission agreements with countries that have poor human rights records is worrying, especially when one considers how these countries might treat individuals who are returned[367]. Art. 59(7) of the Regulation allows for this action on the basis of a presumption of safety. Ideally, this presumption could be overturned if there is evidence that the essential conditions of safety referred to in Art. 59(1) are not met[368]. In addition, individual assessments and the "nexus criterion" set out in Art. 59(5) and (6) should continue to apply: according, in particular, to Art. 59(5) the concept of STC "may only be applied provided that: (a) the applicant cannot provide elements justifying why the concept of safe third country is not applicable to him or her, in the framework of an individual assessment; (b) there is a connection between the applicant and the third country in question on the basis of which it would be reasonable for him or her to go to that country"[369].

In our view, these "hypothetical" safeguards may also stem from a desire to align the text of EU secondary legislation with the rulings and case law of the ECtHR on this issue. In this regard, the Court has never directly challenged the legitimacy of the STC concept, nor has it ruled on whether a particular third country is in fact safe. Instead, the Court of Strasbourg's current position is primarily procedural, focusing on the safeguards that must underpin the assessment made by

[367] *Ibid.* See, *supra,* CHAPTER I, SUB-SECTION 2.2.

[368] "A third country may only be designated as a safe third country where in that country: (a) non-nationals' life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion; (b) non-nationals face no real risk of serious harm as defined in Article 15 of Regulation (EU) 2024/1347; (c) non-nationals are protected against refoulement in accordance with the Geneva Convention and against removal in violation of the right to protection from torture and cruel, inhuman or degrading treatment or punishment as laid down in international law; (d) the possibility exists to request and, where conditions are fulfilled, receive effective protection [...]".

[369] Instead, Regulation 2024/1348, cit., Art. 59(6) clarifies that in the case of unaccompanied minors, a third country can only be considered safe if it is in the best interests of the child and if the authorities of the third country provide assurances that the minor will be taken into care and given immediate access to effective protection. On these "new" provisions, see also, S. PEERS, "The new EU asylum laws, part 7: the new Regulation on asylum procedures", in *EU Law Analysis*, 28 April 2024; D. THYM, "Safe Third Countries: the Next 'Battlefield'", in *EU Immigration and Asylum Law and Policy Blog*, 5 July 2024; D. THYM, *Expert Opinion on Legal Requirements for Safe Third Countries in Asylum Law and Practical Implementation Options*, *op. cit.*, p. 36.

national authorities. The requesting State cannot rely solely on its own designation of a third country as safe; it has a general obligation to ensure a fair and thorough examination of the conditions in that country. The burden of proof in such cases is allocated as follows: *(i)* the applicant bears the initial burden; *(ii)* if there is a known general risk in the third country, the authorities must make an independent investigation; and *(iii)* if there is an individual risk, the burden remains with the applicant, but if the deporting State is made aware of specific facts concerning the individual, its authorities must make their own assessment, particularly if the applicant is at risk of ill-treatment because of membership of a persecuted group[370]. The authorities of States are also obliged to provide the applicant with the necessary information to challenge the classification of a third country as "safe"[371]. From these considerations it can be concluded that the *mere existence* of a readmission agreement with a third country does not imply that the country is safe; the *practical implementation* of readmission must necessarily be taken into account, also in line with ECHR case law.

Consequently, while the EU's "official" and "formal" alignment with the ECHR's views might suggest that Art. 59(7) of the Asylum Procedure Regulation is sufficient for safeguarding human rights, in our opinion, its practical application could be problematic. Indeed, the broad wording of this Article facilitates widespread use that may conflict with international human rights norms and standards. For instance, asylum seekers could potentially be returned to countries that are not parties to the 1951 Geneva Convention, such as Pakistan or Sri Lanka, through EURAs concluded by the EU with these third countries, thereby creating a serious risk of *refoulement*[372]. Furthermore, the Preamble of the Regulation indicates that the presumption of safety does not apply if the readmission agreement

[370] European Court of Human Rights (ECtHR), Research Division, *Articles 2, 3, 8 and 13: The concept of a "safe third country" in the case-law of the Court*, 2018, pp. 20–21. See also, *inter alia*, European Court of Human Rights (ECtHR), Grand Chamber, Judgement of 23 March 2016, *F.G. v. Sweden*, Application No. 43611/11, paras. 125–127; European Court of Human Rights (ECtHR), Fifth Section, Judgement of 23 June 2011, *Diallo v. the Czech Republic*, Application no. 20493/07, paras. 76–77.

[371] European Court of Human Rights (ECtHR), *M.S.S. v. Belgium and Greece*, cit., paras. 351–352.

[372] V. CHETAIL, M. FEROLLA VALLANDRO DO VALLE, "The Asylum Procedure Regulation and the Erosion of Refugee's Rights", in *EU Immigration and Asylum Law and Policy Blog*, 23 May 2024.

is suspended under specific procedures set out in Art. 218(9) TFEU[373]. Ideally, this caveat should be explicitly included in the Regulation itself in order to enhance clarity and ensure robust protection for asylum seekers and compliance with relevant international human rights law standards[374]. Essentially, by unilaterally designating a third country as "safe" under the Asylum Procedure Regulation, the EU and its Member States create in concrete *inadmissible TCNs.* These individuals are not always removed from EU territory, but are often detained on the periphery of the Union, such as in Italian or Greek "hotspots", and are excluded from EU asylum procedures[375]. Through readmission agreements, the EU obliges third countries to accept these inadmissible persons on their territory. The provisions of the STC, combined with the EU's readmission policy, facilitate the rapid removal of those who are deemed ineligible for refugee status determination and protection in the EU. As a result, the STC framework and EURAs have shifted responsibility for asylum and refugee reception to a handful of Member States at the EU's borders or to developing and underdeveloped countries[376].

In this context, the Court has very recently addressed the issue of readmission in relation to the STC concept. More specifically, on 4 October 2024, the ECJ issued a landmark judgment that significantly challenges Greece's long-standing practice of rejecting asylum applications as inadmissible on the basis of Türkiye's designation as an STC, despite Türkiye's refusal to readmit these individuals[377].

[373] Regulation 2024/1348, cit., recital (49). Art. 218(9) TFEU clarifies that "[t]he Council, on a proposal from the Commission or the High Representative of the Union for Foreign Affairs and Security Policy, shall adopt a decision suspending application of an agreement and establishing the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement."

[374] P. GARCÍA ANDRADE, "Cooperation with third countries within the EU legislative reform on migration and asylum", cit.

[375] A. TRIANDAFYLLIDOU, A. DIMITRIADI, "Migration Management at the Outposts of the European Union: The Case of Italy's and Greece's Borders", in *Griffith Law Review*, Vol. 22, Issue 3, 2013, pp. 601–603.

[376] B. N. OSSO, *op. cit.*, p. 287.

[377] European Court of Justice (ECJ), Case C–134/23, *Somateio 'Elliniko Symvoulio gia tous Prosfyges', Astiki Mi Kerdoskopiki Etaireia 'Ypostirixi Prosfygon sto Aigaio' v Ypourgos Exoterikon, Ypourgos Metanastefsis kai Asylou,* Judgement 4 October 2024, ECLI:EU:C:2024:838. It is also a "first of its kind" ruling. Indeed, [t]his is not only the first time that the CJEU has been asked about an aspect of the EU/[Türkiye] asylum relationship. Remarkably, despite the huge number of asylum seekers that have come to Greece over the last decade and more, this is also the first time that the CJEU has been asked *any* questions about EU asylum law by any Greek court". Cfr. S. PEERS, "Pyrrhic victory for the Greek government: the CJEU rules on Turkey as a "safe third country"", in *EU Law Analysis*, 11 October 2024.

The judgment ensures that applicants' rights are upheld by prohibiting the rejection of thousands of applicants' asylum claims where there is no possibility of their being readmitted to Türkiye and by requiring an individual assessment of their cases in line with the Return Directive[378].

The case arose from a preliminary reference from the Greek Council of State concerning the designation of Türkiye as a STC under the "former" Asylum Procedures Directive – later replaced by the "new" Asylum Procedure Regulation – and its compatibility with Art. 18 of the CFR. The applicants, non-profit organizations supporting refugees, challenged the designation of Türkiye as a STC for asylum applicants from specific countries (Syria, Afghanistan, Pakistan, Bangladesh, and Somalia), arguing that Türkiye had refused to readmit these individuals since 2020, raising concerns about the legality of such designation. The Court addressed the interpretation of Art. 38 of the Asylum Procedures Directive, which sets out the conditions for designating a country as a STC for asylum applicants. It ruled that Art. 38, read in conjunction with Art. 18 of the CFR, does not preclude a Member State from classifying a third country as generally safe for certain categories of applicants, even if that country has suspended readmissions of such individuals. The Court clarified that, while a third country must generally ensure admission or readmission for the designation to be valid, the mere suspension of such readmissions does not automatically invalidate the classification[379]. Furthermore, the Court held that proven admission or readmission is not a prerequisite under Art. 38(2) for designating a STC. It emphasised that, Art. 38(4) of the Asylum Procedures Directive, which obliges Member States to provide access to an asylum procedure if a third country refuses to admit the applicant, does not prevent a third country from being classified as a STC even when it declines to admit or readmit applicants for international protection[380]. However, in cases where readmission is no longer possible, the Member State must ensure that the asylum applicant has access to the asylum process within the EU. In this respect, the Court ruled that under Art. 38(4) of the Asylum Procedures Directive, if a third country

[378] Refugee Support Aegean (RSA), *CJEU ruling on the concept of "safe third country"*, Joint Press Release, 8 October 2024, available here: https://rsaegean.org/en/cjeu-ruling-on-the-concept-of-safe-third-country/.

[379] European Court of Justice (ECJ), Case C–134/23, cit., paras. 47–53.

[380] *Ivi*, paras. 42–47 and 52.

designated as safe suspends admission or readmission of applicants, the Member State must grant access to an asylum procedure in line with the principles and guarantees described in Arts. 6 to 30 of that Directive. If the third country refuses readmission, the Member State cannot reject the application as inadmissible under Art. 33(2)(c) or delay its examination, which must be conducted individually within the set time limits[381].

The Court clarified that while Türkiye may remain on Member States' lists of STCs, this designation becomes meaningless in practice if Türkiye refuses to readmit asylum seekers, rendering such applications inadmissible without foundation. This ruling, rooted in Art. 38(4) of the "new" Asylum Procedures Directive, requires Member States to assess the merits of asylum applications in the absence of readmission to a third country, shifting the focus from procedural rejection to substantive examination. In practical terms, this ruling not only requires a reassessment of past applications that were wrongly rejected as inadmissible but also ensures that future applications cannot be rejected on grounds of inadmissibility unless readmission is secured. The decision on the existence or not of the possibility of readmission to the third country, in this case Türkiye, becomes a prerequisite at the stage of issuing the decision on the asylum application and not at the stage of its execution. The judgment represents a major shift in EU asylum law, strengthening procedural safeguards and placing significant restrictions on Member States' use of the STC concept without a reliable readmission mechanism. In our view, this ruling is therefore an important step towards harmonising EU asylum procedures with international protection standards, addressing both the rights of asylum seekers and the responsibilities of Member States in relation to readmission[382]. Nevertheless, it is also clear that the judgment does not provide much-needed guidance on how Member States should interpret and apply the criteria for designating third countries as "safe". The lack of well-defined judicial direction on this issue leaves room for divergent national practices, which could undermine the uniform application of EU asylum law and create inconsistencies in protection standards across the Union. This omission highlights the continued need

[381] *Ivi*, paras. 36–37 and 53.

[382] S. PEERS, "Pyrrhic victory for the Greek government: the CJEU rules on Turkey as a "safe third country"", cit.

for a more harmonised approach, either through legislative clarification or further judicial interpretation, to ensure that the STC concept is applied in a manner that respects fundamental rights and legal certainty, in particular with regard to readmission and return operations and procedures[383].

In addition to including readmission clauses in broader agreements and/or concluding of EURAs with the EU, third countries continue to "shop around" with Member States on a bilateral basis. The following SECTION therefore looks at the interplay between the EU and its Member States in "formal" readmission cooperation with third countries.

4. The EU–Member States' interplay in readmission cooperation

As mentioned above, while the EU negotiates and concludes EURAs with third countries, Member States also retain the competence to negotiate bilateral agreements to regulate this issue. This "dual" competence stems from the shared nature of EU and Member States' competence in this area, as will be better explained in the next SUB-SECTION[384]. In this regard, while the EU currently has concluded 18 EURAs with third countries, the number of agreements concluded by the Member States up to 2020 amounts to around 337, of which around 125 are protocols implementing EURAs[385]. The conclusion of bilateral readmission agreements between the EU and third countries and between Member States and third countries seems to be closely linked to several key factors. These factors include the importance of third countries in the broader context of migration management, in particular with regard to the number of their nationals residing irregularly in individual Member States and the number of TCNs transiting through their territory. Moreover, the geographical proximity of these third countries to the EU's external borders and their position along the main migratory routes to the EU are key determinants of the necessity and functionality of these agreements. Thus,

[383] In this sense, A. PIRRELLO, "Turkey as a 'safe third country'? The Court of Justice's judgment in C-134/23 Elliniko Symvoulio", in *European Law Blog*, 4 December 2024.

[384] M. PANIZZON, *op. cit.*, p. 103. *Infra,* SUB-SECTION 4.1.

[385] J. P. CASSARINO, "Il sistema ibrido della riammissione: Genealogia di un allineamento tra sovranazionalismo e bilateralismo", in *ADiM Blog*, Editorial, 2020, p. 4. For implementing protocols concluded by Member States with third countries, see *infra*, SUB-SECTION 4.3.

the closer a third country is to some Member States' borders or main migration routes, and the more relevant its nationals are to migration flows, the more likely it is to become a party to a bilateral readmission agreement[386]. For example, the readmission agreement between Spain and Mauritania highlights the key role of the latter in Spain's migration strategy, given its location on the West African migration route. Many migrants from sub-Saharan Africa pass through Mauritania on their way to the Canary Islands. Spain sees cooperation with Mauritania as essential to controlling irregular migration flows and preventing migrant boats from reaching the Canary Islands. By working with Mauritania through readmission agreements and border control assistance, Spain aims to intercept migrants before they embark on dangerous journeys, thereby reducing the number of arrivals in the Canary Islands and, by extension, the EU as a whole[387].

According to a report by the European Migration Network (EMN), France and Spain are leading the way in developing and implementing these agreements[388]. Like EURAs, Member States' bilateral readmission agreements are mainly concluded with Eastern and Central European countries, but also with Türkiye, Sri Lanka, Hong Kong, and, as far as France is concerned, Latin American countries[389]. More bilateral readmission agreements than EURAs have been successfully

[386] More, in detail J. P. CASSARINO, "A Reappraisal of the EU's Expanding Readmission System", in *The International Spectator*, Vol. 49, No. 4, 2014, pp. 135 ff.

[387] J. FERNÁNDEZ ARRIBAS, *Mauritania es la puerta de entrada de España a África, al igual que Marruecos, y la cooperación es básica*, Atalayar, available here: https://www.atalayar.com/articulo/economia-y-empresas/mauritania-es-puerta-entrada-espana-africa-igual-que-marruecos-cooperacion-es-basica/20230721140008188596.html. See also, more in detail, *infra*, CHAPTER III, SECTION 5.

[388] European Migration Network (EMN), *Bilateral Readmission Agreements*, September 2022, pp. 10 ff. For an inventory on bilateral readmission agreements (updated in 2021) see also, European Migration Network (EMN), *Inventory on Bilateral Readmission Agreements signed by or entered into force in EU Member States in 2014-2021*.

[389] M. PANIZZON, *op. cit.*, p. 103. See, *inter alia*, Décret No. 97-1180 du 17 décembre 1997 portant publication de l'accord entre le Gouvernement de la République française et le Gouvernement de la République du Paraguay relatif à la réadmission des personnes en situation irrégulière, signé à Paris le 10 avril 1997, Journal officiel de la République française No. 299, 26 December 1997; Décret No. 98-953 du 21 octobre 1998 portant publication de l'accord entre le Gouvernement de la République française et le Gouvernement de la République orientale de l'Uruguay relatif à la réadmission des personnes en situation irrégulière, signé à Paris le 5 novembre 1996, Journal officiel de la République française No. 250, 28 October 1998; Décret No. 2002-139 du 30 janvier 2002 portant publication de l'accord entre le Gouvernement de la République française et le Gouvernement de la République du Venezuela relatif à la réadmission des personnes en situation irrégulière, signé à Caracas le 25 janvier 1999, Journal officiel de la République française No. 31, 6 February 2002. Cfr. European Migration Network (EMN), *Bilateral Readmission Agreements*, cit., p. 10.

concluded with West and North African countries. For example, Germany has concluded a readmission agreement with Syria[390]; Spain with Mauritania[391]; Austria with Tunisia[392].

In order to highlight the interplay between the "formal" actions of the EU and its Member States on readmission, the next SUB-SECTION examines the division of competences with regard to the conclusion of readmission agreements. SUB-SECTION 4.2 then analyses potential overlaps in competences and the criteria for coordination between the EU and its Member States. Moreover, SUB-SECTION 4.3 focuses on the implementation of EURAs by both the EU and individual Member States, with particular attention to the bilateral implementing protocols drawn up by the latter. Clarification of these issues is essential as to avoid legal uncertainty regarding the readmission policy of the EU and its Member States. In this respect, both the EU and its Member States need to respect their "roles" when concluding readmission agreements in order to ensure that they act within the limits of their legal competence. Otherwise, Member States could overstep their legal boundaries or take actions that conflict with EU law, leading to fragmented approaches at EU level. This fragmentation could potentially undermine the EU's ability to present itself as a coherent and effective actor in the international legal arena, as well as weaken the Union's collective bargaining power. Indeed, different approaches could send conflicting signals to third countries, with some Member States prioritising national interests over human rights obligations and others strictly adhering to international norms[393].

Before proceeding, it is important to clarify that the following dissertation examines the interplay between the Member States' bilateral "formal" readmission cooperation and that of the EU strictly from a "supranational" perspective, focusing exclusively on the EU legal order. In other words, it approaches the issue from the

[390] Abkommen zwischen der Regierung der Bundesrepublik Deutschland und der Regierung der Arabischen Republik Syrien über die Rückführung von illegal aufhältigen Personen, 14 July 2008.

[391] Acuerdo entre el Reino de España y la República Islámica de Mauritania, en materia de inmigración, firmado en Madrid el 1 de julio de 2003, Boletín Oficial de España, 4 August 2003.

[392] Notenwechsel betreffend den Abschluß eines Abkommens zwischen Österreich und Tunesien über die Heimbeförderung tunesischer und österreichischer Staatsangehöriger, 1 August 1965, Bundesgesetzblatt für die Republik Österreich, No. 255/1965.

[393] Nevertheless, all Member States remain, of course, bound to respect the relevant rules of customary international law in this area.

standpoint of EU law and the solutions it offers, without delving into the equally significant aspects related to the position of third countries involved in these agreements. In this regard, the guiding principle remains that of *pacta sunt servanda* as set out in Art. 26 of the Vienna Convention on the Law of Treaties[394]. Similarly, the study does not address the issues relating to the constitutional dimensions within Member States, in particular the compatibility of such agreements with national rules on treaty-making powers, as these issues are primarily a matter of national rather than EU law. They are therefore beyond the scope of this analysis, which is limited to the EU and its interplay with the international legal framework.

4.1. The nature of the EU and Member States' competence in concluding readmission agreements

Concerning the EU's competence to conclude EURAs, as mentioned before, Art. 79(3) TFEU constitutes the legal basis for the conclusion of such agreements. It is also the only case where the Lisbon Treaty has introduced a new *explicit external* competence for the Union in the AFSJ and, in particular, migration[395]. The exercise of this competence is therefore based on Art. 216(1) TFEU, according to which "[t]he Union may conclude an agreement with one or more third countries or international organisations *where the Treaties so provide*".

Before Lisbon, the former EC did not have any *explicit* competence in the area of return and readmission. As mentioned before, only with the entry into force of the Amsterdam Treaty in 1999, Member States agreed to transfer their sovereign powers to the EC in various field, including legislation on migration. The legal basis for the conclusion of readmission agreements by the EC was found in Art. 63(3)(b) TEC, read in conjunction with Art. 300 TEC[396]. However, Art. 63(3)(b) TEC

[394] United Nations Vienna Convention on the Law of Treaties, 23 May 1969, Art. 26: "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith". In this sense, F. CASOLARI, "L'interazione fra accordi internazionali dell'Unione europea ed accordi conclusi dagli stati membri con stati terzi per il contrasto dell'immigrazione irregolare", in *Diritto, Immigrazione e Cittadinanza*, Fasc. 1/2018, p. 5.

[395] P. GARCÍA ANDRADE, "EU External Competences in the Field of Migration: How to Act Externally when Thinking Internally", *in Common Market Law Review*, Vol. 55, Issue 1, 2018, p. 159.

[396] Art. 300 TEC clarified the procedure for the conclusion of agreements between the Community and one or more States or international organisations. M. PREVIATELLO, *op. cit.*, p. 92.

merely conferred on the Council the power to adopt measures in the field of migration policy, which includes "illegal immigration and illegal residence, including repatriation of illegal residents". Consequently, the norm did not *explicitly* grant the Community *an external competence* to conclude readmission agreements with third countries[397].

Indeed, readmission corresponded "only" to *an implied external competence*. As for the latter, in Opinion 1/76, the former CJEC held "that the [former Community's] authority to enter into international commitments may not only arise from an express attribution by the treaty but equally may flow implicitly from its provisions"[398]. Therefore, in addition to its explicit external authority, the Court of Luxembourg recognised that the EU also has implied powers, which in turn grant it implied external competence. In the case of readmission, this competence could be inferred implicitly from the EU's internal powers aimed at fighting irregular migration, – such as in the case of Art. 63(3)(b) TEC[399]. In the abovementioned Opinion, the Court also clarified that where EU law conferred on its institutions certain powers to achieve a specific objective within the Union, the EU had the power to conclude the international agreements *necessary* to achieve that objective, even in the absence of a specific provision expressly authorising it[400]. In this context, international agreements with third countries, such as readmission agreements, were considered necessary for the readmission of irregular migrants, as their expulsion could not be effectively carried out under the EU's internal rules alone[401]. It was not until 1999 that the Presidency of the European Council at the

[397] Roig and Huddleston found that in practice the European Parliament played a minimal role under the previous procedure. In most cases, the Parliament was neither consulted nor informed during the negotiations, "and found itself delivering a *post-facto* opinion". A. ROIG, T. HUDDLESTON, *op. cit.*, p. 369. E. ROMAN, *op. cit.*, p. 50.

[398] Court of Justice of the European Communities (CJEC), Opinion 1/76, *Laying-up Fund*, 26 April 1977, ECLI:EU:C:1977:63, para. 3. On the implied external competence see also, Court of Justice of the European Communities (CJEC), Joined cases 3, 4 and 6–76, *Cornelis Kramers and Others*, Judgement 14 July 1976, ECLI:EU:C:1976:114.

[399] Court of Justice of the European Communities (CJEC), Case C–22/70, *Commission v Council (ERTA)*, Judgement 31 March 1971, ECLI:EU:C:1971:32, paras 27–30. M. PANIZZON, *op. cit.*, p. 112.

[400] *Ibid.*, para. 1.

[401] Cfr. P. GARCÍA ANDRADE, "EU External Competences in the Field of Migration: How to Act Externally when Thinking Internally", *op. cit.*, p. 170. On this point, see also, J. KUIJPER, "The Evolution of the Third Pillar from Maastricht to the European Constitution: Institutional Aspects", in *Common Market Law Review*, 2004, pp. 617–618.

Tampere Summit explicitly described and clarified the competence of the European Community in the area of readmission. The declaration confirmed that the Treaty of Amsterdam had conferred powers on the Community in this area, marking a key moment in the development of EU readmission policy[402]. The European Council also encouraged the Council "to conclude readmission agreements or incorporate standard clauses in other agreements between the European Community [now the EU] and pertinent third countries or groups of countries"[403].

While then the "new" Art. 79(3) TFEU grants the EU an *explicit competence* to conclude EURAs *provided for in primary law*, this provision does not clarify the nature of this competence, whether it is exclusive or shared between the EU and the Member States. This is a particularly important issue as Member States have continued to conclude readmission agreements with third countries even in the absence of explicit "authorisation". Indeed, the situation thereof raises several problems. On one hand, if the EU has exclusive competence to conclude readmission agreements, Member States would be obliged to refrain from entering into new readmission negotiations on their own –, even if the Commission is not actively involved in such negotiations with a specific third country. On the other hand, if a shared competence is assumed, Member States would be free to exercise the power to conclude a bilateral readmission agreement with a third country as long as the Commission has not submitted a recommendation to the Council to open negotiations on an EURA with that specific country[404].

The Commission has traditionally maintained that the EU has an *a priori* exclusive competence to negotiate and conclude readmission agreements with third countries. This approach is based on the recognition that in a Union without internal border controls and with free movement of persons, intergovernmental readmission policies could lead to potential distortions[405]. For example, if one Member State

[402] European Council, Presidency Conclusions, Tampere, cit., para. 26. See also, E. ROMAN, *op. cit.*, p. 43.

[403] *Ibid*.

[404] Art. 218(3) TFEU.

[405] European Commission, Communication COM (2001) 672 final to the Council and the European Parliament on a Common Policy on Illegal Immigration, 15 November 2001, p. 25. M. GIUFFRÉ, "Obligation to Readmit? The Relationship between Interstate and EU Readmission Agreements", *op. cit.*, p. 284. In addition, in 1999 the Legal Service of the Council pointed out that if individual Member States were allowed to negotiate their own readmission policies with third countries independently, this could create opportunities to circumvent the efforts of other Member

were to implement a strict readmission policy, migrants refused entry in that State might simply move to another Member State with a more lenient policy. This secondary movement could undermine the effectiveness of the EU's collective efforts to manage migration and border control. By centralising the negotiation and conclusion of international readmission agreements at EU level, the Commission aimed to ensure consistency and coherence in the EU's external relations, particularly in sensitive areas such as readmission. In the Commission's view, this approach may help to avoid disparities between Member States' readmission policies and strengthens the EU's ability to address migration challenges collectively[406]. However, it should also be noted that these are, in any case, relatively old Commission documents. As such, they do not allow us to fully understand the Commission's current position or whether it has evolved over time.

Another possibility would be to apply ERTA exclusivity to readmission. According to this doctrine, today codified in Art. 3(2) TFEU, "each time the Community, with a view to implementing a common policy envisaged by the treaty, adopts provisions laying down common rules, whatever form they may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which *affect* those rules or *alter* their scope"[407]. However, following the entry into force of the Lisbon Treaty the explicit conferral of competence in Art. 79(3) TFEU demonstrates more clearly that readmission is an external policy area distinct from the adoption of internal rules on expulsion and return, such as those referred to in the Return Directive. This distinction, in turn, precludes the application of the ERTA "exclusivity doctrine" to

States. Council's Legal Service Opinion, "Standard Readmission Agreement between the Member States of the European Union, on the one part, and third countries, on the other – Impact of the entry into force of the Treaty of Amsterdam", Doc. 6658/99, 10 March 1999, para. 24.1.

[406] COM (2001) 672 final, cit., p. 25. In this sense, see also M. PANIZZON, *op. cit.* In particular, Panizzon suggests that "shared competence may trigger a race to the bottom over human rights standards".

[407] Emphasis added. Art. 3(2) TFEU claims that claims that "the Union shall have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope". Cfr. P. GARCÍA ANDRADE, "EU External Competences in the Field of Migration: How to Act Externally when Thinking Internally", *op. cit.*, p. 170. See also, P. GARCÍA ANDRADE, "The EU Accession to the Geneva Convention Relating to the Status of Refugees: Legal Feasibility and Added Value", in *The Spanish Yearbook of International Law*, No. 23, 2019, p. 197.

readmission[408]. The doctrine thereof restricts Member States from adopting measures that could impinge upon EU common rules or modify their application. In the case of readmission agreements at EU level, it is unlikely that such agreements would affect or alter the scope of the common EU rules on return, as the areas covered by the Return Directive and readmission agreements are different: the Return Directive regulates the relationship between Member State authorities and individuals in irregular situations, while readmission agreements focus on inter-State relations, in particular the enforcement of returns[409]. Moreover, as García Andrade points out, the negotiation of readmission agreements at bilateral national level could complicate the uniform application of the Return Directive if only certain Member States sign bilateral agreements with a particular third country while others do not. However, if all Member States have bilateral agreements with the same third country, there would be no risk of undermining the uniform application of the Directive, thus confirming that there is no "affectation" within the meaning of ERTA[410].

The shared nature of the EU's external competence in readmission undoubtedly generates other types of distortions arising from the existence of a space without internal border controls. Indeed, the absence of a common and "exclusive" EU readmission policy can lead to secondary movements of irregular immigrants within a space where free movement of people is guaranteed, *de jure* for its beneficiaries but also *de facto* for all persons[411]. Nonetheless, this scenario does not trigger the application of the "ERTA exclusivity doctrine". Under this doctrine, the exclusivity of EU competence is based on the fact that Member States' actions could "affect" existing common rules. In our opinion, since the common rules on

[408] P. GARCÍA ANDRADE, "EU External Competences in the Field of Migration: How to Act Externally when Thinking Internally", *op. cit.*, p. 170

[409] P. GARCÍA ANDRADE, *La acción exterior de la Unión Europea en materia migratoria. Un problema de reparto de competencias*, *op. cit.*, p. 224; P. GARCÍA ANDRADE, "EU External Competences in the Field of Migration: How to Act Externally when Thinking Internally", *op. cit.*, p. 170. In this sense, see also, M. PREVIATELLO, *op. cit.*, p. 99.

[410] P. GARCÍA ANDRADE, "EU External Competences in the Field of Migration: How to Act Externally when Thinking Internally", *op. cit.*, p 170.

[411] Regulation 2016/399 of the European Parliament and the Council, of 9 March 2016, on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification), OJEU, L 77, 23 March 2016, Art. 20. P. GARCÍA ANDRADE, *La acción exterior de la Unión Europea en materia migratoria. Un problema de reparto de competencias*, *op. cit.*, p. 224.

return are not relevant in this context, other "internal" related aspects, such as the rules on free movement or the absence of internal borders, are not affected either. Free movement remains uniformly applied, and this uniformity is not disrupted by the existence of varying readmission agreements with third countries. It seems that the practical difficulties of applying controls within the territory are causing the distortions mentioned, rather than any legal impact on EU rules[412].

Beyond these debates, Member States are clearly (and unsurprisingly) in favour of shared competence for concluding readmission agreements. Indeed, on the consequences of the entry into force of the Treaty of Amsterdam for future readmission agreements concluded by the former Community with third countries, the 2184th meeting of the Justice and Home Affairs (JHA) Council stated that:

"The Community's responsibility with regard to the conclusion of readmission agreements is therefore not exclusive. A Member State can continue to conclude readmission agreements with third States provided that the Community has not concluded an agreement with the third State concerned or has not concluded a mandate for negotiating such an agreement [...] The Member States may no longer conclude agreements if these might be detrimental to existing Community agreements[413]."

Thus, the JHA Council did not consider the potential distortions that bilateral readmission agreements could create in an area without internal borders to be sufficient to justify the exclusive competence of the EU to conclude readmission agreements[414]. Therefore, with the exclusion of the "ERTA exclusivity doctrine", this is a case of shared external competence.

[412] *Ivi*, p. 225.
[413] 2184th JHA Council meeting, Brussels, 27/28 May 1999, 8654/99 (Presse 168), p. 8.
[414] P. GARCÍA ANDRADE, *La acción exterior de la Unión Europea en materia migratoria. Un problema de reparto de competencias, op. cit.*, p. 225; P. GARCÍA ANDRADE, "EU External Competences in the Field of Migration: How to Act Externally when Thinking Internally", *op. cit.*, p. 198.

4.2. Competences overlap and criteria for coordination

Having analysed the EU's competence to conclude readmission agreements – and having established that this competence is shared with its Member States – it becomes clear that it is not uncommon for the same third country to have concluded both an EURA and a bilateral readmission agreement with one or more Member States. This "coexistence" raises the need to examine criteria for coordination in order to avoid the risk of "readmission overlaps" between the EU and individual Member States' readmission agreements.

First and foremost, it is important to emphasise that the duty of sincere cooperation plays a crucial role in managing the interplay between EURAs and bilateral agreements concluded by Member States. The duty of sincere cooperation essentially requires the "Union and the Member States [to] assist each other in carrying out tasks which flow from the Treaties"[415]. In the context of agreements concluded by Member States with third countries, the duty of sincere cooperation implies that Member States must ensure that their actions do not undermine the objectives of the EU or conflict with its legal framework. This includes avoiding agreements that would contravene EU law or undermine the effectiveness of EU policies[416]. Respect for the duty of sincere cooperation under Art. 4(3) TEU is therefore pivotal for the proper exercise of the shared competence to conclude readmission agreements. By concluding international agreements in areas of shared competence, EURAs can in fact limit the power of the Member States to individually conclude agreements with the same partners. Once the competence to conclude a readmission agreement with a certain country is exercised by the Union, the EU occupies the field with regard to that specific third country ("exclusivity by exercise")[417]. Therefore, Member States are prohibited from concluding new

[415] Art. 4(3) TEU.

[416] See, more in detail, C. MOLINARI, "Sincere Cooperation between EU and Member States in the Field of Readmission: The More the Merrier?", in *Cambridge Yearbook of European Legal Studies*, 2021.

[417] P. GARCÍA ANDRADE, "EU External Competences in the Field of Migration: How to Act Externally when Thinking Internally", *op. cit*., p. 171. On the "exclusivity by exercise", see, *inter alia*, C. MOLINARI, "Sincere Cooperation between EU and Member States in the Field of Readmission: The More the Merrier?", *op. cit.*, pp. 269–289; European Court of Justice (ECJ), Opinion of Advocate General Kokott, delivered on 13 July 2006, Case C–217/05, *Confederación*

bilateral readmission agreements with the same third country, except for the conclusion of implementing protocols related to existing EU readmission agreements: the treaty-making power of Member States is thus limited to the conclusion of such implementing protocols, which may be either optional or mandatory, as provided for in all EURAs[418].

From a purely legal point of view, the phenomenon of the "emptiness" of national competences resulting from the exercise of the Union's powers – for example, the conclusion of an EURA with a given third country – is known as "pre-emption"[419]. The principle of pre-emption in EU law refers to the situation where EU law provides that the adoption of an EU legislative act prevents Member States from regulating the same matters[420]. This occurs in areas of shared competence, where both the EU and its Member States have the authority to legislate or to act[421]. The pre-emption principle is essentially about the EU's capacity to "pre-empt" or supersede actions by Member States. In other words, it refers to the situations in which the "Union measures [may] have so-called 'pre-emptive effects', *i.e*, [may] occupy the relevant regulatory field and prevent Member States from legitimately exercising their own competence therein"[422]. This process has led to a gradual reduction in the Member States' room for manoeuvre.

In addition, once the Union has exercised its competence in this area, any future action by Member States must comply with the so-called "mandate theory". This theory, based on the principle of sincere cooperation, prohibits Member States from negotiating bilateral readmission agreements once the Commission has received a

Española de Empresarios de Estaciones de Servicio v, Compañía Española de Petróleos SA, ECLI:EU:C:2006:473, paras. 76–77.

[418] *Infra*, SECTION 4.3 of this CHAPTER.

[419] A. ARENA, *Il principio della preemption in Diritto dell'Unione europea: esercizio delle competenze e ricognizione delle antinomie tra diritto derivato e diritto nazionale*, Editoriale Scientifica, Naples, 2013, p. 34.

[420] Art. 2(2) TFEU: "[t]he Member States shall exercise their competence to the extent that the Union has not exercised its competence".

[421] U. VILLANI, *Istituzioni di Diritto dell'Unione europea*, Sixth Edition, Cacucci Editore, Bari, 2020, pp. 75 ff.

[422] A. DASHWOOD et AL., *European Union Law*, 6th edition, Hart Publishing, Oxford, 2011, p. 102. Cfr. A. ARENA, *op. cit.*, p. 34. This "preclusive effect" is not necessarily final and and irreversible: indeed, Art. 2(2) TFEU also adds that "[t]he Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence. See also, Consolidated version of the Treaty on the Functioning of the European Union, Declaration no. 18 in relation to the delimitation of competences.

mandate from the Council[423]. According to the case law of the ECJ, the granting of a mandate implies the initiation of coordinated action at EU level, which does not necessarily impose on Member States a *total* obligation to abstain from independent action, but at least an obligation to cooperate closely with the Commission, which may even require them to abstain once the Commission has made a recommendation to the Council to open EURA negotiations with a certain country[424]. Member States are allowed to conclude readmission agreements with third countries after the conclusion of EURAs or after the start of negotiations only if the national negotiating approach *does not coincide in all respects* with that of the EU[425]. This may be the case, for example, where a EURA or negotiating mandate contains only general statements on readmission, but one or more Member States require more detailed arrangements on the matter"[426].

Nevertheless, there are several cases which highlight instances where Member States have breached their obligation to cooperate by negotiating bilateral readmission agreements even after the Council had given the Commission a mandate to negotiate an EURA. For example, after the Commission was authorised to negotiate an EURA with Russia in September 2000, Austria (2005), Greece (2004) and Italy (2006) signed their own bilateral readmission or police cooperation agreements with Russia[427]. Furthermore, France signed a bilateral readmission agreement with Bosnia-Herzegovina in December 2006, despite the Commission's mandate for an EURA with the country having been adopted in November 2006[428].

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[423] P. GARCÍA ANDRADE, "EU External Competences in the Field of Migration: How to Act Externally when Thinking Internally", *op. cit*., p. 171.

[424] European Court of Justice (ECJ), Case C–266/03, *Commission v Luxembourg*, Judgement of 2 June 2005, EU:C:2005:341, paras. 60–61; European Court of Justice (ECJ), Case C–433/03, *Commission v Germany*, Judgement of 14 July 2005, EU:C:2005:462, paras. 66–67. *Ibid.* See also, M. PREVIATELLO, *op. cit.*, p. 22.

[425] M. GIUFFRÉ, "Obligation to readmit? The relationship between interstate and EU readmission agreements", *op. cit.*, p. 263. Emphasis added.

[426] *Ibid*.

[427] Cfr. P. GARCÍA ANDRADE, "The Duty of Cooperation in the External Dimension of the EU Migration Policy", in S. CARRERA ET AL. (eds.), *EU External Migration Policies in an Era of Global Mobilities: Intersecting Policy Universes*, Brill | Nijhoff, Leiden, 2018, p. 309.

[428] Accord entre le Gouvernement de la République française et le Conseil des ministres de Bosnie-Herzégovine relatif à la réadmission des personnes en situation irrégulière**,** Sarajevo, 20 December 2000; Council Decision authorising the Commission to negotiate with the Republic of Serbia a readmission agreement between the European Community and the Republic of Serbia Council Decision authorising the Commission to negotiate with the Republic of Montenegro a readmission agreement between the European Community and the Republic of Montenegro Council Decision authorising the Commission to negotiate with Bosnia and Herzegovina a readmission

Furthermore, a distinction should be made between readmission agreements concluded by Member States *before* and *after* their accession to the EU. Concerning the former, while the first paragraph of Art. 351 TFEU clearly states that these agreements "shall not be affected by the provisions of the Treaties", para. 2 affirms that "[t]o the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude". Art. 351(1) TFEU aims thus at ensuring compliance with pre-existing agreements concluded by Member States in the context of international law[429]. This means that compliance with EU law should not prevent Member States from fulfilling their international obligations arising from agreements with other countries, thereby avoiding accountability for international responsibility[430]. However, it should be added that the second paragraph of the provision also aims to prevent such binding international law from being incompatible with the obligations arising from the Treaties and, in general, from EU law. Member States are indeed obliged to intervene immediately to resolve any conflicts, even if they have not yet materialised. The obligations arising from Art. 351 TFEU are therefore also aimed at preventing "potential" future conflicts[431].

agreement between the European Community and Bosnia and Herzegovina, LIMITE 15465/06, Brussels, 17 November 2006; *Ibid.*

[429] See, *ex multis*, European Court of Justice (ECJ), Case C–812/79, *Attorney-General v Burgoa*, Judgement of 14 October 1980, ECLI:EU:C:1980:231, para. 2; European Court of Justice (ECJ), Case C–205/06, *Commission of the European Communities v Republic of Austria*, Judgment of 3 March 2009, ECLI:EU:C:2009:118, para. 35. Cfr. P. MANZINI, "The Priority of Pre-Existing Treaties of EC Member States within the Framework of International Law", in *European Journal of International Law*, Vol. 12, Issue 4, 2001, pp. 783 ff.

[430] F. CASOLARI, "L'interazione fra accordi internazionali dell'Unione europea ed accordi conclusi dagli stati membri con stati terzi per il contrasto dell'immigrazione irregolare", *op. cit.*, p. 6. On Art. 351, see also, *ex multis*, A. ROSAS, "The Status in EU Law of International Agreements Concluded by EU Member States", in *Fordham International Law Journal*, Vol. 34, No. 5, 2011, pp. 1304–1345; L. PANTALEO, "Member States Prior Agreements and Newly EU Attributed Competence", in *European Foreign Affairs Review*, Vol. 19, Issue 2, 2014, pp. 307–324; C. MASSA, *Gli accordi internazionali preesistenti tra Stati membri e Stati terzi nell'ordinamento dell'Unione europea*, Editoriale Scientifica, Naples, 2024.

[431] In this sense, European Court of Justice (ECJ), Opinion 1/03, 7 February 2006, *Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, EU:C:2006:81, para. 126: "[i]t is also necessary to take into account not only the current state of Community law in the area in question but also its future development, insofar as that is foreseeable at the time of that analysis". F. CASOLARI, "L'interazione fra accordi internazionali dell'Unione europea ed accordi conclusi dagli stati membri con stati terzi per il contrasto dell'immigrazione irregolare", *op. cit.*, p. 6. See also, S.

Conversely, as for the agreements concluded *after* accession to the Union, the Treaties do not contain any explicit obligations for Member States regarding the conclusion of international agreements with third countries or international organisations. Nonetheless, as Advocate General Sharpston has also pointed out, the obligations of the Member States in this context – which logically apply also to the conclusion of readmission agreements – "result both from the primacy of EU law and from the duty of *sincere cooperation* laid down in Article 4(3) TEU. Thus, the Treaties do affect Member States' right to conclude such agreements after their accession to the EU. They may do so only in areas falling within their competences and provided they comply with EU law"[432].

With regard to the specific case of the interplay between bilateral readmission agreements concluded by Member States with a third country and EURAs with the same country, all EURAs concluded so far contain a similar provision, which usually provides that:

"The provisions of this Agreement shall take precedence over the provisions of *any* bilateral agreement or arrangement on the readmission of persons residing without authorisation which have been or may [...] be concluded between individual Member States and [the third country concerned], *in so far as the provisions of the latter are incompatible with those of this Agreement"*[433].

It is therefore a "conflict clause", or more precisely a "supremacy clause", which clarifies the interplay between the agreement in which it is inserted and the provisions of other agreements[434]. The provision establishes that EURAs take

SALUZZO, *Accordi internazionali degli Stati membri dell'Unione europea e Stati terzi,* Ledizioni, Turin, 2018, p. 286.

[432] Opinion of Advocate General Sharpston delivered on 21 December 2016, Opinion procedure 2/15, *Free Trade Agreement between the European Union and the Republic of Singapore*, ECLI:EU:C:2016:992, para. 388.

[433] See Art. 21 of the EURA concluded with Belarus, emphasis added. The clause is practically identical in the agreements concluded with, inter alia, Hong Kong (Art. 19), Bosnia-Herzegovina (Art. 20), Montenegro (Art. 20), Macao (Art. 19), Sri Lanka (Art. 19), Moldova (Art. 20), Cape Verde (Art. 20), Armenia (Art. 21) and Georgia (Art. 20). The exception is the agreement with Albania, which merely states that its provisions take precedence over those in bilateral agreements, without adding the final sentence concerning possible incompatibility between them (see, *infra*, in this SUB-SECTION). Cfr. P. GARCÍA ANDRADE, *La acción exterior de la Unión Europea en materia migratoria. Un problema de reparto de competencias*, *op. cit.*, p. 343.

[434] *Ibid.*

precedence over *any* earlier agreements signed by Member States with the same third countries, *but only in cases where the earlier agreements are incompatible with the relevant EURA.* This in turn means that earlier bilateral agreements can still be applied as long as they do not conflict with an EURA[435]. This is valid only if there is an *actual*, and not merely a *potential*, incompatibility between them[436]. To date, Lithuania is the only country in 2014 to have formally suspended its bilateral readmission agreement with Ukraine on this ground, which was in force before the conclusion of an EURA with the third country concerned. However, other Member States suspended these agreements in practice, even though they did not formalise the suspension[437].

The only exception to the wording of "supremacy clause" described above are the EURAs concluded with the Russia and Albania[438]. As for the former, Art. 20 specifies that "[t]he provisions of this Agreement shall take precedence over the provisions of *any* bilateral treaties or arrangements on readmission which have been or may, [...], be concluded between individual Member States and the Russian Federation *insofar as the provisions of the latter treaties or arrangements cover issues that are dealt with by the present Agreement"*[439]. According to García Andrade, this clause is the one whose terms are best suited to the nature of the EU's external competence on readmission, which, as mentioned above, becomes exclusive once the EU exercises it. As a result, once this competence has been exercised by the Union, only the EURA applies and previous bilateral agreements are excluded to the extent that they overlap with the EURA concerned, in accordance with the principle of pre-emption. However, bilateral agreements may still apply in areas not covered by the EURA, unless they conflict with it, in which case the principle of primacy would resolve the issue[440]. The drafting of the

[435] European Migration Network (EMN), *Bilateral Readmission Agreements*, cit., p. 4.

[436] F. CASOLARI, "L'interazione fra accordi internazionali dell'Unione europea ed accordi conclusi dagli stati membri con stati terzi per il contrasto dell'immigrazione irregolare", *op. cit*., p. 11.

[437] For example, Belgium, Luxembourg, and the Netherlands regarding readmission agreements with Bosnia and Herzegovina, Montenegro, North Macedonia and Serbia. Cfr. European Migration Network (EMN), *Bilateral Readmission Agreements*, cit., pp. 4, 11.

[438] Art. 20 of the EURA concluded with Albania and Art. 18 of the EURA concluded with Russia.

[439] Emphasis added.

[440] P. GARCÍA ANDRADE, *La acción exterior de la Unión Europea en materia migratoria. Un problema de reparto de competencias*, *op. cit.*, p. 345.

"supremacy clause" in other EURAs, different from the one concluded with Russia, can be explained by the fact that they do not necessarily deal with the relationship between the exercise of external competence by the EU and the powers of the Member States, but rather with the relationship between the agreements themselves as instruments of international treaty law[441]. For example, Art. 59 of the Vienna Convention on the Law of Treaties clarifies that a treaty is considered to have been terminated if all the parties to it conclude a subsequent treaty on the same subject matter and the provisions of the later treaty are so incompatible with those of the earlier treaty that both cannot be applied simultaneously.

As for Albania, Art. 20 of the EURA concluded with this third country states that "[t]he provisions of this Agreement shall take precedence over the provisions of *any* bilateral agreement or arrangement on the readmission of persons residing without authorisation which have been or may [...] be concluded between individual Member States and Albania". This clause is certainly "stronger" than the one contained in the EURAs concluded with other third countries: it suggests that the precedence of the EU–Albania EURA can be defined over *any other existing bilateral "formal" readmission agreement or "informal" arrangements with the third country concerned*. However, this would be a case of "absolute pre-emption" by the EU, which is contrary to Protocol No. 25 to the TFEU on the exercise of shared competence: "[w]ith reference to Article 2 of the Treaty on the Functioning of the European Union on shared competence, when the Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the *whole* area". Such a notion of "absolute pre-emption", as seems to be contained in the clause in the EURA with Albania, may be conceivable if the EU's external competence is exclusive *ab initio*: however, it does not apply to the exercise of shared competences, such as the conclusion of readmission agreements[442].

[441] *Ivi*, pp. 346–347.

[442] On this point, see *ex multis*, A. ARENA, *op. cit.*, pp. 111–112; T. KONSTADINIDES,"EU Foreign Policy under the Doctrine of Implied Powers: Codification Drawbacks and Constitutional Limitation", in *European Law Review*, Vol. 39 Issue 4, 2014, p. 512; C. TIMMERMANS, "ECJ Doctrines on Competence", in L. AZOULAI (ed.), *The Question of the Competence in the European Union*, Oxford University Press, Oxford, 2014, p. 162.

Finally, it should be also mentioned that the monitoring of the interplay between EURA and Member States' readmission agreements is crucial for the coordination between the two levels of action. However, this monitoring activity requires Member States to provide comprehensive information on existing readmission agreements and protocols adopted in accordance with the principle of sincere cooperation. Nonetheless, this information is often partial and unreliable[443]. Evaluations of national readmission agreements are indeed not carried out by all Member States. This insufficient evaluation may be due to resource limitations, institutional constraints or a perceived lack of need. Without regular evaluation, it can be difficult to assess the effectiveness of bilateral agreements and identify areas for improvement[444]. What is more interesting, in our opinion, is the lack of transparency that characterises this bilateral readmission agreement in several cases, as well as the vagueness of the terms used to refer to respect for individual rights. In fact, in most cases, researchers, academics and legal practitioners trying to analyse such agreements face difficulties in obtaining some of the official texts of the agreements. This difficulty became particularly apparent during the writing of this thesis. In theory, however, such challenges should not typically arise with so-called "formal" readmission agreements, which are often publicly available through government websites, official publications or databases of international agreements. In principle, it should be possible to access bilateral readmission agreements as they are formal treaties adopted through national constitutional procedures. In practice, however, this can be difficult, highlighting an important issue of transparency. Often, their existence is indeed known through the documents of scholarships and/or international organisations, based on "political" statements by negotiators. The fact that much of the specific content of readmission agreements is unknown has – even potentially – negative consequences for the protection and respect of fundamental rights. This is a key issue in an area such as migration[445].

[443] European Migration Network (EMN), *Bilateral Readmission Agreements,* cit., p. 6. See also, COM (2011) 76 final, cit., pp. 11.

[444] European Migration Network (EMN), *Good practices in the return and reintegration of irregular migrants: Member States' entry bans policies and use of readmission agreements between Member States and third countries*, European Commission, Brussels, 2014, p. 29.

[445] M. BORRACCETTI, "L'Italia e i rimpatri: breve ricognizione degli accordi di riammissione", in *Diritto, immigrazione e cittadinanza*, 1/2, 2016, p. 58.

4.3. The role of the EU and Member States in implementing EURAs

Moving from the "theoretical" framework to the practical implementation of readmission between the Member States and the Union, both the EU and its Member States share responsibility for the enforcement of EURAs. Indeed, the implementation of the latter requires coordinated action between the Union and its Member States, particularly when it comes to applying their provisions "on the ground".

In this context, all EURAs include a specific section entitled "Implementation and Application" in which the JRCs play a fundamental role: indeed, they are responsible for ensuring the consistent application and effective implementation of the agreements[446]. The JRCs should address questions of interpretation or practical application of these agreements, propose amendments or additions to their provisions and exchange relevant information. The decisions of the JRCs are binding on the parties to the agreements, with the exception of the EURA with Pakistan[447]. The JRCs follow their own rules of procedure, and their decisions and operational arrangements are confidential[448]. Nonetheless, despite the "official" provisions set out in the EURAs, it remains difficult in practice to assess the real added value of these agreements in readmission procedures and their actual implementation, even with the support of the JRC. Indeed, limited information is available on their operability, use and overall effectiveness. In this regard, there is also considerable doubt about how the Commission currently measure the effectiveness of EURAs, which is mainly a numerical exercise comparing removal orders and forced return rates. Indeed, when measuring effectiveness, the Commission appears to place particular – if not exclusive – emphasis on low return rates[449]: nevertheless, it is worth noting that the return rate alone should not be used

[446] See, for instance, Section VII of the EURAs concluded with Hong Kong, Sri Lanka and Russia.

[447] See Art. 16 of the EURA concluded with Pakistan.

[448] S. CARRERA, *op. cit*., p. 34.

[449] In this sense, European Commission, Communication COM (2015) 240 to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European Agenda Migration, Brussels, 13 May 2015

as the only measure to evaluate the effectiveness of the implementation of an EURA[450].

In addition, one of the main challenges is the high degree of secrecy surrounding the review and verification of the implementation of EURAs. Although the role of the JRC is crucial for all EURAs, the decisions and internal discussions specific to each agreement within the JRC are not *publicly available* or *disclosed*, as mentioned above[451]. As noted by Carrera, the secrecy of decisions and discussions in these committees has several fundamental consequences. Indeed, the JRCs are likely to take decisions that modify the wording and procedural details of a particular EURA. This includes establishing practical methods for conducting interviews to determine the nationality of undocumented returnees and managing cases that require accelerated processing. In addition, JRCs are responsible for finding solutions to specific practical challenges that arise during the implementation of EURAs[452]. Without insight into these aspects, it becomes difficult to fully understand how EURAs are implemented at Union level.

The involvement of Member States is also particularly important in this context, *inter alia* because of the above-mentioned gaps at Union level. Indeed, Member States play a key role in the effective implementation of EURAs through various mechanisms, including the establishment of administrative procedures, the provision of necessary resources for enforcement and the coordination of activities with relevant national agencies and authorities. In addition, in the context of the "Implementation and Application" section, which, as mentioned above, is included in all EURAs, a key aspect within this section relates to bilateral implementation protocols[453]. In this regard, in addition to bilateral readmission agreements concluded by individual Member States with third countries, as also mentioned

[450] European Court of Auditors, cit., para. 3.

[451] Carrera officially requested access to the Operational Conclusions from the JRC meeting on February 2, 2016, related to the EURA concluded with Pakistan, from the Commission (DG Migration and Home Affairs). The Commission denied this request in a letter dated June 6, 2016. The refusal was based on an agreement with Pakistan that the records and documents from the JRC would remain confidential. Disclosing this information, according to the Commission, would harm both current and future relations with Pakistan within the Committee and negatively impact the EU's negotiating position on this sensitive issue. Therefore, releasing the documents would undermine the protection of the public interest concerning international relations, as outlined in Regulation 1049/2001. S. CARRERA, *op. cit.*, p. 41.

[452] *Ibid.*

[453] *Ivi*, p. 33.

above Member States can in fact conclude bilateral implementing protocols with third countries *already* covered by EURAs. The purpose of these protocols is to implement the provisions of the relevant EURAs and to provide practical and operational guidance to national authorities on the procedures to be followed for the readmission of persons found to be irregularly present on their territory[454].

Bilateral implementing protocols serve thus as a technical support for the operationalisation of EURAs[455]. The implementation protocols concluded by the Member States shall, inter alia, contain provisions on: "(a) the competent authorities, the border crossing points, the exchange of information on contact points and the languages in communication; (b) the modalities for readmission under the accelerated procedure; (c) the conditions for escorted transfers, including the transit of third-country nationals and stateless persons under escort [...]"[456]. Furthermore, almost all EURAs affirm that the entry into force of the implementing protocols is subject to notification to the "competent" JRC[457]. The purpose of the mandatory notification requirement is to ensure that the JRC fulfils its monitoring role with regard to the implementation of the EURA. This is achieved through a regular exchange of information between Member States and the third country concerned[458].

The text of most of the EURAs creates an *obligation for Member States* to conclude implementing protocols, as can be deduced from the use of the word "shall"; however, this obligation is contingent upon a request from either a Member State or the third country involved[459]. The only agreements where the Protocols are optional are those with Macao, Hong Kong, Sri Lanka, Albania, Ukraine and Pakistan, which is reflected in the use of the word "may"[460]. Partly because of these

[454] European Migration Network (EMN), *Bilateral Readmission Agreements,* cit., p. 2.

[455] *Ibid.*

[456] Art. 20 of the EURA concluded with Russia. In most Member States, the authorities in charge of readmission are usually the police, immigration authorities, border guards and Ministries of the Interior. In some countries, several authorities share readmission responsibilities. S. CARRERA, *op. cit.*, p. 49.

[457] See, among others, Art. 19 (2) of the EURA concluded with Armenia; Art. 19 (2) of the EURA concluded with Cape Verde; Art. 19 (2) of the EURA concluded with Moldova.

[458] M. PREVIATELLO, *op. cit.*, p. 106.

[459] See, for example, Art. 20 of the EURAs concluded with Belarus, Azerbaijan and Armenia; Art. 19 of the EURA concluded with Cape Verde.

[460]Art. 18 of the EURAs concluded with Macao, Hong Kong and Sri Lanka; Art. 19 of the EURA concluded with Albania; Art. 16 of the EURA concluded with Ukraine; Art. 17 of the EURA concluded with Pakistan.

differences between EURAs, scholars have pointed to a discrepancy between Member States in their commitment to EURA implementation protocols with third countries[461]. Only a few Member States have chosen to pursue such protocols, mostly with third countries close to the EU's external borders, such as Armenia and Russia, even though the EURAs concluded with these countries make the conclusion of implementing protocols as mandatory[462]. For the EURA with Pakistan, where the conclusion of these protocols is optional, only the United Kingdom (UK) – when it was still a Member State – had an implementing protocol[463]. What is more, most of the existing implementing protocols have been ratified and formally entered into force, but their operationalisation has often been delayed, sometimes for several years after the conclusion of the corresponding EURA[464].

The lack of uniformity among Member States in concluding or pursuing these Protocols could thus lead to inconsistencies in how EURAs are enforced across different countries. Furthermore, the confidentiality surrounding the exact content of these implementing protocols adds another layer of complexity to the situation. Analogous to the confidentiality of determinations made by the JRCs, the specific content of these protocols is indeed not publicly disclosed[465]. The only information available on these agreements has been disseminated through a limited number of studies, such as that carried out by the EMN in 2014, based on data collected from Member States' national contact points[466]. According to this study, by 2012, most of the Member States, including Austria, Belgium, Bulgaria, the Czech Republic, Estonia, Germany, Greece, Finland, France, Hungary, Lithuania, Luxembourg, Latvia, the Netherlands, Poland, Portugal, Romania, Slovenia and Spain, had

[461] M. PREVIATELLO, *op. cit.*, p. 106.

[462] As for Armenia: Belgium, Bulgaria, Czech Republic, Estonia, France, Germany, Luxembourg, the Netherlands; as for Russia: Cyprus, Germany, Estonia, Croatia, Italy, Luxembourg, Latvia, Poland, Portugal, Slovakia, Sweden, the Netherlands Austria, Czech Republic, Estonia, Poland, Lithuania, Luxembourg, the Netherlands. Belgium, Luxembourg, and the Netherlands signed bilateral implementing protocols with Russia and Ukraine, but they did not enter into force. Cfr. European Migration Network (EMN), *Bilateral Readmission Agreements,* cit., p. 2.

[463] S. CARRERA, *op. cit.*, p. 42.

[464] European Migration Network (EMN), *Bilateral Readmission Agreements,* cit., p. 2.

[465] S. CARRERA, *op. cit.*, p. 42.

[466] European Migration Network (EMN), *Good practices in the return and reintegration of irregular migrants: Member States' entry bans policies and use of readmission agreements between Member States and third countries*, cit. See also, *ibid.*

started to apply the implementing protocols to the EURAs with third countries. In addition, protocols facilitating the implementation of EU readmission agreements entered into force in two Member States in 2013, namely Hungary and Slovakia[467].

On closer examination, however, it is worth noting that EURAs are international agreements and, as such, are binding on Member States. Consequently, the latter are obliged to comply with the provisions of the EURAs, which are in principle directly enforceable by Member States and usually do not require additional measures. They independent and immediately effective measures that do not always demand the negotiation of bilateral implementing agreements with the respective third country[468]. In the context of EU law, the direct applicability of international agreements refers to the principle that the provisions of these agreements can have immediate legal effect in the legal systems of the Member States without the need for further national implementation. However, not all provisions of international agreements concluded by the EU – and so, EURAs – are necessarily directly applicable. The ECJ has established some criteria for determining whether provisions of international agreements are directly applicable. Indeed, according to the Court, "[a] provision in an agreement concluded by the [EU] with non-member countries must be regarded as being directly applicable when, regard being had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure"[469]. Once a provision of an international agreement has been determined to be directly applicable, it takes precedence over conflicting national laws within the legal systems of the Member States[470].

Overall, the principle of direct applicability of international agreements enhances legal certainty and ensures the effective implementation of EU law in all Member States. It reflects the EU's commitment to respect its international

[467] *Ivi*, p. 21.

[468] J. P. CASSARINO, *Readmission Policy in the European Union*, cit., p. 19; E. CARLI, *op. cit.*, p. 17.

[469] European Court of Justice (ECJ), Case C–12/86, *Meryem Demirel*, Judgment of 30 September 1987, ECLI:EU:C:1987:400, para. 14.

[470] Court of Justice of the European Communities (CJEC), Case C–106/77, *Simmenthal*, Judgment of 9 March 1978, ECLI:EU:C:1978:49, para. 17. Cfr. U. VILLANI, *op. cit.*, p. 453.

obligations and to promote coherence within its legal framework. Thus, from the perspective of EU law, EURAs become effective and binding on the parties concerned, creating rights and obligations, irrespective of whether Member States have concluded the necessary implementing protocols[471]. Nonetheless, it remains unclear whether all provisions within EURAs are directly applicable and capable of producing direct legal effects when incorporated into national legal frameworks, as this has not been explicitly clarified. However, the provisions contained in these agreements seem to be designed to be self-executing and have sufficient material completeness to obviate the need for further implementation by the Member States. This assertion is also evident in the language of all the EURAs, where their direct applicability is sometimes implicit, sometimes explicit. As an example, in earlier agreements, it is explicitly stated that an implementing protocol concluded between a Member State and the third country concerned is to be drawn "[w]ithout prejudice to the direct applicability" of the pertinent EURA[472]. On this point, in *Kupferberg*, the Court of Luxembourg emphasised that the direct effect of an international agreement must be determined primarily by the wording of its provisions. Only if the agreement itself does not provide a clear answer to this question will it be for

[471] A distinction must be made between the concepts of "direct effect" and "direct applicability". Indeed, they are related but distinct concepts which refer to different aspects of the legal effects of EU law, including international agreements concluded by the EU. Direct effect refers to the possibility for natural or legal persons to rely on certain provisions of EU law before national courts. If a provision has direct effect, it means that individuals can rely on it directly in legal proceedings and that national courts are obliged to enforce it, even if it conflicts with national law. Direct effect can be vertical, *i.e.*, it applies to relations between individuals and the State, or horizontal, *i.e.*, it applies to relations between private parties. Direct applicability instead refers to the automatic integration of international agreements into the EU legal order without the need for further domestic implementing measures. In this sense, European Court of Justice (ECJ), Opinion of Advocate General Sharpston, delivered on 15 July 2010, *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky, C–240/09*, ECLI:EU:C:2010:436, para. 38. See, *in extenso*, N. GHAZARYAN, "Who Are the 'Gatekeepers'? In Continuation of the Debate on the Direct Applicability and the Direct Effect of EU International Agreements", in *Yearbook of European Law*, Vol. 37, 2018, pp. 27–74.; K. LENAERTS, "Direct Applicability and Direct Effect of International Law in the EU Legal Order", in I. GOVAERE et AL.**,** *The European Union in the World: Essays in Honour of Marc Maresceau*, Brill | Nijhoff, Leiden, 2014, pp. 45–64.

[472] Art. 18 (1) of the EURAs concluded with Macao, Hong Kong and Sri Lanka; Art. 16 (1) of the EURA concluded with Ukraine; Art. 20(1) of the EURA concluded with Armenia; Art. 17 (1) of the EURA concluded with Pakistan. In this sense, E. CARLI, *op. cit.*, p. 24. For the sake of accuracy, it should be stressed that, despite the wording of the text, which would give direct applicability to a particular EURA, it must always be taken into account that the Court's criteria mentioned above are met.

the competent courts, in particular the ECJ, to resolve the issue, as with any question of interpretation concerning the application of the agreement within the EU[473].

The Commission also appears to support the direct applicability of EURAs, stating in 2011 that "[t]he Commission (with strong support from the Member States) has always insisted that the EURAs are self-standing, directly operational instruments which do not necessarily require the conclusion of bilateral implementing protocols with the third country. In the longer-term protocols are mere facilitators, even if they are sometimes mandatory[474]". According to this interpretation, such protocols would unnecessarily complicate the already "crowded" framework of EU readmission policy in the broad sense. Indeed, such protocols would be *de facto* redundant, as relations with a specific third country regarding readmission could potentially be regulated by multiple sources[475]. This situation can easily make the monitoring of all these instruments even more difficult than it already is, given also the challenges already discussed here.

5. The autonomy of EU law and its relevance in shaping readmission cooperation

Several observations can be made from the discussion so far. First, in the context of the EU's "formal" approach to readmission, the influence of international law can be seen not only in the literal texts of readmission clauses and EURAs, but also in numerous documents issued by European institutions dealing with the issue. The EU's understanding of readmission and related obligations under international law is consistent with the customary obligation to readmit nationals, while the readmission of TCNs is considered legitimate only where it is explicitly covered by treaty law. At the same time, the European integration project has often been described as a "self-contained regime" within international law, a notion advanced in the academic discourse of the 1980s[476]. The metaphor introduced by Simma and

[473] Court of Justice of the European Communities (CJEC), Case 104/81, *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.*, Judgement 26 October 1982, ECLI:EU:C:1982:362, para. 17.

[474] COM (2011) 76 final, cit., p. 4. Cfr. S. CARRERA, *op. cit.*, p. 33.

[475] M. PREVIATELLO, *op. cit.*, p. 23. See also, C. MOLINARI, *Going All Out to Manage Migration: A Constitutional Analysis of the EU Readmission Policy*, *op. cit.*, p. 155.

[476] B. SIMMA, "Self-Contained Regimes", in *XVI Netherlands Yearbook of International Law*, 1985, pp. 111–136.

Pulkowski in their 2006 article vividly portrays the EU legal order as a "planet" within the broader "universe" of international law, reflecting its distinct legal nature and structure[477]. This concept underscores the autonomy of its legal system both internally and externally, establishing its independence not only from the legal order of its individual Member States but also from international law[478]. This framework of "self-containment" extends, of course, to issues related to readmission, which is in our interest.

On the one hand, as underlined in the INTRODUCTION, the "internal dimension" of the autonomy of the EU law is essential for maintaining the unity and consistency of the Union's legal framework, ensuring its supremacy and uniformity across all Member States. This is particularly significant in areas of shared competence, such as the negotiation and conclusion of readmission agreements. As Roldán Barbero notes, the formal replacement of Member State agreements by agreements at EU level provides a more secure legal framework when an issue falls within EU competence[479]. In our opinion, the lack of clear data on the proper implementation and even the content of many bilateral agreements complicates legal transparency and creates uncertainty as to the correct exercise of this competence. This ambiguity makes it difficult to assess whether the "internal" dimension of the autonomy of EU law has really served its purpose in this area. While in the past the conclusion of readmission agreements was primarily a matter for Member States, the continuing practice of Member States independently concluding such agreements with third countries – despite the EU's explicit external competence in this area and its growing role – today raises concerns about the transparency and legal clarity of the relationship between bilateral readmission agreements and EURAs[480]. The fragmentation of readmission practice within the EU may also have significant implications for the Union's role in the "international legal arena". Indeed, this

[477] B. SIMMA, D. PULKOWSKI, "Of Planets and the Universe: Self-contained Regimes in International Law", in *European Journal of International Law*, Vol. 17, 2006, pp. 483–529. Cfr. T. MOLNÁR, *The Interplay between the EU's Return Acquis and International Law*, *op. cit.*, p. 3.

[478] *Infra*, INTRODUCTION.

[479] J. ROLDÁN BARBERO, "The Relationship of the Member States' International Agreements with the EU", in P. EECKHOUT, M. LÓPEZ-ESCUDERO (eds.), *The European Union's External Action in Times of Crisis*, Hart Publishing, Oxford and Portland, Oregon, 2016, pp. 249 ff.

[480] F. CASOLARI, "L'interazione fra accordi internazionali dell'Unione europea ed accordi conclusi dagli stati membri con stati terzi per il contrasto dell'immigrazione irregolare", *op. cit.*, p. 25.

fragmentation risks creating inconsistencies in the obligations imposed on third countries, as different agreements may set different standards and requirements for readmission. Such inconsistencies may undermine the EU's credibility as a single actor in international relations, complicate negotiations and reduce the predictability and reliability of its legal framework.

On the other hand, the "external" dimension of the autonomy of EU law, as also stated in the INTRODUCTION of this work, does not suggest that the EU legal order and the international legal order coexist without any kind of interplay. In other words, "the Community's municipal legal order and the international legal order pass by each other like ships in the night"[481]. The understanding of readmission adopted by the EU, along with the international obligations arising from readmission clauses and EURAs, described in this CHAPTER exemplifies this integration. These discussions also lead us to reflect on the fact that the interplay between EU law and international law is not unidirectional. While EU legal framework, in this case on readmission, is undoubtedly shaped by international law, the reverse is also true: international law has increasingly been influenced by the norms and legal developments of the EU[482]. This outward dimension highlights the EU's growing influence as an international legal actor, capable of shaping not only its own legal framework but also the wider international legal order. The EU's readmission policy is a clear example of how EU law can, *in theory*, influence international legal practice. This is evident in the inclusion of readmission clauses in broader agreements not strictly related to migration, as well as in the inclusion of TCNs clauses in EURAs. While the "practice of TCNs clauses" had already emerged in international contexts before becoming standard in EURAs, the latter have undoubtedly become the most significant example of this development, setting a "precedent" that other States are likely to follow[483]. Moreover, the EU's position during the GCM negotiations can be seen as an attempt to build a broader global

[481] T. MOLNÁR, "The concept of autonomy of EU law from the comparative perspective of international law and the legal systems of Member States", *op. cit.*, p. 6. See also, E. DUBOUT, "La relativité de la distinction des normes du droit de l'Union européenne et du droit international", in de L. BURGORGUE-LARSEN et AL. (eds.), *Les interactions normatives. Droit de l'Union européenne et droit international*, Editions A. Pedone, Paris, 2012, pp. 17–51.

[482] *Supra*, INTRODUCTION.

[483] *Supra*, CHAPTER I, SECTION 2.

consensus on readmission obligations, while at the same time reinforcing its own position on the issue. Ultimately, the EU's narrative has secured a prominent place within the GCM framework in the understanding of the international obligation to readmit[484].

Nevertheless, in our view, in practice the EU's "formal" cooperation on readmission – such as through the inclusion of readmission clauses and the conclusion of EURAs – is essentially an area of bilateral cooperation where the EU and third countries are free to negotiate and agree rules governing their bilateral relations, as long as these *jus dispositivum* norms do not contravene customary international law or relevant treaty obligations, such as those arising from the ECHR[485]. This has been demonstrated, for example, by the Union's partial incorporation of the Strasbourg Court's jurisprudence in its interpretation of the STC concept when dealing with readmission[486]. Nonetheless, the treaty practice reflected in EURAs does not lend itself to *"universal codification"*, as no uniform practice or general rules can be derived from the growing network of these agreements[487]. For example, the EU remains the only international actor to *systematically* include the TCNs clause in all its readmission agreements, a practice not *consistently* followed by other States, as highlighted in the previous CHAPTER.

A key conclusion is that the EU's formal cooperation on readmission is closely aligned with existing obligations under international law, in particular the customary norm requiring States to readmit only their own nationals, while the readmission of TCNs is governed by treaty law. Ultimately, the EU has adopted a more conservative approach to readmission, seeking to maintain the *status quo* and

[484] E. GUILD, K.T. WEATHERHEAD, cit. *Supra,* SUB-SECTION 3.1 of this CHAPTER.

[485] Cfr. T. MOLNÁR, "EU Migration Law Shaping International Migration Law in the Field of Expulsion of Aliens: The Empire Strikes Back?", *op. cit.,* p. 60.

[486] Moreover, the relevance of the ECHR is enshrined at the level of primary EU law, which further reinforces its influence. The EU Charter incorporates the fundamental rights protected by the ECHR, effectively making these rights part of EU law. Art. 52(3) of the Charter states that rights guaranteed by the Charter which correspond to rights guaranteed by the ECHR shall have the same meaning and scope as those rights. Moreover, Art. 6(2) clarifies that [t]he Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties". On this point, see also, *ex multis,* J. WOUTERS, M. OVÁDEK, *The European Union and Human Rights: Analysis, Cases, and Materials*, Oxford University Press, Oxford, 2021, pp. 212–312. *Supra,* SUB-SECTION 3.2 of this CHAPTER.

[487] T. MOLNÁR, "EU Migration Law Shaping International Migration Law in the Field of Expulsion of Aliens: The Empire Strikes Back?", *op. cit.,* p. 60.

showing little ambition to set new standards beyond the current legal framework, whether in terms of the EU acquis or international obligations. This position only fulfils the first part of Art. 3(5) TEU, which mandates the EU to uphold and promote its values and interests in external relations, but falls short of the second part, which calls for the development of international law. This represents a partial and unambitious operationalisation of a constitutionally significant objective in the EU's external relations[488]. It is also particularly interesting to note that the EU's "formal" readmission framework reflects the "State-based perspective" described in the previous CHAPTER, *i.e.*, a State-centric approach that prioritises the return of irregular migrants at all costs, often to the detriment of voluntary considerations[489]. A clear example of this can be seen in the negotiations surrounding the Samoa Agreement, as mentioned above, where the EU pushed for a stricter legal obligation to ensure the readmission of irregular migrants regardless of their willingness to return[490]. This example underlines the EU's emphasis on readmission "whatever the cost".

The high degree of compliance with international law described above is further evidenced by the inclusion of "human rights clauses" in EURAs and the *formal textual emphasis* on human rights protection mechanisms in the context of readmission. However, as discussed in SECTION 3.2, the limited focus on the actual implementation of these policies hinders a thorough assessment of whether these formal commitments are actually respected in practice. The risk of compromising human rights standards remains significant, in particular due to the lack of effective monitoring by EU institutions at both national and Union level. In particular, the last *comprehensive* and *detailed* evaluation of the EURAs took place in 2011, leaving a significant gap in the data needed for a full assessment[491].

Over the last decade, the Union has made limited progress in using the "formal" instruments described in this CHAPTER, notably EURAs. Partner third countries have generally been reluctant to cooperate with the EU through the "traditional"

[488] In this sense, see T. MOLNÁR, *The Interplay between the EU's Return Acquis and International Law*, *op. cit.*, p. 201.
[489] *Supra*, CHAPTER I, SECTION 1.2.
[490] *Supra*, SECTION 2 of this CHAPTER.
[491] COM (2011) 76 final, cit.

channels described above because of the constraints imposed by these methods, the difficulties of negotiation and the challenges of implementing "conventional" agreements[492]. In the absence of appropriate conditions for including readmission clauses in agreements or concluding formal EURAs, the EU's focus on enforcing an *effective* readmission policy has led to a clear trend towards "informalisation". It can therefore be argued that both the lack of conditions for concluding fully-fledged EU readmission agreements and the EU's need to make its return policy effective have paved the way for a trend towards "informalisation" of EU readmission policy[493]. Consequently, along with "standard" binding solutions under EU law, other kinds of tools have gradually emerged during the "second phase" of the EU return and readmission policy. The asymmetric costs and benefits of cooperation on readmission have led the EU (but also its Member States individually) to opt for flexible cooperation frameworks that bypass lengthy procedures and can be easily renegotiated to prevent unilateral withdrawal, given way to an "more flexible phase" on cooperation on readmission with third countries[494]. The objective of the EU and its Member States was to find more flexible solutions for better management of migration flows and readmission cooperation with third countries. The paramount priority set by the EU became "to achieve fast and operational returns, and not necessarily formal readmission agreements"[495]. Therefore, the Union has started to explore alternative approaches to achieve an effective readmission policy, *i.e.,* what we called "transformative trends". The "turn" to "informal" arrangements has been prompted by the failure to secure "standard" readmission cooperation with key third countries, leading the EU to explore alternative methods and a broader range of policies. In this context, recourse to "informal" solutions seems to have been the most appropriate response to the circumstances. The next CHAPTER aims to examine the trend towards "informalisation" in EU readmission-related policy, with a view to exploring whether and to what extent it may influence international norms governing

[492] European Court of Auditors, cit., sections IV–V. Cfr. C. MILANO, *op. cit.*, pp. 836–837.

[493] E. FRASCA, E. ROMAN, *op. cit.*, p. 933.

[494] J. P. CASSARINO, "A Reappraisal of the EU's Expanding Readmission System", *op. cit*., p. 132.

[495] J. P. CASSARINO, M. GIUFFRÉ, *Finding Its Place in Africa: Why Has the EU Opted for Flexible Arrangements on Readmission?*, FMU Policy Brief No. 01/2017, p. 4.

readmission. By examining the EU's use of "informal" instruments to deal with readmission, the analysis seeks to uncover whether this "flexible" shift could have broader implications for the international legal landscape on this issue and, more generally, for the governance of migration.

CHAPTER III

THE "INFORMALISATION" PROCESS WITHIN THE EU READMISSION POLICY

TABLE OF CONTENTS: 1. "Informal" tools: key concepts and definition attempts. – 2. EU "informal" cooperation on readmission with third countries: laying the groundwork. – 3. The main features and challenges of EU readmission arrangements. – 3.1. The procedure for the adoption of "informal" readmission arrangements and their legal nature. – 3.2. Readmission-related provisions. – 3.3. Human rights issues. – 4. Readmission and return through administrative cooperation: the role of FRONTEX and its Working Arrangements. – 5. "Informal" cooperation instruments with readmission provisions in the aftermath of the New Pact on Migration and Asylum. The case of "global partnerships". – 6. Towards a strategic "institutionalisation" of the soft law mechanism in the area of readmission? The (potential) impact on international law.

1. "Informal" tools: key concepts and definition attempts

The EU's "standard" approach to cooperation on readmission, outlined in the previous CHAPTER, has fallen short of the intended results. Indeed, the EU has limited success in concluding readmission agreements, as noted by the European Court of Auditors[496]. Persistent challenges, particularly the issue of the TCNs clause, have continued to hamper negotiations. As noted in the previous CHAPTER, third countries are often reluctant to enter into readmission agreements, which have not consistently proved effective in ensuring the timely execution of return decisions[497]. This "failure" – together with the uncertainties surrounding international obligations on readmission as analysed in CHAPTER I – has given the Union the opportunity to abandon the early and "formal" approach in favour of more "flexible" methods of cooperation with third countries in the field of readmission. These "informal" arrangements specifically address the issue of the readmission of TCNs and reflect the obligations set forth in the EURAs.

[496] European Court of Auditors, cit., para. 26.
[497] *Supra*, CHAPTER II, SECTION 3.

In particular, the "informal" arrangements adopted by the EU so far are: the EU–Türkiye Statement; the "Joint Way Forward with Afghanistan" (JWF) of the 2nd of October 2016, which was replaced in 2021 by the "Joint Declaration on Migration Cooperation between Afghanistan of the EU" (JDMC), agreed on the 26th of April 2021[498]; the "EU–Guinea Good Practices", in force since July 2017; the "EU–Bangladesh Operating Procedures for the Identification and Return of Persons without an Authorization to Stay (SOPs with Bangladesh)", agreed in September 2017[499]; the "EU–Gambia Good Practices on Identification and Return", which entered into force on 16 November 2018; the "EU–Côte d'Ivoire Joint document on the procedures for identification and readmission of migrants presumed to be Ivorian nationals staying irregularly in the EU", in force since October 2018; the "EU–Ethiopia Admission Procedures", agreed on 5 February 2018[500]. It is also worth noting that in 2016 the EU also finalised the "Standard Operating Procedures between the EU and the Republic of Mali for the identification and return of persons without an authorisation to stay" (SOPs with Mali)[501]. Although the Malian government decided "to backtrack on signature [of the SOPs], upon facing strong public pressure", the document nevertheless provides valuable insights relevant to

[498] "Joint Way Forward on migration issues between Afghanistan and the EU" (JWF), agreed in Kabul on the 2nd of October 2016, available here: https://www.eeas.europa.eu/sites/default/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf; European Commission, Request for endorsement of the Joint Declaration on Migration Cooperation between Afghanistan and the EU, 13 January 2021, LIMITE 5223/21.

[499] Available here: https://arts.unimelb.edu.au/__data/assets/pdf_file/0009/3409830/Bangladesh-1.pdf.

[500] Council of the European Union, General Secretariat, *Draft Admission procedures for the return of Ethiopians from European Union Member States*, LIMITE MIGR 233 COAFR 332, Brussels, 18 December 2017. This is a leaked document, not an official one. See also, more in detail, E. FRASCA, E. ROMAN, *op. cit.*, p. 941. Cfr. J. SANTOS VARA, L. PASCUAL MATELLÁN, "The Externalisation of EU Migration Policies: The Implications Arising from the Transfer of Responsibilities to Third Countries", in W. T. DOUMA ET. AL., *The Evolving Nature of EU External Relations Law*, Springer, T.M.C. Asser Institute, The Hague, 2021, p. 37. There is no official reference to the "informal" readmission arrangements with Guinea, The Gambia and Côte d'Ivoire, as they have not been made public, as will be shown in the following pages. Their existence, if not their content, is known from official documents and communications from the Commission or other EU institutions. See, for example, European Commission, Report to the Council. Assessment of third countries' level of cooperation on readmission in 2021, COM (2022) 735 final, Brussels 8 December 2022, pp. 55, 78 and 90. *Infra*, SECTION 3.

[501] Council of the European Union, General Secretariat, Draft Standard Operating Procedures between the EU and the Republic of Mali for the identification and return of persons without an authorisation to stay, LIMITE 15050/16, Brussels, 6 December 2016.

addressing the research question of the thesis[502]. For this reason, it seems appropriate to proceed with their analysis and include them in our considerations. Moreover, in 2023 the EU also endorsed a "non-binding instrument" with Iraq to enhance cooperation on the readmission of Iraqi nationals: at this stage, there is no text of the future arrangement, only a request to the Council to authorise the Commission to open negotiations[503]. The stated objective is to establish an overarching arrangement at EU level on return and readmission. Such an arrangement should bring clarity, transparency and predictability to the process for both Parties, while ensuring that the future "informal" readmission arrangement does not replace existing bilateral agreements or impose legal readmission obligations on Member States[504].

CHAPTER III examines the developing trend of "informalisation" in the EU's cooperation with third countries on readmission. Building on the shortcomings of the EU's "formal" approach discussed in the previous CHAPTER, the analysis focuses on the shift towards more "flexible" arrangements for the readmission of irregular migrants. These tools reflect the obligations set out in EURAs but allow for greater adaptability. After contextualising the phenomenon within the broader framework of the "informalisation" of the EU's external action on migration (SECTION 2), SECTION 3 examines the main features and challenges of "informal" readmission arrangements, focusing mainly on their legal nature, the readmission-related provisions they contain and their human rights implications. Moreover, this CHAPTER highlights the role of administrative cooperation, in particular through FRONTEX and its Working Arrangements, as a key example of how

[502] European Commission, Report to the Council. Assessment of third countries' level of cooperation on readmission in 2019, COM (2021) 55 final, Brussels, 10 February 2021, p. 53.

[503] Council of the European Union, General Secretariat, *A Non-Binding Instrument on Return and Readmission between the EU and Iraq − Authorisation to Negotiate an NBI*, LIMITE 13551/23, Brussels, 4 October 2023. A readmission clause already existed in a "formal" global cooperation agreement with Iraq, *i.e.*, the EU–Iraq Partnership and Cooperation Agreement, which entered into force in 2018 (Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Iraq, of the other part, 11 May 2012, Art. 105. This agreement obliges both Parties to take back their nationals who are irregularly present on the other's territory. In practice, however, Iraq's cooperation has been limited. While it has mainly facilitated voluntary returns, it has only occasionally agreed to involuntary returns, mostly of criminals. Cfr. Council of the European Union, General Secretariat, *A Non-Binding Instrument on Return and Readmission between the EU and Iraq − Authorisation to Negotiate an NBI*, cit., para. 1. See also, *supra*, CHAPTER I, SUB–SECTION 1.1.

[504] *Ivi*, paras. 5 and 17.

"informalisation" has influenced the operational and administrative dimensions of EU policy in this area. The CHAPTER also examines how these developments are reflected in the Commission's proposal for the New Pact on Migration and Asylum, which explicitly highlights the possibility of using "informal" instruments to manage irregular migration, with readmission as one of the main priorities. Finally, the CHAPTER looks at the so called "global partnerships" with Tunisia, Mauritania and Egypt as a case study – flexible arrangements that, while not exclusively focused on readmission, contain provisions relevant to the issue[505]: indeed, they contain provisions aimed at enhancing cooperation on the return and readmission of migrants irregularly staying in the EU. Through this analysis, the CHAPTER seeks to determine whether these trends represent a strategic "institutionalisation" of soft law mechanisms in the field of readmission and to assess their potential implications for international law.

However, before examining the specifics of the EU's "informalisation" practice in relation to readmission cooperation, it is necessary to clarify the key concepts and definitions associated with the process of "informalisation" and "informal instruments". Generally speaking, "informal" instruments represent long-standing practice in international relations. As Ott notes, "[f]or over fifty years, we have witnessed a multiplication of instruments that escape the categorisation of binding international agreements in light of Article 2 of the Vienna Convention on the Law of Treaties"[506]. While "informalisation" is thus a recognised and established phenomenon in various fields, it still lacks a generally accepted definition by scholars or courts.

[505] European Commission, *Memorandum of Understanding on a strategic and global partnership between the European Union and Tunisia*, Press Release, 16 July 2023 (hereinafter, the EU–Tunisia MoU); Joint Declaration establishing a Migration Partnership between the Islamic Republic of Mauritania and the European Union, 7 March 2024 (hereinafter, the EU–Mauritania JD). In this regard, see also, European Commission, *The European Commission launches new migration partnership with Mauritania*, Press Release, 7 March 2024; European Commission, *Joint Declaration on the Strategic and Comprehensive Partnership between the Arab Republic of Egypt and the European Union*, 17 March 2024 (hereinafter, the EU–Egypt JD). It is also interesting to note that the EU also seems to be negotiating a Migration and Mobility Partnership with Egypt, very similar to the one with Mauritania. Cfr. Council of the European Union, Migration and Mobility Partnership with the Arab Republic of Egypt – Authorisation to negotiate an NBI, ST 9741 2024 INIT – ITEM NOTE, 15 May 2024.

[506] Cfr. A. OTT, "Informalization of EU Bilateral Instruments: Categorization, Contestation, and Challenge", in *Yearbook of European Law*, Vol. 39, 2020, p. 572. United Nations, Vienna Convention on the Law of Treaties, 23 May 1969.

To define an "informal" deal, it is helpful first to understand what constitutes an international "formal" agreement. According to the Vienna Convention on the Law of Treaties, a "treaty" is "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation" (Art. 2(1)(a)). Thus, under international law, the terms "agreement" or "treaty" are interpreted broadly, with the key element being the intention to create binding legal obligations between the Parties involved. Fully "formal" international agreements typically include mechanisms for accountability in the event of breaches and provide for dispute resolution before a court[507]. The process of negotiating and adopting these agreements involves parliamentary assemblies, either through *ex-ante* or *ex-post* ratification[508]. Additionally, treaties are generally required to be made public and officially published in domestic or regional official journals[509].

Moving on from these premises, Lipson (1991) defines "informal" international deals as those that do not undergo the "formal" process of treaty ratification. They lack the highest level of official State approval, distinguishing them from "formal" treaties that require extensive legislative endorsement and official consent[510]. Pauwelyn, Wessel and Wouters, in a comprehensive empirical study of "informal international lawmaking", provide a similar definition: indeed, they agree with Lipson an arrangement is "informal" if it omits certain formalities traditionally associated with international law[511]. Nevertheless, both Lipson and Pauwelyn agree that not all "informal" discussions between public authorities at the international level qualify as "informal tools." Lipson notes that they must involve reciprocal promises or actions implying future commitments. Pauwelyn adds that the outcome

[507] E. FRASCA, E. ROMAN, *op. cit.*, p. 938.

[508] See, *inter alia*, F. MARRELLA, D. CARREAU, *Diritto Internazionale*, Third Edition, Giuffrè Editore, Milan, 2021, pp. 142 ff.

[509] E. FRASCA, E. ROMAN, *op. cit.*, p. 938.

[510] C. LIPSON, "Why are Some International Agreements Informal?", in *International Organization*, Vol. 45, Issue 4, 1991, p. 498.

[511] J. PAUWELYN, "Informal International Law-making: Framing the Concept and Research Questions", in J. PAUWELYN, R.A. WESSEL, J. WOUTERS, *Informal International Law-making: Mapping the Action and Testing Concepts of Accountability and* Effectiveness, Oxford University Press, Oxford, 2012, p. 15. See also, J. PAUWELYN, R.A. WESSEL, J. WOUTERS, "When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking", in *European Journal of International Law*, Volume 25, Issue 3, 2014, pp. 733–763.

of "informal" international law-making must be normative, guiding behaviours or affecting the freedom of the Parties. While not strictly part of the law, it should have some legal effects or fit into a broader legal or normative framework[512].

In this context, it is also important to distinguish between the process of "informalisation" and soft law, as they are not synonymous. "Informalisation" refers to the evolution of law-making methods, moving away from rigid legal mechanisms towards more adaptable and flexible "informal" practices within regulatory and governance frameworks[513]. Soft law refers to the *outcomes* of this process, such as deals, rules, guidelines, or principles that, although not legally binding, influence behaviour and decision-making. Soft law is traditionally understood as non-legally binding norms with practical legal relevance[514]. In summary, while both soft law and "informalisation" involve non-binding norms and practices, soft law consists of articulated non-binding rules, whereas "informalisation" emphasises the process of shifting from "formal" to "informal" methods of regulation, highlighting the transformative nature of this process[515].

Specifically in the EU context, the practice of "informalisation" in bilateral relations with third countries leads to the creation of instruments that "operate" outside the framework of the procedures laid down in Art. 218 TFEU. A disclaimer is necessary: the adoption of such instruments is not prohibited by the Treaties; rather, the EU chooses an alternative approach to the "formal" procedures laid down in this article. However, in any case the EU institutions must respect the safeguards of EU law when adopting non-legally binding instruments. Moreover, it cannot "avoid" following the procedures of Art. 218 TFEU by resorting to soft law when binding legal instruments are explicitly required by the Treaties[516].

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[512] E. FRASCA, E. ROMAN, *op. cit.*, p. 939.

[513] *Ivi*, p. 937.

[514] J. SANTOS VARA, "Soft international agreements on migration cooperation with third countries: a challenge to democratic and judicial controls in the EU", in S. CARRERA, J. SANTOS VARA, T. STRIK, (eds.), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis: Legality, Rule of Law and Fundamental Rights Reconsidered*, Cheltenham: Elgar, 2019, p. 22.

[515] E. FRASCA, E. ROMAN, *op. cit.*, p. 937.

[516] Consider, for example, the conclusion of Free Trade Agreements (FTAs), which impose legal obligations on both the EU and third countries. See Art. 207(2) TFEU and *infra*, CHAPTER IV, SECTION 3.

Despite the "informal" and explicit non-binding nature of some EU deals, the latter can have legal consequences. Cardwell and Dickson describe this phenomenon as "formal informality", which is defined as "the appearance of formality, insofar as resembling familiar or established tools [...], but lacking the procedural safeguards, transparency and classification provided by law and legal processes"[517]. In this regard, Chetail distinguishes between the form and substance of an instrument: generally, soft law instruments lack legal force in both form and substance. However, some instruments may be non-binding in form but binding in content, and *vice versa*[518]. For example, when a provision of a binding instrument contains a soft law norm, scholars often refer to this as "material soft law". This term is used to describe norms that are flexible, imprecise or vague in substance. Because of this vagueness, substantive soft law is open to wide interpretation and can be adapted according to the context or actors involved[519]. This view contrasts with the positivist perspective, which views soft law as "non-law" due to its lack of coercive power and a formal legislative process[520]. Considering these perspectives, it can be asserted that the *nomen juris* and the form of an act are not necessarily decisive for its precise legal classification. The ICJ clarified that terminology "is not a determinant factor as to the character of an international agreement or undertaking", but also held that acts seemingly classifiable as soft law, were in fact genuine international treaties[521]. The ECJ also clarified that, according to the TFEU, the expression "agreement" indicates any undertaking entered into by entities

[517] P. J. CARDWELL, R. DICKSON, "'Formal informality' in EU external migration governance: the case of mobility partnerships", in *Journal of Ethnic and Migration Studies*, Vol. 49, Issue 12, 2023, p. 3121.

[518] V. CHETAIL, "The Global Compact for Safe, Orderly and Regular Migration: A Kaleidoscope of International Law", *op. cit.*, p. 253.

[519] S. JEAN (ed.), *Dictionnaire de droit international public*, Bruylant, Brussels, 2001, p.1039. Cited in S. MAGOGA-SABATIER, *Corporate social responsibility as groundwork to impose social duties on platforms, a possible reconciliation between economic freedom and social law?*, Zagreb EISS European Institute of Social Security Droit, 2021, p. 7.

[520] M. PANIZZON, K. ALLINSON, M. GRUNDLER, "Forms and functions of soft norms and informal law-making in international migration law: a different frontier", in *Frontiers in Human Dynamics*, 8 February 2024.

[521] International Court of Justice (ICJ), *Ethiopia v. South Africa; Liberia v. South Africa*, Preliminary objections, 21 December 1962. Cfr. A. SARDU, "L'*Informal International Lawmaking* in materia di riammissione: prassi e implicazioni sul rapporto tra diritto internazionale e diritto dell'Unione europea", in *Freedom, Security & Justice*, No. 2, 2021, p. 333.

subject to international law which has binding force, whatever its formal designation (the so-called "*substance over form principle*")[522].

Having established the necessary background for understanding the phenomenon in question, it is in this context that "informal" readmission arrangements become relevant. The purpose of the following SECTIONS is to examine the main characteristics and challenges of these arrangements in order to understand how they interplay with international law, thereby addressing the central research question of this thesis. In order to fully address the issue, the discussion begins with an exploration of the historical roots and broader context in which these arrangements have emerged in Europe, tracing the developments that have shaped their current significance.

2. EU "informal" cooperation on readmission with third countries: laying the groundwork

The process of "informalisation" of cooperation between the EU and third countries in migration-related issues has always coexisted with the Union's "formalisation" efforts. In the context of readmission, this work refers to this process of "informalisation" as a "transformative trend" because it is a departure from the traditional model of managing readmission based on EURAs and readmission clauses inserted in broader agreements. In this sense, it marks a significant shift compared to the adoption of "formal" procedures: in this respect, legally binding migration-related instruments have not been at the centre of the EU's readmission policy for more than a decade. Indeed, "formal" readmission agreements concluded by the Union came to a virtual standstill in 2014 – apart from the readmission agreement concluded with Belarus in 2020.

The European Commission has long emphasised the need for diverse and flexible partnerships with third countries to address readmission and migration management. This approach gained momentum with the abovementioned GAM,

[522] Court of Justice of the European Communities (CJEC), Opinion 1/75, *Local Cost Standard*, 11 November 1975, ECLI:EU:C:1975:145; European Court of Justice (ECJ), Case C–327/91, *French Republic v Commission of the European Communities*, Judgement 9 August 1994, ECLI:EU:C:1994:305, para. 27.

which marked a shift in the EU's external migration and asylum policies towards comprehensive partnerships[523]. In 2011, the Global Approach to Migration and Mobility GAMM formalised this strategy, explicitly promoting the use of different instruments to achieve the EU's migration policy objectives[524]. Indeed, the GAMM has been defined as an "overarching framework of the EU External Migration Policy, based on genuine partnership with non-EU countries", which emphasised the undefined use of "all available tools" and "a full range of migration instruments"[525]. These tools include strictly legal mechanisms, such as the EURAs and readmission clauses discussed in the previous CHAPTER, as well as instruments that are predominantly political in nature.

A key component of the latter instruments within the GAMM are Mobility Partnerships (MPs). These non-legally binding agreements are concluded with third countries, mainly in the EU's neighbourhood, to provide a framework for dialogue and cooperation on common migration and mobility challenges[526]. Introduced by the European Commission in a 2007 Communication, MPs were highlighted alongside circular migration as innovative approaches to improving the

[523] European Council, Presidency Conclusions, 15/16 December 2005, Brussels, Doc. 15914/05, para. 8.

[524] European Commission, Communication COM (2011) 743 final to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, The Global Approach to Migration and Mobility, Brussels, 18 November 2011.

[525] *Ivi*, p. 5. Cfr. P. J. CARDWELL, R. DICKSON, *op. cit.*, p. 3124.The renewed GAMM focuses on four "pillars": improving the organisation of legal migration and facilitated mobility, preventing and reducing irregular migration in an efficient, yet humane way, strengthening the synergies between migration and development, and strengthening international protection systems and the external dimension of asylum. See also, European Commission, *Global Approach to Migration and Mobility (GAMM)*, EMN Asylum and Migration Glossary, available here: https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/global-approach-migration-and-mobility-gamm_en. Although the GAMM remain a fundamental framework for EU migration law and policy, there have been significant developments in recent years that have led to its evolution. The increase in migration flows to Europe, in particular since the 2015 refugee crisis, has prompted the EU to review and update its migration strategies. In summary, the GAMM remains an important reference for the management of migration issues in the EU, but it has been integrated and partially replaced by new initiatives and instruments that reflect the changing dynamics of migration and the new political priorities of the EU, as the recent New Pact clearly shows.

[526] European Commission, *Mobility Partnership*, EMN Asylum and Migration Glossary, available here: https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/mobility-partnership_en#:~:text=A%20cooperation%20arrangement%2C%20on%20the,mobility%20%2C%20on%20a%20voluntary%20basis.

management of legal migration flows between the EU and third countries[527]. In order to participate in MPs, third countries are expected to demonstrate strong cooperation on security and migration issues from an EU perspective[528]. MPs are pursuing a three-pronged strategy: managing legal migration, linking migration to development and combating irregular migration, including through readmission agreements[529].

Nonetheless, a recent wave of "informalisation" in the EU migration governance, triggered by the 2015–2016 migration crisis, has made this trend more visible and even privileged[530]. The outbreak of the Syrian civil war in 2011 – along with other global crises – forced millions of people to flee to neighbouring countries and the EU. In 2015 the EU saw in fact an unprecedented influx of over one million asylum seekers and migrants from Syria, Afghanistan, Iraq and more distant countries such as Pakistan and Nigeria. Without an effective system to distribute responsibility for processing these asylum applications, Southern and Eastern Member States bore the brunt of the impact as arrivals spiked and remained high into 2016[531]. This migration crisis quickly became a continent-wide issue, "threatening to undermine the decades-long project of European integration and shatter the notion of Europe as a singular entity that could speak with one voice"[532].

In this emergency context, under intense public pressure, the Commission adopted the European Agenda on Migration[533]. This instrument – as intended by the Commission – was meant to establish "a set of core measures and a consistent

[527] European Commission, Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, On circular migration and mobility partnerships between the European Union and third countries, Brussels, 16 May 2007, p. 2.

[528] *Ivi*, pp. 4 ff. See, more in detail, S. CARRERA, R. HERNÁNDEZ I SAGRERA, *The Externalisation of the EU's Labour Immigration Policy Towards Mobility or Insecurity Partnerships?,* CEPS Working Document No. 321, October 2009, pp. 11 ff.

[529] J. P. CASSARINO, "A Reappraisal of the EU's Expanding Readmission System", *op. cit.*, p. 138.

[530] E. FRASCA, E. ROMAN, *op. cit.*, pp. 933 ff; E. ROMAN, *op. cit.*, pp. 2 ff.

[531] European Parliament, *Asylum and migration in the EU: facts and figures*, Topics,Published on 30 June 2017, updated on 5 August 2022, available here: https://www.europarl.europa.eu/topics/en/article/20170629STO78630/asylum-and-migration-in-the-eu-facts-and-figures.

[532] K. TERRY, "The EU-Turkey Deal, five years on: A frayed and controversial but enduring blueprint", in *Migration Policy Institute* (MPI), 8 April 2021.

[533] European Commission, Communication COM (2015) 240 final to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European Agenda on Migration, Brussels, 13 May 2015.

and clear common policy", primarily to introduce a new and more European approach to migration[534]. This was to be achieved through an optimal combination of internal and external policies and the involvement of all key actors in a common European migration policy: Member States, EU institutions, international organisations, civil society and third countries. The Commission also signalled its intention to revise its approach to readmission agreements, prioritising cooperation with key countries of origin for irregular migrants. The overarching goal of the Agenda was to ensure that third countries adhere to their international obligations to readmit their own nationals[535]. Nonetheless, beyond these programmatic statements, the Agenda does not clarify which elements and/or actions should determine the EU's new approach to readmission, which will only be defined by subsequent practice[536]. In this sense, the Agenda has led to a significant increase in the influence of Member States at the expense of the EU and a clear preference for the use of "informal" instruments to cooperate with third countries in the fight against irregular migration[537]. Indeed, the path that emerged from the Agenda marked a departure from the EU's pre-2015 approach, which emphasised an active role for the EU and the use of "traditional" instruments of international law, such as readmission agreements and readmission clauses in broader agreements. In the "new way" developed since Agenda 2015, this framework has been significantly redefined, driven not only by a pronounced preference for the use of "informal" or atypical instruments – initially by individual Member States and later adopted as a broader approach by the Union itself, as mentioned elsewhere – but also by a shift in priorities that challenged the traditional reliance on "formal" mechanisms[538]. The objective of strengthening cooperation on the readmission of irregular migrants to their countries of origin on the basis of rapid procedures was also reiterated a few months later. Indeed, it is worth noting that in this context the EU's preference for "informal" readmission arrangements was, *inter alia*, highlighted during the 2015

[534] *Ivi*, p. 2.

[535] COM (2015) 240 final, cit., pp. 9–10. *Ibid.*

[536] F. CASOLARI, "Il ricorso dell'Unione europea a strumenti informali per il contrasto all'immigrazione irregolare", in *Rivista trimestrale di diritto pubblico,* No. 2, 2019, p. 543.

[537] A. SARDU, *op. cit.*, p. 329.

[538] F. CASOLARI, "Il ricorso dell'Unione europea a strumenti informali per il contrasto all'immigrazione irregolare", *op. cit.,* p. 543; A. SARDU, *op. cit.*, p. 328.

EU–Africa Valletta Summit. The Valletta Summit Action Plan in fact saw Member States agree to "develop practical cooperation arrangements and bilateral dialogues on the implementation of returns, particularly concerning identification and issuance of travel documents"[539].

In this context, in 2016 the EU also launched the Migration Partnership Framework (MPF), which aims at addressing migration "holistically", with a particular focus on cooperation with third countries on the return and readmission of irregular migrants. In particular, the Commission's Communication on the establishment of such a framework clearly shows the intention to direct the EU's external action towards the establishment of "informal" partnerships with the main third countries of origin and transit, using also all the type of instruments available to the Union for a more effective management of the migration phenomenon[540]. A key element of this approach is the concept of "Compacts". These serve as a political framework for sustainable and operational cooperation, integrating different workstreams, instruments and tools to build comprehensive partnerships with third countries[541]. Instead of relying on "traditional" international agreements, the Commission foresaw that the "Compacts approach" would have avoided the risk of concrete readmissions being delayed by the technical negotiations required for a fully-fledged "formal" agreement[542].

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[539] European Council, Valletta Summit, 11–12 November 2015, Joint Action Plan, para. 15.

[540] European Commission, Communication COM (2016) 385 final to the European Parliament and the Council, Establishing a new Partnership Framework with third countries under the European Agenda on Migration, Brussels, p. 3 ff. On this point see, *inter alia*, R. PALLADINO, "Nuovo quadro di partenariato dell'Unione europea per la migrazione e profili di responsabilità dell'Italia (e dell'Unione europea) in riferimento al caso libico", in *Freedom, Security & Justice*, No. 2, 2018, pp. 104–134; F. GRAZIANI, "The European Union External Action on Migration and Asylum: The 2016 Migration Partnership Framework and Its Outcomes", in *International Relations*, n. 1, 2017, pp. 30–41.

[541] European Commission, *Migration Partnership Framework: A New Approach to Better Manage Migration*, p. 2 available here: https://www.eeas.europa.eu/sites/default/files/factsheet_ec_format_migration_partnership_framework_update_2.pdf.

[542] European Commission, Communication COM (2016) 700 final, First Progress Report on the Partnership Framework with third countries under the European Agenda on Migration, Brussels, 18 October 2016, p. 3: "[f]ormal international agreements, such as readmission agreements, can flow from the compact process. But the compacts approach avoids the risk that concrete delivery is held up by technical negotiations for a fully-fledged formal agreement." See also, C. BAULOZ, "The EU Migration Partnership Framework: an External Solution to the Crisis?", in *EU Migration Law Blog*, 31 January 2017; C. CASTILLEJO, *The EU Migration Partnership Framework: Time for a Rethink?*, Deutsches Institut für Entwicklungspolitik, Discussion Paper No. 28, 2017, p. 1.; N. RESLOW, *op. cit.*, pp. 106 ff;

This trend has been confirmed by the Commission's proposal for the New Pact on Migration and Asylum: as will be seen in more detail in this CHAPTER, the New Pact deepens in fact the "informal" logic[543]. Indeed, the Pact seeks to promote cooperation on readmission with third countries through the activation of both existing "agreements and arrangements", reflecting, as we have seen, a long-standing historical trend towards "informal" approaches.

3. The main features and challenges of EU readmission arrangements

The phenomenon of "informal" arrangements specifically dealing with readmission first attracted attention in political science research thanks to the pioneering work of Professor Cassarino, who was one of the first to recognise the importance of "informal" cooperation on readmission[544]. Indeed, Cassarino was one of the first to note that some European countries were beginning to develop a broader framework of cooperation on readmission, relying on administrative arrangements, bilateral arrangements, exchanges of letters and memoranda of understanding as alternatives to "formal" readmission agreements[545]. In particular, Cassarino reported that France, Germany, Greece, Italy and Spain have been particularly active in adopting these informal bilateral practices since the 2000s[546]. "Inspired" by these state-level initiatives, the EU has drawn on this "informal" approach to develop similar practices at the Union level.

As outlined above, "informalisation" in this area refers to the practice of negotiating or implementing arrangements outside formal legal frameworks – in particular, in the EU context, outside the scope of the Treaties. This trend may have a significant impact on patterns of international cooperation, often to the detriment

[543] *Infra*, SECTION 5.

[544] See, *inter alia*, J. P. CASSARINO, "A Reappraisal of the EU's Expanding Readmission System", *op. cit.*; J.P. CASSARINO, "Informalizing EU readmission policy", in A. RIPOLL SERVENT, F. TRAUNER (eds.), *The Routledge Handbook of Justice and Home Affairs Research*, Routledge, London, 2018, pp. 393–404; J.P. CASSARINO, "Informalising Readmission Agreements in the EU Neighbourhood", *op. cit.*

[545] J.P. CASSARINO, "Informalising Readmission Agreements in the EU Neighbourhood", *op. cit.*, p. 180

[546] *Ivi*, p. 187.

of migrants' rights[547]. These challenges, coupled with contested legal interpretations regarding the legitimacy of such arrangements, have increasingly attracted the attention of legal scholars, fostering an evolving debate on their implications for both international law and the EU legal order.

Drawing on both the legal and political discourse on the issue – as well as on relevant EU legal sources and a thorough review of the available texts of these instruments – the following analysis seeks to unpack the defining characteristics and challenges of "informal" readmission arrangements, focusing on some key aspects: *i*) the "institutional" and "procedural" framework governing their adoption, as well as considerations regarding their legal nature; *ii)* the scope and interpretation of the readmission-related provisions they contain; and *iii)* the human rights issues and implications associated with these instruments.

3.1. The procedure for the adoption of "informal" readmission arrangements and their legal nature

a) "Institutional" and "procedural" issues

As "informal" readmission arrangements are not considered to be "standard" EURAs, the procedure laid down in Art. 218 TFEU does not apply to their adoption. It is therefore possible to affirm that these "flexible" instruments are similar to EURAs but lack some of their defining features: the procedure for concluding "formal" international treaties, such as in the case of EURAs, is in fact governed by clearly defined rules in primary law. While the Treaties do not provide specific guidance on the adoption procedure for "informal" instruments, the respect for the prerogatives of each EU institution remains essential in this context. This can be inferred "through a combined reading of the general institutional provisions (arts. 13–19 TEU) and the legal basis in the field of readmission (art. 79(3) TFEU)"[548]. In this regard, the Court ruled in 2004 in *France v Commission* that the non-legally

[547] J. P. CASSARINO, L. GABRIELLI, D. PERRIN, *Cooperation on Readmission in the Euro-Mediterranean Area and Beyond: Lessons Learned and Unlearned*, EuroMeSCo Policy Study no. 28, p. 11.

[548] C. MOLINARI, "Parallel Paths that Need to Cross?", in *Verfassungsblog*, 29 September 2020.

binding nature of an arrangement does not justify in any case circumventing the division of powers or disregarding the institutional balance enshrined in the EU Treaties[549]. This view was confirmed in the so called "*Swiss MoU case*", where the Court reaffirmed the importance of respecting the principle of institutional balance[550]. The latter requires each EU institution to act within the limits of its competences as defined by the Treaties. Moreover, the duty of sincere cooperation enshrined in Art. 13(2) TEU obliges the institutions to cooperate within their respective mandates, reinforcing the need for balanced and inclusive institutional engagement

With regard to the principle of institutional balance applied to the procedure for adopting "informal" arrangements, based on a broad interpretation of Art. 17 TEU – which gives the Commission the role of representing the EU externally –, it can be argued that the Commission has the authority to negotiate non-binding or "soft" arrangements with international partners[551]. However, this negotiating role does not extend to decision-making powers, which remain the prerogative of the Council under Art. 16 TEU. Specifically, the Council, acting through its Foreign Affairs configuration, is responsible for shaping the Union's external action, authorising negotiations, and deciding whether to sign such arrangements[552]. In the abovementioned "*Swiss MoU case*" the Court of Luxembourg clarified that the power of international representation does not include for the Commission the authority to sign a political agreement[553]. For this purpose, the Commission must first obtain the prior approval of the Council. The Court further emphasised that, even if the arrangement negotiated by the Commission perfectly aligns with the mandate provided by the Council, the Council must still determine whether signing

[549] European Court of Justice (ECJ), Case C–233/02, *French Republic v Commission of the European Communities*, Judgement 23 March 2004, ECLI:EU:C:2004:173, para. 40.

[550] European Court of Justice (ECJ), Case C–660/13, *Council of the European Union v European Commission*, Judgement 28 July 2016, ECLI:EU:C:2016:616. For a comment on this case, see, among others, T. VERELLEN, "On Conferral, Institutional Balance and Non-binding International Agreements: The Swiss MoU Case", in *European Papers*, Vol. 1, No 3, 2016, pp. 1225–1233.

[551] P. GARCÍA ANDRADE, "Respect for Institutional Balance in the Adoption of Non-legally Binding Agreements: *France v Commission II",* in G. BUTLER, R. A. WESSEL, *EU External Relations Law: The Cases in Context*, Hart Publishing, Oxford, 2022, P. 450.

[552] Art. 16(6) TEU. Cfr. P. GARCÍA ANDRADE, E. FRASCA, "The Memorandum of Understanding between the EU and Tunisia: Issues of procedure and substance on the informalisation of migration cooperation", in *EU Immigration and Asylum Law and Policy Blog*, 26 January 2024.

[553] European Court of Justice (ECJ), Case C–660/13, cit., paras 36–40.

the arrangement remains in the EU's interests[554]. The act of signing is therefore subject to the Council's political discretion. Commenting on the decision issued in the case at hand, the Council's Legal Service clarified that this ruling applies broadly to all non-binding instruments, whether bilateral or multilateral, irrespective of whether they involve third countries or international organisations: it is equally relevant whether the EU is represented in negotiations by the Commission, the High Representative, or the EEAS[555].

In accordance with the ECJ case law, in the context of the EU–Afghanistan JDMC, the Commission asked the Council for authorisation to open negotiations and subsequently to seek its approval to the arrangement before signing them. Following the necessary authorisations, negotiations were conducted by the Commission and the EEAS[556]. The text of the arrangement was approved by the Parties. The Commission has adopted the decision regarding the signature of the agreement and submitted it to the Council for approval[557]. A similar procedure was followed for the conclusion of other "informal" readmission arrangements[558].

However, when it comes to the "institutional" and "procedural" aspects governing the adopting such "informal" arrangements, the differences between them and EURAs do not end there. In this respect, as discussed in the previous CHAPTER on the conclusion of EURAs, the role of the European Parliament in shaping the EU's external action has increased significantly, especially since the Lisbon Treaty: the Parliament now plays a more active role in the procedure for concluding international agreements under Art. 218 TFEU[559]. Nonetheless, as noted by García Andrade, this increased parliamentary involvement in "formal" agreements contrasts sharply with the Parliament's limited – if not non-existent –

[554] *Ivi,* para 43. Cfr. P. GARCÍA ANDRADE, E. FRASCA, cit.

[555] Council of the European Union, Legal Service, Case before the Court of Justice of the European Union: Judgment of the Court (Grand Chamber) in Case C–660/13, *Council of the European Union v European Commission*, 22 September 2016, LIMITE 12478/16, para. 16. M. PREVIATELLO, *op. cit.,* p. 57.

[556] Council of the European Union, General Secretariat, Joint Declaration on Migration Cooperation between Afghanistan and the EU – Authorisation of signing/Approval, CM 1559/21, Brussels, 4 February 2021.

[557] European Commission, Note from Commission to Delegations, Request for endorsement of the Joint Declaration on Migration Cooperation between Afghanistan and the EU, 13 January 2021, LIMITE 5223/21. Cited in M. PREVIATELLO, *op. cit.,* p. 142.

[558] *Ibid.*

[559] *Supra,* CHAPTER II, SECTION 3.

involvement in the EU's adoption of non-binding international commitments[560]. Indeed, no explicit role is given to the Parliament in the adoption of "non-agreements", since, as mentioned above, these soft law instruments are not recognised in EU primary law. This contrasts with internal soft law acts, which are explicitly recognised in the Treaties through the reference in Art. 288 TFEU to recommendations and opinions, which are non-binding acts[561].

Nevertheless, according to García Andrade, the Court's reasoning in the *France v Commission* and the *Swiss MoU* case, concerning respect for the division of powers and, above all, the principle of institutional balance in relation to the adoption of non-legally binding agreements, should logically be extended to the role of the Parliament[562]: indeed, the complete exclusion of the Parliament from the adoption of soft law instruments could arguably be contrary to the Treaties[563]. This means that the Parliament's role is not just a procedural formality but a critical component in ensuring the democratic legitimacy and accountability of EU actions, especially concerning international soft law instruments. Additionally, Art. 14(1) TEU confers upon the Parliament political control and consultative functions, suggesting that non-legally binding agreements should involve parliamentary oversight. This involvement can take various forms, including consultative roles and informal participation through questions, reports, resolutions, and recommendations. Therefore, involving the Parliament in "informal" agreements, such as those on readmission, is essential for maintaining the democratic and transparent external action of the Union[564].

Moreover, as far as "informal" readmission arrangements are concerned, the exclusion of the application of Art. 218 TFEU also "rules out" the advisory role of the ECJ, which according to Art. 218 (11) TFEU, is entitled to give an opinion on draft agreements concerning EU primary law. This preliminary examination is a

[560] P. GARCÍA ANDRADE, "The Role of the European Parliament in the Adoption of Non-Legally Binding Agreements with Third Countries", in J. SANTOS VARA, S. R. SANCHEZ-TABERNERO (eds.), *The Democratization of EU International Relations Through EU Law*, Routledge, New York, p. 115.

[561] *Ivi*, p. 119.

[562] European Court of Justice (ECJ), Case C–233/02, cit., para. 40; European Court of Justice (ECJ), Case C–660/13, cit., para. 46.

[563] P. GARCÍA ANDRADE, "The role of the European Parliament in the adoption of non-legally binding agreements with third countries", *op. cit*., pp. 121–122.

[564] *Ibid.*

preventive measure to ensure that agreements do not conflict with the EU Treaties. The exclusion of Art. 218 TFEU from the adoption procedures of these instruments reduces the judicial oversight that ensures compliance with EU primary law and potentially allows the adoption of instruments – even if not "formal" ones – that are incompatible with EU law. Consequently, EU institutions can make "informal" arrangements to avoid or limit the Court's "indirect validity test"[565].

In this discussion, the case regarding the EU–Türkiye Statement is particularly pertinent, as the Court explicitly examined its own authority over these kinds of "informal" acts, as it underlines the role of the Court in this context[566]. According to the content of this Statement – made "public" only via a press release from the European Council – all new irregular migrants crossing from Türkiye to the Greek islands from 20 March 2016 onwards would be returned to Türkiye, with a "one-for-one" resettlement scheme whereby for every Syrian returned, another Syrian would be resettled from Türkiye to the EU[567]. In return, the EU pledged to speed up visa liberalisation for Turkish citizens and to provide Türkiye with an initial €3 billion in aid to support refugees, with the potential for a further €3 billion by the end of 2018. The Statement also aimed to revive Türkiye's EU accession talks and improve humanitarian conditions in Syria. Following a meeting held on 16 March 2016, the content of the arrangements was disseminated only through a press release by the European Council[568]. This highlights the elusive legal framework of the EU–Türkiye Statement, in which the Union and third countries continue to work to achieve the desired results: the cooperation of countries of origin and transit in the control of migration flows, the reception of asylum seekers and the readmission of irregular migrants and refugees or asylum seekers[569].

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[565] C. MOLINARI, *Going All Out to Manage Migration: A Constitutional Analysis of the EU Readmission Policy*, *op. cit.*, p. 280.

[566] On this matter see also, *ex multis*, C. DANISI, "Taking the "Union" out of "EU": The EU-Turkey Statement on the Syrian Refugee Crisis as an Agreement Between States under International Law", in *EJIL Talk*, 20 April 2017; A. OTT, *EU-Turkey Cooperation in Migration Matters: A Game Changer in a Multi-layered Relationship?*, CLEER Papers No. 4, 2017; S. PEERS, "The final EU/Turkey Refugee Deal: A Legal Assessment", in *EU Law Analysis*, 18 March 2016.

[567] *Infra*, CHAPTER IV.

[568] European Council, *EU–Turkey statement*, cit.

[569] C. FAVILLI, "Nel mondo dei "non-accordi". Protetti sì, purché altrove", in *Questione Giustizia*, 2020.

In its well-known case *NF*, the General Court stated that it did not have jurisdiction to rule on the legality of the declaration, arguing that the EU itself was not a party to the Declaration with Türkiye, but rather the Member States collectively, who in no way acted on behalf of the Union[570]. Nonetheless, there are several factors which, taken together, indicate that the EU–Türkiye Statement was made by the European Council on behalf of the EU and should therefore be attributed to the EU rather than to the Member States. First, the wording of the Declaration identifies the EU and Türkiye as the responsible Parties, imposing explicit obligations on both the EU and the Turkish Part, such as, for example, the resettlement mechanism, according to which "for every Syrian being returned to Türkiye from Greek islands, another Syrian will be resettled from Türkiye to the EU taking into account the UN Vulnerability Criteria"[571]. Secondly, the involvement of the European Council, which includes all the heads of State and government of the Member States and EU institutions such as the Commission, suggests that the negotiations were conducted on behalf of the EU. Moreover, the Declaration is embedded in broader EU policies, such as financial assistance and migration management, which reinforces its status as an EU instrument. Finally, Türkiye's consistent reference to the EU in subsequent communications and actions confirms that it sees the Declaration as part of its relationship with the EU, not with individual Member States[572]. The fact remains, however, that the position undertaken by the General Court in the *NF* case significantly limits the CJEU's ability to evaluate the scope, effects, and validity of "informal" readmission arrangements, thereby weakening its capacity to uphold the rule of law[573]. As

[570] General Court, Cases T–192/16, T–193/16 and T–257/16, *NF, NG and NM v European Council*, Order of 28 February 2017, ECLI:EU:T:2017:128. On this specific decision, see, among others, S. CARRERA, L. DEN HERTOG, M. STEFAN, *It wasn't me! The Luxembourg Court Orders on the EU-Turkey Refugee Deal*, CEPS, 28 April 2017. For a commentary on this ruling, E. CANNIZZARO, "Denialism as the Supreme Expression of Realism – A Quick Comment on NF v. European Council", in *European Papers*, Vol. 2, n. 1, 2017.

[571] EU–Türkiye Statement, cit., action point 2). In support of the Declaration's qualification as an international agreement, *ex multis*, C. FAVILLI, *op. cit.*; M. GATTI, "La dichiarazione UE–Turchia sulla migrazione: un trattato concluso in violazione delle prerogative del Parlamento?", in *Eurojus*, 11 April 2016.

[572] M. GATTI, A. OTT, "The EU-Turkey statement: legal nature and compatibility with EU institutional law", in S. CARRERA, J. SANTOS VARA, T. STRIK (eds.), *op. cit.*, pp. 179 ff.

[573] F. CASOLARI, "Il ricorso dell'Unione europea a strumenti informali per il contrasto all'immigrazione irregolare", *op. cit.*, p. 549. On this point, see in detail C. MOLINARI, *Going All*

García Andrade points out, the decisions of both the General Court and the Court of Justice – which dismissed the appeal on procedural grounds – effectively precluded judicial review of these cooperation instruments[574]. This lack of review has left critical questions unanswered as to its compliance with the rule of law, respect for the institutional balance in the EU's external action and compatibility with EU asylum and human rights standards[575].

To complete the discussion on "procedural aspects", "informal" readmission arrangements are often characterised by limited transparency and visibility as they are not subject to official publication requirements[576]. In this respect, the arrangements with Türkiye, Afghanistan, Bangladesh, Ethiopia and Mali are the only ones whose content has been made public. More specifically, as mentioned above, the EU–Türkiye Statement was made "public" only via a press release from the European Council. As far as the cooperation between the EU and Afghanistan is concerned, although not published in the OJEU, both the JWF and the JDMC are available online on the website of the EEAS[577]. In addition, the text the EU–Bangladesh SOPs is annexed to the Commission Decision on its signature, which is deposited in the register of documents of this EU institution[578]. The arrangement with Ethiopia is annexed, instead, in a non-final version, to a note sent by the General Secretariat of the Council to COREPER, which can be found in the Council's register of documents[579]. Finally, the existence of SOPs between the EU and Mali are known thanks to a document from the Council[580]. Instead, the content of the arrangements with Gambia, Guinea and Côte d'Ivoire have not been made available to the public. The existence (but not the content) of these arrangements is

Out to Manage Migration: A Constitutional Analysis of the EU Readmission Policy, Ph.D. Thesis, Katholieke Universiteit Leuven, Faculty of Law, 2022, pp. 264 ff.

[574] P. GARCÍA ANDRADE, "The External Dimension of the EU Immigration and Asylum Policies Before the Court of Justice", in *European Papers*, Vol. 7, No. 1, 2022, p. 117.

[575] *Ibid.*

[576] E. FRASCA, E. ROMAN, *op.cit.*, p. 943.

[577] *Supra*, SECTION 1.

[578] European Commission, Annex to the Decision on the Signature of the EU–Bangladesh Standard Operating Procedures for the Identification and Return of Persons without an Authorisation to Stay, C (2017) 6137 final. E. FERNANDO GONZALO, "The EU's Informal Readmission Agreements with Third Countries on Migration: Effectiveness over Principles?", in *European Journal of Migration and Law*, No. 25, 2023, p. 94.

[579] *Supra*, SECTION 1.

[580] *Ibid.*

known from official Commission documents and communications, or other EU institutions' official documents[581].

In cases where such arrangements are not published at all, it is virtually possible to make a request to the Council under the Regulation (EC) 1049/2001 in order to consult them[582]. Some individuals submitted requests for access to the agreements with Gambia, Guinea and Côte d'Ivoire: however, the Council refused these requests on the basis of the public interest exception relating to international relations provided for in Art. 4(1)(a) of the Regulation[583]. Indeed, the Council justified its refusal by stressing that:

"The success of the cooperation between the EU and Guinea, The Gambia, and the Ivory Coast on return and readmission depends on the existence of a climate of mutual trust between all parties involved. Given that the cooperation with third countries is ongoing and having due regard to the fact that the return and readmission are very sensitive issues for those countries, it would be counter-productive if concrete sensitive information in an area that concerns and is deemed important by all Member States and the EU, may be made publicly available. Such a disclosure could put the third country authorities in a difficult position which might result in the pressure from their societies against returns and readmission, as already experienced by some countries, and could therefore decrease the willingness of the authorities of those countries to cooperate with the EU on return and readmission[584]".

[581] M. PREVIATELLO, "L'accesso alle intese informali in materia di riammissione tra vincoli di riservatezza e obblighi di pubblicazione", in *Quaderni AISDUE*, No.4, 2023, pp. 55 ff. *Supra*, SECTION 1.

[582] Regulation 1049/2001 of the European Parliament and of the Council, of 30 May 2001, regarding public access to European Parliament, Council and Commission documents.

[583] "The institutions shall refuse access to a document where disclosure would undermine the protection of: (a) the public interest as regards: public security; defence and military matters; international relations; the financial, monetary or economic policy of the Community or a Member State".

[584] Council of the European Union, Note from General Secretariat of the Council to Working Party on Information, Public access to documents – Confirmatory application No 10/c/01/21, 7783/21 LIMITE, 5 May 2021, para. 20. M. PREVIATELLO, "L'accesso alle intese informali in materia di riammissione tra vincoli di riservatezza e obblighi di pubblicazione", *op. cit.*, p. 56.

The fact remains that because the text of some of these deals is kept secret, not even Parliament itself is aware of them. This is clear, for example, from the Parliament's statement on the "EU–Ethiopia Admission Procedures": "[n]either the Council nor the Commission published the text, so the European Parliament was compelled to base its assessment on a leaked version"[585].

b) The legal nature of "informal" readmission arrangements

As regards the legal nature of these instruments, readmission arrangements explicitly state that they are not intended to create any legal rights or obligations under international law[586]. However, their non-binding nature does not exclude the possibility that these declarations may have legal effects, which reflect those of the EURAs. This is all the more so as the Parties are obliged to respect the principle of good faith and must therefore refrain from acting in a manner that is inconsistent with the commitments they have entered into, thereby undermining the expectations they have created with their partners[587]. Moreover, the commitments in these arrangements are not merely "encouraging or indicative", but rather "normative and prescriptive", especially since the Parties agree to act in accordance with international law[588]. For example, the language in the Admission Procedures with Ethiopia often refers to what has been agreed upon and the specific obligations the parties intend to undertake. Similarly, the arrangement with Mali requires technical cooperation between Malian authorities and Member States' authorities, resembling the structure of a "formal" readmission agreement[589]. Furthermore, in the POS with Ethiopia, there are formulations typically used in international treaties

[585] Council of the European Union, General Secretariat of the Council, Permanent Representatives Committee, *Draft Admission procedures for the return of Ethiopians from European Union Member States*, LIMITE MIGR 233 COAFR 332, Brussels, 18 December 2017.

[586] See, for example, the SOPs with Bangladesh.

[587] L. C. TEODORESCU, *L'azione esterna della politica di immigrazione dell'Unione europea: Sviluppo, modalità di attuazione e legame con la dimensione interna*, Ph.D. Thesis, University Roma Tre, 2017, p. 101.

[588] M. GATTI, A. OTT, *op. cit.*, p. 195.

[589] E. FRASCA, cit.

to indicate the assumption of an obligation: specifically, the verb tenses are introduced by "shall" and "will"[590].

Consequently, these "informal" readmission arrangements only *on paper* claim not to create any legal rights or obligations under international law. In theory, the texts of the instruments under consideration specify their non-legally binding nature, confirming that they are political declarations not meant to establish rights and obligations between the Parties under either international or domestic law[591]. In practice, it can be observed that, despite their proclamations, these "informal" instruments replicate mechanisms typical of treaty-based international law. This highlights a key function of soft law: its role as a "para-law" mechanism, as described by Peters and Pagotto, when hard law instruments are not available, often due to disagreement about their desirability[592]. In such cases, soft law emerges as an *alternative* that allows cooperation to take place despite the absence of "formal" legal instruments. An example of such a "replication" of treaty-law mechanisms can be seen in the Accession Procedures with Ethiopia: this "informal" readmission arrangement in fact mirrors the amendment processes typical of international treaties, as outlined in Section 6, paras. 3 and 4: "[t]he EU or the Government of Ethiopia may at any time request an amendment to this procedure. (...) Any amendment shall be subject to the mutual written consent of the EU and the Government of Ethiopia accepting the amendment"[593]. In this context, it is also essential to consider the provisions on identification procedures and the facilitation of readmission procedures, which oblige the authorities of the countries of origin to send travel documents within a few days or weeks of the request, or the provisions on the organisation and cost of transport, which limit the number of persons to be readmitted[594].

[590] F. MARTINES, "Il ricorso dell'Unione europea a strumenti informali per la riammissione di migranti irregolari: inquadramento e problematiche giuridiche", *op. cit.*, p. 743.

[591] See, for instance, Section I (1) of the Admission Procedure with Ethiopia: ["t]his Admission Procedure is not an international agreement and is not intended to create legal rights or obligations under domestic or international law". See also the Introduction of the JDMC and of the SOPs with Bangladesh.

[592] A. PETERS, I. PAGOTTO, "Soft law as a new mode of governance: a legal perspective", in *NEWGOV: New Modes of Governance,* 2006, pp. 23–24.

[593] F. MARTINES, "Il ricorso dell'Unione europea a strumenti informali per la riammissione di migranti irregolari: inquadramento e problematiche giuridiche", *op. cit.*, p. 743.

[594] M. PREVIATELLO, *La dimensione esterna della politica di immigrazione e d'asilo: competenze e strumenti, op. cit.,* p. 154.

The practical requirements described suggest a functional equivalence to binding agreements, challenging the proclaimed political and non-binding nature of these arrangements. Although the ECJ generally regards the intention of the Parties as the decisive criterion for determining whether an instrument is legally binding, the content and wording of these agreements often seem to contradict this intention. They appear to be designed to create mutual obligations between the Parties and, at the very least, to produce legal effects[595]. In this regard, the EU–Türkiye Statement prompted Greece to reform its asylum framework by enacting Law No. 4375 of 2016. This law reorganised the Asylum Service, the Appeals Authority and the Reception and Identification Service, established the General Secretariat for Reception and incorporated Directive 2013/32/EU into Greek law[596]. As Molinari notes, the only elements that seem to distinguish soft deals from "formal" agreements in this context are flexibility and "and lower negotiation costs (due also to the lack of transparency surrounding their negotiations)", as discussed above[597]. Fahey identifies this as a case of "de-legalisation", meaning "the practice of putting issues, laws, practices and litigation beyond the scope of genuine and meaningful judicial review"[598].

This could also support the argument that, even if these arrangements are non-standard agreements, they still have *strong ties and links* to "hard procedures" endowed with legal obligations. In this sense, the Commission stated that these arrangements should "represent a first step in establishing mutual trust as well as towards the launch of formal negotiations for fully-fledged readmission

[595] Regarding the intention of the parties, see, *ex multis*, Court of Justice of the European Communities (CJEC), Opinion 1/75, cit.; European Court of Justice (ECJ), Case C–327/91, cit., para. 27; European Court of Justice (ECJ), Case C–233/02, cit., para. 42.

[596] Greek Asylum Law 4375/2016, Published in the State Gazette on 3 April 2016. Cfr. European Commission, *European Website on Integration*, available here: https://migrant-integration.ec.europa.eu/library-document/greek-asylum-law-43752016_en#:~:text=Published%20in%20the%20State%20Gazette,granting%20and%20withdrawing%20international%20protection. The English version of the law is available here: https://www.asylumlawdatabase.eu/en/content/en-law-4375-organization-operation-asylum-service-appeals-authority-reception-identification. E. FRASCA, E. ROMAN, *op. cit.*, p. 941.

[597] C. MOLINARI, "Parallel Paths that Need to Cross?", cit.

[598] E. FAHEY, "Unravelling the subjects and objects of EU external migration law", in D. BIGO et AL. (eds.), *The Routledge Handbook of Critical European Studies. Routledge International Handbooks*, Routledge, London, 2021, p. 124. Cited in E. FRASCA, "Informal agreements and quasi-legal mechanisms in EU-Africa cooperation on migration: how the EU takes advantage of the GCM commitments", cit.

agreements"[599]. This approach seems to be expressed in the Introduction of the JDMC, where it is underlined that the agreement "paves the way for a structural dialogue and cooperation on migration issues, based on a commitment to identify effective ways to address the needs of both sides". In our opinion, by establishing a framework for dialogue and practical cooperation, the JDMC potentially lays the groundwork for a more structured and potentially "formalised" governance of migration, in line with the Commission's broader objectives in the area of readmission. In this context, another important function of soft law instruments comes to the fore: "informal" arrangements may also serve to pave the way for future treaties, effectively acting as *precursors* to the creation of binding hard law. These deals may can indeed be helpful in initiating a "learning process" between the Parties, allowing them to better assess the benefits and costs of cooperation[600]. This role can be described the "locomotive" function of soft law, driving the development of binding legal frameworks. In this context, Peters and Pagotto distinguish soft law with a "pre-law" function, referring to acts that act as a catalyst or impetus for the creation of hard law[601].

Another example of a "linkage" between this instrument and "hard procedures" can be found in the SOPs between the EU and Mali, the preamble of which states that the instrument was adopted "within the framework of the existing legal instruments on identification and readmission, in particular Article 13 of the Cotonou Agreement". This suggests that the instrument is rooted in the legal framework, principles, and objectives of the Cotonou Agreement, which, as discussed in CHAPTER II, governed relations between the EU and ACP countries – at least until the entry into force of the Samoa Agreement[602]. The SOPs with Mali would appear to "operationalise" the international commitments made by the ACP countries and the EU under the Cotonou Agreement[603]. A similar basis underpins the EU–The Gambia readmission arrangement, where regular political dialogue

[599] COM (2011) 76 final, cit. para.3.

[600] A. SARDU, *op. cit.*, pp. 341–342.

[601] A. PETERS, I. PAGOTTO, *op. cit.*, pp. 22–23. In this regard, see also, G. SCALESE, "La problematica dei c.d. "accordi non vincolanti" nel diritto internazionale: un potenziale paradosso", in *Rivista della cooperazione giuridica internazionale*, 2017, p. 9.

[602] *Supra*, CHAPTER II, SECTION 2.

[603] *Ibid.* See also, *infra,* SUB–SECTION 3.2.

takes place within the framework of the Cotonou Agreement (now the Samoa Agreement) and the EU Treaties to facilitate the exchange of information and mutual understanding[604]. The readmission arrangement with Côte d'Ivoire is also part of the same framework[605]. In order to justify the adoption of non-binding procedures for the conclusion of such arrangements, the EU seemed thus to rely on the fact that these "informal" readmission instruments, at least for sub-Saharan countries, fall within the scope of Art. 13 of the "old" Cotonou Agreement[606]. By "anchoring" these arrangements in this provision the EU positions them as the implementation of commitments already agreed by the Parties, while avoiding lengthy negotiations and ratification processes. In our view, framing these "informal" arrangements in the context of the "legally binding" EU-ACP relationship – or similar frameworks – may also serve a symbolic and legitimising purpose. By referring to an agreement based on principles of partnership and development, the EU probably seeks to present readmission cooperation as mutually beneficial and part of a broader cooperative relationship, rather than a unilateral imposition. This approach is in line with the Commission's stated intention to emphasise partnership and mutual understanding, as discussed above. Such a framing could reduce resistance from third countries, while reinforcing a narrative consistent with EU values and principles.

The argument outlined above proved effective in the context of the Cotonou Agreement, but seems less applicable to the "new" Samoa Agreement. This shift marks a significant development: with the adoption of the Samoa Agreement, in particular its Annex I, it may no longer be necessary to negotiate separate bilateral readmission agreements or arrangements with ACP countries. Annex I of the Samoa Agreement is not only directly applicable but also closely mirrors the

[604] European External Action Service (EEAS), *The European Union and The Gambia*, 4 August 2021, available here: https://www.eeas.europa.eu/gambia/european-union-and-gambia_en?s=100#:~:text=The%20partnership%20between%20the%20EU,dialogue%2C%20trade%20and%20development%20cooperation.

[605] European Commission, DG Trade, *Economic Partnerships*, available here: https://policy.trade.ec.europa.eu/development-and-sustainability/economic-partnerships_en

[606] F. MARTINES, "Il ricorso dell'Unione europea a strumenti informali per la riammissione di migranti irregolari: inquadramento e problematiche giuridiche", in AA.VV., *Temi e Questioni di Diritto dell'Unione Europea: Scritti offerti a Claudia Morviducci,* Cacucci Editore, Bari, 2019, p. 741.

provisions of EURAs[607]. This indicates a possible move towards a more "uniform" approach in the management of readmission cooperation with ACP countries. However, it seems too early to draw definitive conclusions on the effectiveness and appropriateness of this approach.

In any case, it seems to follow that the legal basis for these "informal" arrangements is to some extent linked to and dependent on the "formal" agreements, mechanisms or procedures established and regulated by EU law, along with the legal obligations arising from it. In our opinion, however, the main problem remains that while these "flexible" arrangements draw from "formal" legal frameworks, they do not inherit the same level of accountability, enforceability, or scrutiny through judicial review processes, as mentioned before and as the following pages will show.

3.2. Readmission-related provisions

As regard the issue of readmission-related provisions within these "informal" readmission instruments, first of all they share the same precise "readmission objectives" with "formal" EURAs. In the latter, such objectives are generally clarified in the preamble of these tools. For example, the Preamble of the EURA concluded with Albania states that the Parties wish to establish, "by means of this Agreement and on the basis of reciprocity, rapid and effective procedures for the identification and safe and orderly return of persons who do not, or no longer, fulfil the conditions for entry to, presence in, or residence on the territories of Albania or one of the Member States of the European Union, and to facilitate the transit of such persons in a spirit of cooperation". The same objectives, with – (not so) – different words, underpin most of the "informal" readmission arrangements. As a sample, the JDMC, with Afghanistan states that this instrument:

"[i]dentifies a series of actions to be pursued by the EU and the Government of Afghanistan with the objective to establish a rapid, effective and manageable process for a smooth, dignified and orderly return of Afghan nationals who do not

[607] See the considerations made *supra*, CHAPTER II, SECTION 2.

fulfil the conditions in force for entry to, presence in, or residence on the territory of the EU, and to facilitate their sustainable reintegration in Afghanistan in a spirit of cooperation"[608].

It is also particularly interesting in this context to note that while, as mentioned in the previous CHAPTER, all EURAs contain a clause requiring the readmission of TCNs, in most of the "informal" readmission arrangements disclosed so far, the "non-legal obligation" seems to be limited to the readmission of nationals of the third countries concerned[609]. It appears useful to analyse this question on the basis of the available texts of these arrangements.

With regard to the readmission arrangement between EU and Afghanistan, it is clear that the cooperation framework applies only to Afghan nationals. Indeed, the introduction of the JDMC explicitly emphasises that the objectives of this cooperation are to address and prevent irregular migration and to ensure the return of *Afghan nationals* who are irregularly present in the EU and who do not qualify for international protection. Similarly, the readmission arrangement with Ethiopia explicitly includes the joint establishment of admission procedures for the return of *Ethiopian nationals* residing irregularly in EU Member States[610].

As for the EU–Mali SOPs, the situation is more complex, as the arrangement does not explicitly mention the readmission of Malian nationals only, nor does it clearly address also the readmission of TCNs. However, several textual and contextual elements suggest that the SOPs are intended to apply only to Malian nationals. From a textual perspective, the central and explicit role of the Republic of Mali's diplomatic and consular authorities in verifying nationality and issuing travel documents may indicate that the procedures are designed for persons claiming Malian nationality[611]. Furthermore, the SOPs refer to Art. 13 of the Cotonou Agreement, which deals with the readmission of nationals without explicitly extending its provisions to TCNs[612]. Contextual factors also support this interpretation. For example, a parliamentary question tabled by a Verts/ALE Member of the European Parliament (MEP) on the use of incentives to secure

[608] JDMC, Introduction.
[609] *Supra*, CHAPTER II, SECTION 3.2.
[610] EU–Ethiopia Admission Procedures, Introduction.
[611] EU–Mali, SOPs, Art. 3.
[612] *Ivi*, Introduction.

Mali's cooperation on readmission in the context of non-signed SOPs refers exclusively to the issue of the readmission of Malian nationals[613]. The document also underlines that "the EU has repeatedly stated its interest in making progress on the readmission and return of (alleged) Malian nationals to the country". This focus is reinforced in both the Commission's 2019 and 2023 reports on the assessment of the level of cooperation of third countries on readmission, which only provide data on the readmission of Malian nationals and emphasise the primary focus on the third country's own nationals concerned[614]. In our opinion, taken together these elements suggest that the arrangement is designed to deal exclusively with the readmission of Malian nationals.

Instead, there is considerable ambiguity in the interpretation of the SOPs with Bangladesh. While the arrangement appears to focus primarily on the return of Bangladeshi nationals – as evidenced by detailed procedures for verifying nationality through official documents, national biometric databases and cooperation with Bangladeshi authorities –, certain provisions create uncertainty[615]. Indeed, while the SOPs with Bangladesh do not explicitly provide for the readmission of TCNs, such non-binding arrangement often leave room for different interpretations. In particular, the SOPs contain references to the "requested country", which could be interpreted in different ways. First, to include persons with ties to Bangladesh, rather than only Bangladeshi nationals[616]. In contrast to the SOPs with Mali, which, as reported above, consistently refer to the diplomatic and consular authorities of the Republic of Mali, the SOPs with Bangladesh also refer to the "diplomatic or consular representation of the requested country", which further adds to the challenges of interpretation. Alternatively, another interpretative hypothesis could be that the reference to the "requested country" cannot be a general reference to either the party, such as Bangladesh or the EU, acting as the requested country, as the arrangement should be framed in terms of "reciprocity".

[613] European Parliament, Question for written answer E-001535-18 to the Commission, Rule 130, Ska Keller (Verts/ALE), 13 March 2018.

[614] COM (2021) 55 final, cit., p. 53; COM (2022) 735 final, cit., p. 27; European Commission, Report to the Council, Assessment of third countries' level of cooperation on readmission in 2022, COM (2023) 467 final, Brussels, 20 July 2023, p. 65.

[615] EU–Bangladesh SOPs, Art. 2.

[616] *Ivi*, Arts. 2–4.

The possible inclusion of TCNs may depend on specific bilateral practices or future clarifications. Nevertheless, as in the case of Mali, also in the case of Afghanistan, Ethiopia and Bangladesh, the 2023 Commission's report on the implementation of readmission cooperation with these third countries explicitly refers to data related only to the readmission of nationals of these countries, underlining the exclusive focus on their nationals[617].

Among the EU's "informal" readmission agreements with third countries, only the EU–Türkiye Statement seems to *explicitly* include TCNs in its scope, providing for the readmission of [a]ll new irregular migrants crossing from Turkey to the Greek islands as of 20 March 2016". While there is still some ambiguity in the case of Bangladesh, in our view there is sufficient evidence to conclude that the other arrangements are limited to the readmission of nationals of the third countries concerned. This may lead to the deduction that "informal" readmission arrangements (at least most of them) appear to be "more in line" with customary international law, which only provides for the obligation to readmit State's own nationals. Thus, while EURAs impose broader obligations on third countries, "informal" readmission arrangements appear to adhere more strictly to established international norms, suggesting that the EU's practice of using these "informal" instruments does not alter the fundamental principles of customary international law. In our opinion, the fact that most of these "informal" readmission deals do not explicitly mention the readmission of TCNs appears to be driven primarily by political considerations rather than by the "informal" nature of the instrument itself. While the flexibility and lack of "formal" legal obligations in such arrangements may make them more attractive to third countries, the omission of explicit TCN provisions seems to reflect a deliberate strategy to avoid politically sensitive commitments. As noted earlier in this work, third countries often face significant domestic and regional challenges that make taking on TCNs commitments particularly controversial, such as fears of overburdening their infrastructure or triggering social unrest[618]. In our view, the ambiguous language found in these

[617] COM (2023) 467 final, cit., pp. 4 ff.
[618] *Supra*, CHAPTER II.

arrangements reinforces this point, as it allows third countries to avoid explicit commitments that could provoke scrutiny or backlash.

3.3. Human rights issues

While "informal" readmission arrangements are often similar in structure to EURAs, as noted above, they differ significantly in terms of the safeguards they provide, particularly with regard to the protection of human rights. As also mentioned in the previous pages, this concerns the conditions of publicity and, in particular, the involvement of the institutions, in particular *ex-ante* and *ex-post* control by the Parliament and the ECJ. For example, the lack of control by the representative body of EU citizens has significant implications for individual rights, as "informal" readmission instruments, like EURAs, may also affect individual rights under both EU and international law. According to the Ombudsman, the right to good administration requires that all actions taken by EU institutions, and by Member States when acting within the scope of EU law, must include an assessment of their human rights impact before proceeding[619]. This requirement applies regardless of the political nature, or labels attached to these instruments. It underlines the obligation to ensure that any proposed action is consistent with the EU's fundamental rights obligations and other key constitutional provisions. Preventive and mitigating measures need to be taken at every stage of the project life cycle, starting before an agreement or arrangement is concluded. If identified risks make compliance with EU law unachievable, the proposed cooperation should not proceed[620].

The situation described above illustrates that while "human rights issues" may arise in the context of EURAs, these concerns become much more complex when dealing with "informal" readmission instruments. In theory, "formal" EURAs at least offer minimum guarantees: oversight during the negotiation process, greater transparency, and institutional participation. As a sample, within the negotiations

[619] European Ombudsman, Decision in the Joint inquiry into complaints 506–509–674-784-927-1381/2016/MHZ against the European Commission concerning a human rights impact assessment in the context of the EU-Turkey Agreement, 18 January 2017. See also Art 41 and Art 51(1) CFR.

[620] Cfr. V. MORENO-LAX, "EU constitutional dismantling through strategic informalisation: Soft readmission governance as concerted dis-integration", in *European Law Journal*, 2024.

on EURAs, the agreement can be questioned by the Parliament, particularly if there is a lack of focus on human rights[621]. This was, for instance, the case with the EURA concluded with Pakistan. Indeed, prior to the approval of the EURA with Pakistan, several MEPs raised concerns and questioned whether the agreement lacked in practice strong safeguards and mechanisms to address fundamental rights violations. They also pointed out that the EURA contained several ambiguities, particularly regarding definitions, travel documents, deadlines for responding to readmission requests, transit, burden of proof and the possibility of retroactive application[622]. Nevertheless, this type of Parliamentary oversight, as clarified above, is absent from "informal" arrangements. These arrangements also generally lack provisions similar to those found in EURAs, such as a clause stating that the agreement does not affect rights, obligations or responsibilities under international law; such clauses are important safeguards for the protection of human rights[623]. In fact, only the JDMC contains references similar to the clause found in EURAs[624]. "Informal" readmission arrangements may therefore raise human rights concerns, in particular with regard to the right to an effective remedy and the principle of *non-refoulement*.

As regards the right to an effective remedy, in the context of EU law, the principle of an effective remedy ensures that individuals have the right to access justice and obtain redress when their rights under EU law are violated. This principle is enshrined in Art. 47 of the CFR, which guarantees the right to an effective remedy before a tribunal and requires Member States to provide sufficient

[621] M. LILIENKAMP, S. SALIBA, *EU Readmission Agreements Facilitating the return of irregular migrants*, April 2015, p. 3. Similar scrutiny can take place at the national level when national parliaments review bilateral readmission agreements. E. FRASCA, E. ROMAN, *op. cit.*, p. 950.

[622] European Parliament, Committee on Civil Liberties, Justice and Home Affairs, Recommendation on the proposal for a Council decision on the conclusion of the Agreement between the European Union and the Islamic Republic of Pakistan on the readmission of persons residing without authorisation, 15 July 2010, Report A7-0231/2010. Cfr. K. GILLADE, *Readmission Agreements concluded by the EU*, Master's Degree Thesis, University of Ghent, 2011, pp. 67–68.

[623] *Supra*, CHAPTER II, SUB-SECTION 3.2.

[624] JDMC, Preamble: "[i]n their cooperation under this declaration, the EU and Afghanistan remain committed to all their respective international obligations, in particular; respecting the provisions of the 1951 Convention relating to the Status of Refugees and its 1967 New York Protocol; upholding the rights and freedoms guaranteed in the International Covenant on Civil and Political rights and the EU Charter on Fundamental Rights and the Universal Declaration on Human Rights; respecting the safety, dignity and human rights of irregular migrants subject to a return and readmission procedure".

legal avenues for individuals to challenge unlawful acts, ensuring that remedies are accessible, timely, and effective in practice[625]. Moreover, in accordance with Art. 13 of the Return Directive, a person who is the subject of a removal procedure must be guaranteed an effective remedy to appeal or seek a review of his or her removal decision.

In this vein, "informal" readmission deals may hinder effective judicial protection for various reasons. For example, these arrangements often lack clarity regarding their attribution to the Union, as the case of the EU–Türkiye Statement demonstrates, creating ambiguity about the responsible authority and complicating accountability. This obscurity undermines the potential for scrutiny under Art. 263 TFEU, which governs the annulment of EU acts, making legal challenges more uncertain. Indeed, at "first sight", the non-binding nature of these agreements may, by their very nature, exclude them from direct review by the Court under Art. 263 TFEU, since this article only applies to acts "intended to produce legal effects *vis-à-vis* third parties"[626]. While thus their non-binding nature would seem to place such agreements outside the jurisdiction of the Court, recent case law reflects a more nuanced interpretation of the fulfilment by non-legally binding measures of the requirements imposed by the concept of a "reviewable act" under Art. 263 TFEU. In the *OIV* case, for example, the Court recognised that, although the recommendations at issue in the specific case were not binding under international law, they could influence the content of EU legislation by virtue of their incorporation into EU law[627]. Years later, as noted by García Andrade, in the abovementioned "Swiss MoU case", the Court annulled the Commission's decision

[625] See, *ex multis*, C. FAVILLI, "The Standard of Fundamental Rights Protection in the Field of Asylum: The Case of the Right to an Effective Remedy between EU Law and the Italian Constitution", in *Review of European Administrative Law*, Vol. 12, 2019, pp. 167–183; A. RADJENOVIC, *Effective remedies for asylum-seekers at EU external borders. A new pact on migration and asylum*, EPRS | European Parliamentary Research Service, October 2021. See also *supra*, CHAPTER I, SECTION 2.2.

[626] More precisely, Art. 263 TFEU states that "[the Court] shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties".

[627] European Court of Justice (ECJ), Case C–399/12, *Germany v Council (OIV)*, Judgement 7 October 2014, ECLI:EU:C:2014:2258, para. 63. Cfr. P. GARCÍA ANDRADE, "Respect for Institutional Balance in the Adoption of Non-legally Binding Agreements: *France v Commission II", op. cit.*, p. 453.

to sign a non-binding arrangement on substantive grounds, without addressing the issue of admissibility[628]. This decision confirmed the Court's broad interpretation of what constitutes "legal effects" within the meaning of Art. 263 TFEU. In this regard, Advocate General Sharpston also clarified that "characterising the act as 'political' does not necessarily place it outside the scope of Article 263 TFEU, provided that it has legal effects. Nor does the absence of specific rules in the Treaties on how a specific act is to be adopted"[629]. By focusing on substantive issues rather than on admissibility, both the Advocate General and the Court seem to implicitly recognise that soft law instruments can have significant legal effects within EU law, despite their non-binding status in international law: "it is for the Court to ultimately determine whether the normative force of these deals is sufficient to allow for direct judicial review"[630].

In any case, it is undeniable that these challenges and uncertainties that "informal" deals pose to the Court's capacity to ensure compliance with EU norms may impede individuals from accessing effective remedies when dealing with these arrangements. Individual applicants must prove the deal's attributability to EU institutions and its legal effects[631]. They must also show that the readmission arrangement directly and specifically alters their legal situation, thus fulfilling the criteria of direct and individual concern in accordance to Art. 263, paragraph 4, TFEU. However, given that "informal" readmission instruments in most cases apply broadly to *all nationals* of the readmitting State who are irregularly present in a Member State (see, for instance, the readmission arrangement with Ethiopia), it is extremely difficult to demonstrate direct and individual concern. Indeed, readmission arrangements may make it more difficult for private parties (so-called non-privileged applicants) to fulfil the restrictive standing requirements imposed by

[628] *Ibid.*

[629] Opinion of Advocate General Sharpston, delivered on 26 November 2015, Case C–660/13, *Council of the European Union v European Commission*, ECLI: ECLI:EU:C:2015:787, para. 60. D. VITIELLO, "Legal Narratives of the EU External Action in the Field of Migration and Asylum: From the EU-Turkey Statement to the Migration Partnership Framework and Beyond", in V. MITSILEGAS, V. MORENO-LAX, N. VAVOULA (eds.), *Securitising Asylum Flows: Deflection, Criminalisation and Challenges for Human Rights,* Leiden-Boston, 2020, p. 154.

[630] C. MOLINARI, "Parallel Paths that Need to Cross?", cit.

[631] M. SORMUNEN, "The outdating of asylum policy from within: The EU's informal readmission arrangements and the Rule of Law", in *Reconnect*, 8 April 2022

the Treaties to challenge EU measures through the annulment action[632]. The difficulty in accessing effective remedies against "soft" readmission arrangements translates into significant challenges in obtaining judicial determinations on the impact these arrangements may have on fundamental rights. This issue may have serious implications for the proper application of respective provisions under both EU and international law[633].

It is also worth noting that although the "informal" nature of readmission agreements does not by itself exempt them from the validity test of the Court in preliminary rulings, national courts rarely challenge these EU arrangements in such proceedings[634]. On the one hand, this reluctance is probably due to the fact that the heavy workload and limited resources of national courts reduce the likelihood of using preliminary rulings to challenge these "informal" deals[635]. On the other hand, as expected, the practice of the EU adoption of "informal" agreements does not seem to be opposed by the Member States, on the contrary it seems to be supported by them. Indeed, Member States have not brought actions for annulment before the ECJ to challenge the legality of such acts. Conversely, in the actions for annulment brought in the *NF* case concerning the EU–Türkiye Statement declaration, several Member States, together with the Council and the Commission, intervened in support of the European Council without claiming that their prerogatives to

[632] The Court has consistently applied a narrow interpretation to the requirements of direct and individual concern, despite continued calls for a broader approach to ensure effective judicial protection. According to the Court, for an act to be of direct concern to applicants, it must directly affect their legal status. In addition, for an act to be of individual concern, it must affect applicants by reason of specific characteristics peculiar to them or of special circumstances which distinguish them from others, and which distinguish them in a manner similar to that of the person directly addressed by the act. See, *inter alia*, Court of Justice of the European Communities (CJEC), Case 25–62, *Plaumann & Co. v Commission of the European Economic Commu*nity, Judgment of 15 July 1963, EU:C:1963:17, para. 107; Court of Justice of the European Communities (CJEC), Joined cases 41 to 44/70, *NV International Fruit Company and others v Commission of the European Communities*, Judgment of 13 May 1971, EU:C:1971:53, para. 28. Cfr. C. MOLINARI, *Going All Out to Manage Migration: A Constitutional Analysis of the EU Readmission Policy*, *op. cit.*, pp. 397.

[633] See also, *inter alia*, E. MUIR, C. MOLINARI, "Micro-harmonisation of the fundamental right to an effective judicial remedy in the Proposed Return Directive and beyond: a dangerous path?", in S. CARRERA, D. CURTIN, A. GEDDES (eds.), *20 Years Anniversary of the Tampere Programme: Progress and Future Priorities of the EU AFSJ*, Center for European Policy Studies, 2020, pp. 157–172.

[634] In this sense, C. MOLINARI, "Parallel Paths that Need to Cross?", cit.

[635] See M. GLAVINA, "To Refer or Not to Refer, That Is the (Preliminary) Question. Why Member States' Judges Do Not Participate in the Preliminary Ruling Procedure", in *Croatian Yearbook of European Law and Policy*, Vol. 16, Issue 1, 2020, pp. 25–59; C. MOLINARI, *Going All Out to Manage Migration: A Constitutional Analysis of the EU Readmission Policy*, *op. cit*, p. 108.

conclude international agreements had been infringed[636]. Moreover, it should be recalled that these practices were first adopted by the Member States and then emulated by the Union, as clarified in SECTION 3 of this CHAPTER: this reflects, in our view, a consistent and coherent approach by the Member States in this context. Moreover, the European Parliament has (of course) not challenged these deals in terms of human rights protection either, as mentioned earlier in this SECTION, because the informality of the process excludes it from the adoption process[637].

As for the principle of *non-refoulement,* while the previous CHAPTER underlined that EURAs pose significant challenges to the respect of this customary norm, the situation becomes even more precarious under "flexible" arrangements. Indeed, many of these "informal" deals are concluded with third countries that cannot be deemed genuinely safe: the risks of *refoulement* may vary, yet they often remain substantial. For instance, the EU has adopted "informal" arrangements with countries which are considered high-risk and do not ensure adequate levels of safety for readmitted individuals. The situation in Afghanistan is telling. Even before the Taliban came to power, deteriorating conditions made it unsafe to return. Despite this, the JWF with Afghanistan was not suspended but renewed with the "new" JDMC, which was eventually suspended only after the Taliban took power[638]. What is striking is that such "flexible" arrangements should not have been adopted in the first place. Even before the change of government, the situation in Afghanistan had deteriorated to the point where it could not guarantee protection against the risk of *refoulement.* The dire conditions on the ground, with escalating violence and instability, made it clear that the country was not in a position to ensure the safety of returnees. Despite these obvious risks, the arrangement was renovated, demonstrating a disturbing disregard for the basic protection needs of individuals facing potential persecution. Furthermore, in the case of the JDMC, the objectives outlined in the deal are twofold: first, to combat and prevent irregular migration; and second, to ensure the return of irregular migrants[639]. According to Moreno-Lax,

[636] General Court, Cases T–192/16, T–193/16, cit. paras. 21–22. A. SARDU, *op. cit.,* p. 347

[637] See also, *supra*, SUB-SECTION 3.2.

[638] Council of the European Union, Operationalization of the Pact – Action plans for strengthening comprehensive migration partnerships with priority countries of origin and transit, Draft Action Plan: Afghanistan, 10472/2/21 REV 2, Brussels, 8 October 2021, p. 9.

[639] JDMC with Afghanistan, Introduction.

"this goes beyond normal readmission duties under a usual EURA, not only regulating returns but affecting arrivals as well, thereby impinging upon the right to leave any country and the right to asylum that international and EU law recognise"[640]. While EURAs generally focus on facilitating the return of irregular migrants, the JDMC also targets the prevention of irregular migration, thereby influencing not only the conditions of return but also the dynamics of arrival. This dual approach, Moreno-Lax argues, risks violating fundamental rights protected under international and EU law, including the right to leave any country and the right to seek asylum, as described in CHAPTER I[641]. In this regard, the European Council on Refugees and Exiles (ECRE) criticised the JDMC for further undermining protection safeguards, particularly for vulnerable groups, by narrowing the definitions of key terms such as "family unit" and "seriously ill individuals" (Part 1, Section 5 of the JDMC)[642]. Contrary to its title, as noted by Frasca and Roman, the JDMC does not comprehensively address migration and mobility between the EU and Afghanistan but instead prioritises bolstering and expediting deportations to Afghanistan: it seems therefore to be designed to facilitate deportations to Afghanistan, despite the country's escalating instability[643].

These examples show that "informal" readmission arrangements may have a significant impact on fundamental rights within the EU. However, according to the EU Charter of Fundamental Rights (CFR) any interference with these rights must

[640] Art 18 CFR, Protocol No. 4 to the ECHR, Arts. 3 and 4, and Arts. 7 and 12(2) ICCPR. V. MORENO-LAX, "EU constitutional dismantling through strategic informalisation: Soft readmission governance as concerted dis-integration", *op. cit*, p. 6.

[641] In this regard, see also, V. MORENO-LAX, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law*, Oxford University Press, Oxford, 2017.

[642] European Council on Refugees and Exiles (ECRE), *The JDMC: Deporting people to the world's least peaceful country*, Policy Note No. 35, 2021, pp. 2–3: "[t]he JDMC explicitly expands the possibility for MS to deport vulnerable people, achieved by narrowing the concept of the family unit to parents with minor children below the age of 18 and by limiting the definition of seriously ill people to those with a serious disease that cannot be treated in Afghanistan. ECRE is concerned that the narrower family definition might lead to family separation and deportation of people who do not fall within the definition but who are nonetheless dependent on family members; the needs of family members requiring continuous support and care may not be taken into account. [...] Moreover, limiting the category of seriously sick people to those who have serious diseases which cannot be treated to Afghanistan is highly concerning. Reports indicate that Afghanistan has a poor and underfunded medical system and that many Afghans often have to travel to neighbouring countries for medical treatment. This means that even if an illness could theoretically be treated in Afghanistan, the practical access to medical care is not guaranteed."

[643] E. FRASCA, E. ROMAN, *op. cit.*, p. 953.

be strictly governed by law[644]. This means that any limitations on fundamental rights must be established through an official legal text that is not only enacted and published, but also accessible and clear, and clear, avoiding above all the vagueness of language often found in this type of instruments. The legal framework must provide effective judicial protection and remedies to those affected, ensuring their rights are upheld. Soft law mechanisms, which lack the binding force and official publication requirements of legislation, do not meet these stringent criteria. Consequently, they seem to be inadequate for guaranteeing the protection and enforceability of fundamental rights as required by the principles of legality and effectiveness[645].

4. Readmission and return through administrative cooperation: the role of FRONTEX and its Working Arrangements

As noted in the previous analysis, the EU has sought to achieve objectives related to readmission and the broader control of irregular migration that, however, would be difficult to achieve independently. One of the ways in which EU Agencies have helped in this regard is through FRONTEX, which has played a crucial role in providing operational support for readmission and return procedures. FRONTEX, and in particular its Working Arrangements, seem to have been influenced by the trend towards "informalisation" that characterises the Union's approach to readmission and, more generally, its cooperation with third countries in the area of migration, albeit with certain differences that merit discussion. It is therefore appropriate to examine this aspect at this stage of the research. The activities of FRONTEX not only underline the EU's reliance on competent Agencies to achieve its migration objectives, but also illustrate how the trend towards "informalisation" has shaped the whole of the EU's readmission and return policy. This is particularly evident in the central role played by FRONTEX in this area. By analysing the role of the Agency and its adaptation to these "informal" practices, this SECTION sheds light on the operational dynamics of the EU readmission framework and its broader

[644] Arts 41, 47, Art. 52 (1) CFR.

[645] V. MORENO-LAX, "EU constitutional dismantling through strategic informalisation: Soft readmission governance as concerted dis-integration", *op. cit.*, p. 26.

implications for the interplay with international law. As shown, FRONTEX functions as the "operational arm" of the Union, and its actions must be understood in the context of overarching EU trends that validate and reinforce these practices.

As it is well known, FRONTEX is a specialised EU Agency whose main task is to assist Member States and Schengen associated countries in managing the EU's external borders. It also assists with the return of individuals and the fight against cross-border crime[646]. FRONTEX was established in 2004 through a Council Regulation, and its creation was based on two key articles from the TEC: Art. 62(2)(a) TEC, which focused on setting standards and procedures for Member States to follow when conducting border checks on people; Art. 66 TEC, which emphasized the importance of cooperation between the relevant departments of the Member States and the Commission in matters related to visas, asylum, immigration, and policies concerning the free movement of people[647]. The inclusion of the latter provision is significant because it underlines that FRONTEX is designed to act as a coordination centre, facilitating cooperation between national authorities and the EU level, as well as "a centre of excellence for border control activities at the EU's external borders"[648]. Today, one of FRONTEX's main tasks is in fact to manage and supervise controls at the EU's external borders

Initially, the Agency had a limited role, mainly facilitating the exchange of information and best practices between Member States and providing logistical and financial support to Member States[649]. Although the 2004 Regulation did not explicitly mention readmission, the link between the activities of FRONTEX and the readmission of irregular migrants to third countries was reflected in Art. 9: this provision stated that the Agency was mandated to assist in the organisation of joint return operations by Member States. It was also authorised to use former Community financial resources available for return operations and was required to

[646] European Border and Coast Guard Agency (FRONTEX), *Frontex: Beyond European Borders*, 2021.

[647] Council Regulation 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, no longer in force.

[648] European Union, *European Border and Coast Guard Agency (Frontex)*, available here: https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/search-all-eu-institutions-and-bodies/frontex_en.

[649] *Ivi*, Art. 1(2).

identify best practices for obtaining travel documents and facilitating the removal of irregularly staying TCNs.

Nonetheless, since its creation, FRONTEX has experienced a remarkable expansion of its budget, staff and responsibilities, a growth trajectory unmatched by any other EU Agency. This development should be understood in the broader context of the increasing reliance on Agencies in the AFSJ in recent years[650]. The 2016 Regulation and later on the 2019 Regulation on FRONTEX have significantly expanded the Agency's responsibilities, as well as its human and financial resources, to better protect the EU's external borders and restore normal operations within the Schengen area[651]. For example, for the first time ever, the Union has established a uniformed service with executive authority – the European Border and Coast Guard standing corps[652]. This corps is composed of officers employed by FRONTEX as well as those seconded by Member States. They are deployed at the EU's external borders to assist national authorities with border control, coastguard tasks and return operations[653].

As for the specific issue of return, FRONTEX supports Member States through coordinated actions in relation to return operations. These activities aim at enhancing border security, managing migration flows and ensuring the implementation of EU policies on the ground. FRONTEX can provide operational and technical support to an EU or Schengen country at different stages of the return process: from pre-return preparations to the coordination and implementation of the

[650] See, *ex multis*, M. CHAMON, *EU Agencies: Legal and Political Limits to the Transformation of EU Administration*, Oxford University Press, Oxford, 2016; E. CHITI, "An Important Part of the EU's Institutional Machinery: Features, Problems and Perspectives of European Agencies", in *Common Market Law Review*, Vol. 46, Issue 5, 2009, pp. 1395–1442.

[651] Regulation 2016/1624 of the European Parliament and of the Council, of 14 September 2016, on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) 863/2007 of the European Parliament and of the Council, Council Regulation (EC) 2007/2004 and Council Decision 2005/267/EC, no longer in force; 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. More in details, D. VITIELLO, *Le frontiere esterne dell'Unione europea*, *op. cit.*, pp. 93 ff.

[652] Regulation 2019/1896, cit. European Border and Coast Guard Agency (FRONTEX), Standing corps, available here: https://www.frontex.europa.eu/about-frontex/standing-corps/standing-corps/.

[653] European Border and Coast Guard Agency (FRONTEX), *Frontex: Beyond European Borders*, cit.

return operation, to post-return assistance[654]. It is therefore unsurprising to see a recent Commission Communication referring to FRONTEX as the "operational arm of the common EU system of returns"[655].

It is precisely in the area of return and readmission that a particular feature of all FRONTEX's operational activities becomes most apparent: the ability to affect the legal position of the persons targeted by FRONTEX's actions. Indeed, the area of returns is one of the most controversial areas where the protection of rights and border management collide. The 2019 Regulation contains various compromises in order to balance a "dialectic" between efficiency and security and the protection of fundamental rights[656]. For example, with regard to the personal data of the individual returned, the 2019 Regulation clarifies in fact that "[g]iven the particular policy need for expedient return procedures, it is necessary for the Agency to be able to restrict certain rights of data subjects so as to prevent the *abuse of such rights* from impeding the proper implementation of return procedures and the successful enforcement of return decisions by the Member States or from preventing the Agency from performing its tasks efficiently"[657]. In brief, Regulation 2019/1896 gives FRONTEX enhanced capabilities to manage return procedures efficiently by limiting certain rights of individuals in specific circumstances. This is done to prevent actions that could delay or obstruct the return process, while still ensuring that fundamental rights are respected and monitored throughout the process[658].

Although FRONTEX is primarily responsible for carrying out its tasks within the territory of the EU, international cooperation has also been an integral part of the Agency's tasks from the outset. In general terms, the externalisation of the EU migration policies has led to an expansion in the number of EU actors involved in migration cooperation and border controls with third States. Practical and operational cooperation with third countries, in particular in the field of return and

[654] *Ibid*. In this regard, see Regulation 2019/1896, cit., recitals 79–87; Art. 10. However, it should be also recalled that the decision to return individuals is the sole responsibility of the judicial or administrative authorities of the Member States. *Supra,* SUB–SECTION 2.1.

[655] European Commission, Communication COM (2021) 120 final to the European Parliament and the Council Communication on the EU Strategy on Voluntary Return and Reintegration, Brussels, 27 April 2021, para. 3.1.

[656] D. VITIELLO, *Le frontiere esterne dell'Unione europea, op. cit.,* p. 112.

[657] Regulation 2019/1896, cit., recital (100).

[658] D. VITIELLO, *Le frontiere esterne dell'Unione europea, op. cit.,* pp. 112–113.

readmission, can be considered as one the areas where FRONTEX's mandate has been most extended by the 2019 Regulation. Indeed, Art. 1(1) of the "new" FRONTEX Regulation not only reiterates the traditional objective of the European integrated border management – namely, to ensure it "with a view to managing those borders efficiently in full compliance with fundamental rights" –, but also adds a new explicit objective, *i.e.*, to increase the efficiency of the Union return and readmission policy. Moreover, for the first time in the history of FRONTEX, Art. 73 (5) of the 2019 Regulation *explicitly* states that the Agency shall contribute to the implementation of the Union external policy on return and readmission, clarifying what had previously only been *implied*: the role of the Agency in cooperation with third countries for the implementation of both EU readmission and return policies[659].

In the light of the above, it is important to note that FRONTEX is one of the EU Agencies whose founding regulation – especially after its most recent amendments – contain detailed provisions on the Agency's mandate for international cooperation with third countries, the instruments it uses and the relevant procedural aspects[660]. Indeed, the 2019 Regulation explicitly states that the Agency may cooperate with the authorities of third countries to the extent necessary to fulfil its "operational" tasks[661]. This includes activities such as combating human trafficking and providing training and technical assistance to third country authorities on border management and, above all, facilitating returns and readmissions. Traditionally, the cooperation with third countries in the "external dimension" of the operative framework of

[659] The Regulation also includes "cooperation with third countries [...] which have been identified through risk analysis as being countries of origin or transit for illegal immigration" among the components of the concept of European integrated border management. Regulation 2019/1896, cit., Art. 3(g).

[660] See also, the European Union Aviation Safety Agency (EASA), the European Union Agency for Asylum (EUAA), the European Banking Authority (EBA), the European Union Agency for Law Enforcement Cooperation (Europol) and the European Union Agency for Fundamental Rights (FRA). F. COMAN-KUND, "The International Dimension of the EU Agencies: Framing a Growing Legal-Institutional Phenomenon", in *European Foreign Affairs Review*, Vol. 23, No. 1, 2018, p. 99.

[661] Art. 73(1) of Regulation 2019/1896, cit. J. SANTOS VARA, "The Activities of Frontex on the Territory of Third Countries: Outsourcing Border Controls Without Human Rights Limits?", in *European Papers*, Vol. 8, No. 2, 2023, p. 987.

FRONTEX has been done within the framework of non-binding and "flexible" arrangements called "Working Arrangements"[662].

The latter Arrangements often include a statement clarifying that they are not international agreements and do not create international obligations for the EU, its institutions and its Member States[663]. These Working Arrangements establish operational cooperation between FRONTEX and the administrative authorities of third countries in order to fight irregular migration through border control[664]. In this regard, the 2011 Regulation explicitly encouraged FRONTEX to cooperate with the competent authorities of third countries specifically on the return of irregular migrants[665]. This "instruction" was subsequently implemented a year later, as evidenced by the Working Arrangement between FRONTEX and the Turkish border guard. Point 10 of this arrangement in fact states that "FRONTEX and the competent Turkish authorities may explore possibilities to develop cooperation in the field of FRONTEX coordinated joint return activities in accordance with their respective legislation as well as promote the active facilitation and participation of the competent Turkish authorities in such activities"[666].

To date, FRONTEX has adopted Working Arrangements with the authorities of 19 third countries: Albania, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Canada, Cape Verde, North Macedonia, Georgia, Kosovo, Moldova,

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[662] Y. ZHONG, H. CARRAPICO, "Frontex goes global: A two-level experimentalist governance analysis of Frontex's International action and its role within the externalisation of EU Borders", in *Contemporary European Politics*, Vol. 2, Issue 1, 2024, p. 4.

[663] See, *inter alia*, European Border and Coast Guard Agency (FRONTEX), Working arrangement establishing operational cooperation between European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union and the National Security Council of the Republic of Armenia of 22 February 2012, Art. 6; European Border and Coast Guard Agency (FRONTEX), Working arrangement establishing operational cooperation between European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union and the Ministry of Internal Affairs of the former Yugoslav Republic of Macedonia of 19 January 2009, Art. 7. Cfr. A. OTT, E. VOS, F. COMAN-KUND, *EU Agencies and their international mandate: A new category of global actors?*, Centre for the Law of the EU External Relations (CLEER) Working Paper 2013/7, p. 32.

[664] C. MOLINARI, *Going All Out to Manage Migration: A Constitutional Analysis of the EU Readmission Policy, op. cit.*, p. 296.

[665] Regulation 1168/2011 of the European Parliament and of the Council, of 25 October 2011, amending Council Regulation (EC) 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders, no longer in force, Art. 9(2).

[666] European Border and Coast Guard Agency (FRONTEX), Memorandum of Understanding on establishing cooperation between the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union and the Ministry of Foreign Affairs of the Republic of Turkey of 28 May 2012.

Montenegro, Nigeria, Russia, Serbia, Türkiye, Ukraine, the U.K., and the U.S.[667]. The "flexible" and "non-binding" content of the Working Arrangements agreed concluded so far is very similar. Among the objectives, the fight against irregular migration and related cross-border crime through border control and the strengthening of border security are very prominent. The Working Arrangements provide for cooperation on risk analysis and the exploration of possibilities for cooperation on joint return operations, with the active participation of a representative of each Party[668].

Therefore, the Working Arrangements fall within the framework of the "informalisation" process in matters of return and readmission and, in general terms, in the EU "informalisation trends" regarding migration governance. FRONTEX's Working Arrangements serve as a "quasi-legal" basis for the development of increasingly complex and articulated forms of inter-administrative cooperation, aimed at integrating third countries into the European border security system[669]. In adopting these arrangements, FRONTEX has indeed enjoyed a margin of discretion, given the nature of soft law and their programmatic content[670]. However – unlike the "informal" arrangements adopted by the EU in the field of readmission –, these Working Arrangements have been standardised thanks to the 2019 Regulation. Indeed, Art. 73(4) specifies that "[t]he Agency may cooperate, to the extent required for the fulfilment of its tasks, with the authorities of third countries competent in matters covered by this Regulation" and that "[w]here available, the Agency shall […] act within the framework of working arrangements concluded with the authorities of third countries […]. The working arrangements [...] shall specify the scope, nature and purpose of the cooperation and shall be related to the management of operational cooperation". This standardisation is also

[667] European Border and Coast Guard Agency (FRONTEX), *Beyond EU borders. Working arrangements*, available here: https://www.frontex.europa.eu/what-we-do/beyond-eu-borders/working-arrangements/.

[668] M. FINK, "Frontex Working Arrangements: Legitimacy and Human Rights Concerns Regarding 'Technical Relationships'", in *Merkourios: Utrecht Journal of International and European Law*, Vol. 28, Issue 75, p. 29. See also, D. FERNANDEZ-ROJO, *EU Migration Agencies: The Operation and Cooperation of FRONTEX, EASO and EUROPOL*, Edward Elgar Publisher, Cheltenham, 2021, pp. 116 ff.

[669] D. VITIELLO, *Le frontiere esterne dell'Unione europea, op. cit.,* p. 118.

[670] F. COMAN KUND, *The International Dimension of the EU Agencies: Charting a Legal-Institutional 'Twilight Zone'*, TARN Working paper 5/2017, pp. 12 ff.

based on the preparation of a specific template by the Commission, drafted in consultation with the European Union Agency for Fundamental Rights (FRA) and the European Data Protection Supervisor (EDPS)[671]. The standardisation of Working Arrangements is a crucial element in preserving the Commission's role of external representation (Art. 17(1) TEU) and can be seen as a step towards greater political accountability, respecting the principles of sincere cooperation and institutional balance[672]. In addition, the 2019 Regulation not only requires the Commission to approve in advance any Working Arrangements with the competent authorities of third countries, but also requires the European Parliament to be informed of the prospective Parties and the content of the Working Arrangements under negotiation[673]. The 2019 Regulation therefore seems to strengthen democratic control over the Agency's external actions.

It is also worth noting that FRONTEX's external activities occupy a legal "grey" area, much like the "informal" deals regarding readmission. Working Arrangements are generally deemed technical-programmatic instruments, not intended to independently produce binding legal effects on third parties[674]. However, their provisions on entry into force, amendment, termination and interpretation may suggest that they may have some legal significance in certain contexts[675].

[671] Regulation 2019/1896, cit., Art. 76(2)(2). Cfr. D. VITIELLO, *Le frontiere esterne dell'Unione europea*, *op. cit.*, p. 120. However, these Working Arrangements are not entirely clear about the applicable legal framework and human rights protections, and the wording of these Arrangements is relatively vague. J. SANTOS VARA, "The Activities of Frontex on the Territory of Third Countries: Outsourcing Border Controls Without Human Rights Limits?", *op. cit.*, pp. 987 ff.

[672] Cfr. D. VITIELLO, *Le frontiere esterne dell'Unione europea, op. cit.,* p. 120. See also, C. MOLINARI, *Going All Out to Manage Migration: A Constitutional Analysis of the EU Readmission Policy*, *op. cit.*, p. 312: "[t]he institutional set-up of Frontex has evolved together with its competences and seems capable, as currently designed, to ensure that the agency's external action is conducted in compliance with the principles of institutional balance and – to a certain extent – the non-delegation doctrine."

[673] Regulation 2019/1896, cit., Art. 76.

[674] M. ZAGOR, "Safe Legal Pathways" or New Colonial Frontiers? A Critical Analysis of European Intervention in the Sahel and the Creation of Anomalous Legal Zones", in *Refugee Survey Quarterly*, Vol. 43, Issue 1, 2024, p. 43.

[675] See, as a sample, Working Arrangement establishing operational cooperation between the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX) and the Ministry of the Interior of Republic of Serbia, 17 February 2009, Art. 7; Working Arrangement establishing operational cooperation between the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX) and the Ministry of Security of Bosnia and Herzegovina, 3 April 2009, Art. 7; Working Arrangement establishing operational cooperation between the European Agency for the Management of Operational Cooperation at the

Nonetheless, as FRONTEX lacks international legal personality and the capacity to bind the EU, these arrangements cannot be considered binding international agreements under international law. That said, these Working Arrangements may reflect an intention to establish a quasi-legal framework for cooperation, particularly in areas such as return and readmission, that could potentially violate the human right to leave one's country[676]. As Coman-Kund points out, an analysis of the wording and content of these arrangements shows that, although they are primarily non-binding, in practice they can give rise to limited legal rights and obligations[677].

In addition, although FRONTEX's Working Arrangements operate outside the formal EU procedures laid down in the Treaties for concluding international agreements, they remain closely linked to such frameworks. Indeed, the legal framework for the extraterritorial activities of FRONTEX through these Working Arrangements requires a *status agreement* to be concluded between the competent authorities of the Union and of the third country concerned, in accordance with the procedure set out in Art. 218 TFEU and drafted on the basis of a model prepared by the Commission[678]. In our view, the "operationalisation" of the FRONTEX's Working Arrangements therefore depends on the conclusion of status agreements, *i.e.,* international agreements between the EU and third countries that allow FRONTEX to carry out executive measures such as joint operations, rapid border interventions and return operations on the territory of the partner country[679]. This

External Borders of the Member States of the European Union (FRONTEX) and the Nigerian Immigration Service, 19 January 2012, Art. 7.

[676] D. VITIELLO, "L'Agenzia dell'Unione europea per l'asilo come strumento di armonizzazione: potenzialità, limiti e prospettive", in *Diritto, Immigrazione e Cittadinanza*, Fasc. 1/2024, pp. 10 ff.

[677] F. COMAN-KUND, "The International Dimension of the EU Agencies: Framing a Growing Legal-Institutional Phenomenon", *op. cit*., pp. 115–116.

[678] European Commission, Communication COM (2016) 747 final to the European Parliament and the Council, Model status agreement as referred to in Article 54(5) of Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard, Brussels, 22 November 2016. Lastly, European Commission, Communication COM (2021) 829 final to the European Parliament and the Council, Model status agreement as referred to in 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, Brussels, 21 December 2021.

[679] On the status agreements see more in details, M. PREVIATELLO, "Il nuovo modello di accordo sullo status: le azioni esecutive di Frontex oltre i confini dell'Unione europea", in *BlogDUE,* 17 June 2022; M. PREVIATELLO, *Frontex actions beyond EU borders: status agreements, immunities and the protection of fundamental rights*, EUI Working Paper, 2023.

underscores that the Agency's Working Arrangements are limited to addressing technical cooperation issues and cannot independently support the exercise of executive border control powers in third countries[680]. Instead, their operation depends on the legal framework established by status agreements, reinforcing their auxiliary and preparatory nature within the broader legal framework of EU external relations[681].

This raises another important issue. Although FRONTEX's Working Arrangements do not have the legal capacity to bind the EU internationally – as the EU can only be bound by agreements concluded in accordance with Art. 218 TFEU – this does not relieve the Union of responsibility for the Agency's actions[682]. In fact, the EU remains accountable for decisions or activities undertaken by the Agency that may violate international law[683]. Indeed, although FRONTEX appears to have sufficient autonomy in international cooperation, as mentioned above, the Agency is subject to numerous "formal" conditions and controls that significantly limit its discretion in this area. As a result, EU Agencies, including FRONTEX, typically act as technical bodies and operative "arms" of the EU in international affairs, which means that their international cooperation activities should be attributable to the Union[684]. This observation is in line with the broader trend of "informalisation" in EU migration governance – particularly in relation to readmission – and highlights how FRONTEX's Working Arrangements fit seamlessly into this paradigm. Its structure and functioning reinforce the Union's trend towards increasingly "informal" mechanisms in this area, and, in our view, confirm the EU's commitment to developing this approach.

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[680] See also, J. SANTOS VARA, "The Activities of Frontex on the Territory of Third Countries: Outsourcing Border Controls Without Human Rights Limits?", *op. cit.*, pp. 996 ff.

[681] P. GARCÍA ANDRADE, "The external dimension of the EU migration policy: the legal framing of building partnerships with third countries", in E. TSOURDI, P. DE BRUYCKER, *Research Handbook on EU Migration and Asylum Law*, Edward Elgar Publishing, Cheltenham, 2022 p. 382. See also, P. GARCÍA ANDRADE, *La acción exterior de la Unión Europea en materia migratoria. Un problema de reparto de competencias*, *op. cit*., pp. 365 ff.

[682] In this regard, see also European Parliament, the Council and the European Commission, Joint Statement on Decentralised Agencies, Common Approach on EU Agencies, 19 July 2012, para. 25.

[683] D. VITIELLO, *op. cit.*, p. 11. And this despite the fact that Regulation 2019/1896, cit., Art. 7(4) describes FRONTEX as "fully responsible and accountable for any decision it takes and for any activity for which it is *solely responsible*".

[684] F. COMAN-KUND, "The International Dimension of the EU Agencies: Framing a Growing Legal-Institutional Phenomenon", *op. cit.*, p. 117.

5. "Informal" cooperation instruments with readmission provisions in the aftermath of the New Pact on Migration and Asylum. The case of "global partnerships"

Building on the analysis of "informal" readmission deals in the previous SECTIONS, which highlighted their main characteristics, challenges, similarities and differences with respect to the EURAs – as well as the operational role of FRONTEX in this area, *inter alia*, through non-binding Working Arrangements – this SECTION looks at another specific category of "informal" arrangements dealing with readmission-related issues. This SECTION aims to examine the inclusion of readmission objectives and readmission "provisions" in non-binding, multi-purpose frameworks with third countries, which have developed in the wake of the New Pact. These frameworks include several measures, aimed – both explicitly and implicitly – at fighting irregular migration from countries of origin and transit and ensuring readmission. As highlighted by President von der Leyen with regard to the EU–Tunisia MoU, this kind of deals – *i.e.*, the so called "global partnerships" – may offer mutual benefits that go beyond migration management, making it a potentially replicable model for EU engagement with other partner countries[685]. The promise has been kept, as this SECTION shows in the case of Mauritania and Egypt.

The phenomenon of "global partnerships", together with the trend towards "informalisation" in dealing with migration governance and readmission, seems to have been officially confirmed and exploited by the New Pact on Migration and Asylum, as mentioned above[686]. Indeed, the Pact has officially paved the way for the Union to adopt any kind of instruments that could help it to achieve its objectives of strengthening cooperation with third countries on readmission and migration management. Before turning to an analysis of "global partnerships" as a

[685] European Commission, *2023 State of the Union Address by President von der Leyen*, 13 September 2023. Cfr. F. BATTAGLIA, "Il Memorandum of understanding UE- Tunisia: profili giuridici e impatto sui diritti umani", in *Quaderni AISDUE, Sezione "Atti convegni AISDUE",* No. 37, 2023, p. 876.

[686] For the references to "global partnerships", see *supra*, INTRODUCTION.

specific manifestation of this trend, it is important to examine *how* the Pact crystallises the "informalisation" process in this area.

As also mentioned in the references to some passages of the previous discussion, the Commission's Proposal on the New Pact emphasises the critical role of cooperation with countries of origin and transit in managing migration flows. Recognising this cooperation as a cornerstone of effective immigration policy, the Proposal Pact dedicates significant attention to this issue, particularly in section 6, entitled "working with our international partners". In addition, references to international cooperation are interwoven throughout the document[687]. The Proposal outlines that EU cooperation on migration and asylum with third countries should focus on several objectives: addressing the root causes of irregular migration, combatting migrant smuggling, promoting readmission and return, helping refugees residing in third countries and supporting well-managed legal migration[688]. The Commission's objective is to explore ways of involving third countries in managing migration towards the EU in a "mutually beneficial", comprehensive and balanced manner. The issue of readmission is specifically addressed in paragraph 6.5 of the Commission's Proposal: this paragraph focuses almost exclusively on the necessity to use all available tools and methods to improve the effectiveness of the readmission system and to encourage cooperation with third countries of origin and transit in this field.

The Commission's Proposal presents this migration cooperation strategy with third countries as heralding a "fresh start" and marking a paradigm shift[689]. However, despite calls for innovative approaches, this vision seems instead to lack substantive revolutionary change. As García Andrade observes, the professed comprehensive and balanced partnerships appear more rhetorical than practical[690]. Indeed, the persistent focus on objectives such as return, readmission, and combating migrant smuggling suggests that these priorities continue to underpin the EU's international migration strategy since – and even before – the 2015 refugee

[687] F. MARTINES, "Il nuovo Patto sulla migrazione e l'asilo e la riammissione dei migranti irregolari da parte dei paesi di origine o di transito", *op. cit*., p. 48.

[688] See, for example, COM (2020) 609 final, cit., paras.1 ff.

[689] *Ivi*, para. 1.

[690] P. GARCÍA ANDRADE, "EU cooperation on migration with partner countries within the New Pact: new instruments for a new paradigm?", cit.

crisis, as outlined in this CHAPTER. Efforts to integrate migration into the EU's broader external action and to use different internal and external policies are not new approaches, but rather long-standing practices, as seen in the previous phase of EU readmission policy characterised by "formalisation". This continuity is crucial for the purpose of this dissertation, as it seems to indicate an official recognition and consolidation of "informally established" EU practices in readmission management[691]. In this regard, what is worrying is that there is a specific and explicit reference to the use of soft law in relation to readmission cooperation, as the Commission's Proposal refers to both "EU agreements and arrangements"[692].

Furthermore, while the New Pact purports to forge "mutually beneficial" cooperation with third countries, as mentioned above, in practice this mutual benefit remains opaque, echoing the imbalances between the Parties that were already evident in earlier phases of the EU's readmission policy[693]. Indeed, the Pact's stated objective of addressing migration challenges and root causes to benefit the EU, its citizens, partner countries, migrants, and refugees fails to fully acknowledge that these migrants and refugees are citizens of those very third countries the EU seeks to engage[694]. However, it fails to fully recognise that migrants and refugees are citizens of third countries with their own interests. As underlined by Guild, by focusing primarily on EU citizens, the Pact overlooks the responsibility of third countries to protect the rights of their own citizens[695]. This narrow approach ignores broader principles of international relations, where all migrants belong to specific countries, and just as the EU defends the rights of its citizens, other States have an obligation to do the same. In our view, this perspective may influence the balance between the right to leave and the right to return: in this respect, the Pact appears to prioritise the right to return for TCNs, as opposed to the greater freedom of EU citizens to leave, return and move within the EU. As these issues are made public,

[691] N. RESLOW, "Transformation or continuity? EU external migration policy in the aftermath of the 'migration crisis'", in S. CARRERA, J. SANTOS VARA, T. STRIK (eds.), *op. cit.*, pp. 95–115.

[692] P. GARCÍA ANDRADE, "EU cooperation on migration with partner countries within the New Pact: new instruments for a new paradigm?", cit.

[693] See, more in details, *infra*, CHAPTER IV.

[694] COM (2020) 609 final, cit., para. 6.1.

[695] E. GUILD, "Negotiating with Third Countries under the New Pact: Carrots and Sticks?", in *EU Migration Law Blog*, 27 November 2020.

it becomes increasingly difficult for third countries to cooperate with the EU on migration, as they perceive the relationship as "unequal"[696].

As mentioned above, the recent "global partnerships" reached by the Union with three key countries – Tunisia, Mauritania and Egypt – seem to fit perfectly into the framework set out by the New Pact. These arrangements – which were negotiated during 2023 (or for which the EU has already announced its intention to negotiate, as in the case of Egypt) – do not focus solely on the readmission of irregular migrants "whilst respecting their dignity and acquired rights" [697], but instead adopt a "holistic approach" in line with the EU's stance. These instruments appear to be fully in line with the call for action set out in this legal and political landscape. An analysis of these "global partnerships" can provide insight into whether we are seeing not only a well-established and "crystallised" practice, but also a form of "institutionalisation" of soft law mechanisms in addressing readmission-related issues[698]. This analysis makes it possible to assess whether the EU "informal" approach could have an impact on international obligations regarding readmission and, more generally, on the global governance of migration flows.

As for Tunisia, on 16 July 2023, the EU and this third countries signed a MoU for a strategic and comprehensive partnership, a clear example of the trend towards "informal" international law-making and the increasing use of soft law instruments

[696] *Ibid.*

[697] In this sense, see the wording of the MoU EU–Tunisia and the EU–Mauritania PDM. As for Tunisia, while the MoU underlines the strengthening of their economic and trade partnership with a view to supporting Tunisia's economic reforms, the parties commit themselves to managing irregular migration in a responsible and humane manner. Tunisia and the EU also agree to facilitate the return and readmission from the EU of Tunisian nationals in an irregular situation, while ensuring compliance with international law and respect for the dignity and acquired rights of these persons. Furthermore, the EU–Mauritania JD focuses on migration in a comprehensive manner, emphasising cooperation based on solidarity, shared responsibility and respect for human and fundamental rights. A key aspect of this partnership is the objective of strengthening cooperation to prevent irregular migration: this includes increased cooperation on the return and readmission of Mauritanians residing irregularly in the EU. Finally, the EU–Egypt JD clarifies that "[g]uided by the principles of Partnership, shared responsibility and burden sharing, Egypt and the EU adopt a holistic approach to migration governance. The European Union will further provide the necessary financial support to assist Egypt on migration-related programs that entail developing a holistic approach to migration including [...] tackling the root causes of irregular migration, combating smuggling of migrants and trafficking in persons, strengthening border management, and ensuring dignified and sustainable return and reintegration". In this regard, T. STRIK, R. ROBBESOM, "Compliance or Complicity? An Analysis of the EU-Tunisia Deal in the Context of the Externalisation of Migration Control", in *Netherlands International Law Review*, Vol. 71, 2024, p. 199.

[698] *Ivi*, p. 221.

in the EU's external migration policy[699]. Under this arrangement, the EU commits to providing direct budgetary support and accelerating EU funding to strengthen cooperation with Tunisia in areas such as macroeconomic stability, the economy and trade, renewable energy and promoting people-to-people links; in addition, the EU is committed to improving mobility opportunities for Tunisian citizens in EU Member States. In return, Tunisia agrees to cooperate on migration management, in particular by preventing the departure of migrants by sea, combating smuggling and trafficking in human beings and facilitating the return of foreigners from Tunisia to their home countries. As mentioned above, the MoU is a comprehensive instrument which does not focus solely on migration issues. The MoU is in fact structured around five pillars: macroeconomic stability, economy and trade, green transition, people-to-people contacts and migration. Each pillar includes a number of investment and cooperation projects, many of which are designed to be funded by the EU[700].

On closer inspection, Tunisia is a key partner for the EU on migration issues. Since the end of 2022, it has become the main departure point for migrants crossing the central Mediterranean. As a result, the EU has made strengthening its cooperation on migration with the third country concerned a top priority[701]. While the text of the MOU remains vague on financial details, it is expected to be crucial given Tunisia's struggling economy[702]. Indeed, the International Monetary Fund (IMF) has conditioned its substantial loans – 1.9 billion needed to revive the country's economy – on the implementation of a series of national reforms[703]. However, President Saïed quickly voiced strong opposition to the terms of the IMF bailout, rejecting what he called a "diktat": as a result, the IMF suspended

[699] P. GARCÍA ANDRADE, E. FRASCA, cit.

[700] F. PERRINI, "Strumenti giuridici efficaci per una cooperazione efficace: il negoziato del Team Europa con la Tunisia in quale direzione va?", in *SIDIBlog*, 25 June 2023.

[701] European Border and Coast Guard Agency (FRONTEX), *Central Mediterranean accounts for half of irregular border crossings in 2023, 14 September 2023*, available here: https://www.frontex.europa.eu/media-centre/news/news-release/central-mediterranean-accounts-for-half-of-irregular-border-crossings-in-2023-G6q5pF#:~:text=The%20Central%20Mediterranean%20remains%20the,for%20this%20period%20since%202016. Cfr. P. GARCÍA ANDRADE, E. FRASCA, cit.

[702] A. PIJNENBURG, "Team Europe's Deal", in *Verfassungsblog*, 21 August 2023.

[703] A. VITERBO, "La Tunisia tra due fuochi: la condizionalità del Fondo Monetario Internazionale e un debito sovrano insostenibile", in *SIDIBlog*, 19 June 2023.

disbursement of the loan pending more favourable indications from Tunis[704]. In this context, Tunisia aimed to renew relations with the EU to secure funds to alleviate the country's severe financial difficulties and to gain international trust and credibility[705].

Although MoU does not explicitly state that it is non-binding, its wording, scope and title clearly indicate that the Parties intended it to be a non-binding instrument. As García Andrade and Frasca point out, the language used in the MoU is not prescriptive and the terms used throughout the document do not appear to impose legally binding obligations. Furthermore, there is no indication that the Parties intended to create legal obligations, as evidenced by the format of the MoU and the lack of provisions for its application and interpretation[706]. The process that led to the signing of the MoU with Tunisia is also particularly interesting. Indeed, the signing followed an important meeting in Tunisia between Tunisian President Kais Saied and "Team Europe", composed of European Commission President Ursula von der Leyen, Italian Prime Minister Giorgia Meloni and Dutch Prime Minister Mark Rutte. The signing of this MoU was preceded by a high-level joint statement on the occasion of the inaugural visit of "Team Europe" to Tunis on 11 June, during which the President of the European Commission introduced herself and the other Member States' leaders with the phrase "we are here as Team Europe"[707]. It is important to clarify that the so-called Team Europe is not a tangible entity, but a concept first used during the COVID-19 pandemic to strengthen the commitment of the Union and its Member States to work together more closely to overcome the crisis[708]. In essence, the "Team Europe approach" is a model of action whereby the

[704] See, *inter alia*, Rédaction Africanews, *Tunisia's President Kais Saïed Rejects IMF 'Diktats'*, AfricaNews, 7 April 2023, available here: https://www.africanews.com/2023/04/07/tunisias-president-kais-saied-rejects-imf-diktats//. Cfr. M. DO CÉU PINTO ARENA, "The US and EU Response to Tunisia's Democratic Backsliding: Promoting Democracy or Protecting Interests?", in *The International Spectator*, 2024.

[705] F. BATTAGLIA, *op. cit.*, p. 877.

[706] P. GARCÍA ANDRADE, E. FRASCA, cit. This contrasts with the "informal" readmission agreements discussed in the previous SECTIONS, which contain more explicit elements that we believe support the legal effects of the instruments analysed above.

[707] European Commission, Press statement by President von der Leyen with Italian Prime Minister Meloni, Dutch Prime Minister Rutte and Tunisian President Saied, Tunis, 11 June 2023. F. PERRINI, cit.

[708] European Commission, Joint communication JOIN (2020) 11final to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the

Member States and the Union would coordinate their respective actions in order to make the most effective use of their resources[709]. Gradually, the "Team Europe approach" has been extended to other areas of Union competence, notably the management of migratory flows. In this context, the Council, in its declaration of 31 August on the situation in Afghanistan, stated that "[a] Team Europe approach is needed to work with Afghanistan's neighbours to address the impact of displacement in the region"[710].

However, the presence of the President of the Commission and the Prime Ministers of Italy and the Netherlands at the summit where the MoU was signed does not mean that they took part in the actual signing[711]. On the EU side, the MoU was signed by the Commissioner for Enlargement and European Neighbourhood Policy, while Tunisia was represented by the Secretary of State of the Ministry of Foreign Affairs, Migration and Tunisians Abroad. There is no formal evidence that the Council authorised the Commission to sign the MoU. In this respect, as Battaglia points out, a review of last year's Council and European Council conclusions shows that there is no explicit authorisation for the Commission to conclude the MoU[712]. For instance, such an authorisation cannot be derived from the conclusions adopted by the European Council in June 2023[713]. On that occasion, the European Council merely welcomed the progress made on the comprehensive partnership package with Tunisia, supported the resumption of political dialogue under the EU–Tunisia Association Agreement and underlined the importance of strengthening and developing similar strategic partnerships between the EU and other regional partners[714]. Nevertheless, there is no clear indication that the Council formally approved the MoU before it was signed, as required by the Court's decision in the above mentioned "Swiss MoU case" concerning "informal" agreements. The presence of Member States' Prime Ministers and the Commission

Regions, Communication on the Global EU response to COVID-19, Brussels, 8 April 2020. Cfr. F. BATTAGLIA, *op. cit.*, p. 879.

[709] *Ibid.*

[710] Justice and Home Affairs Council, 31 August 2021, Statement on the situation in Afghanistan, Brussels, 31 August 2021, 11385/21, para. 5. *Ivi*, p. 880.

[711] P. GARCÍA ANDRADE, E. FRASCA, cit.

[712] F. BATTAGLIA, *op. cit.*, p. 894. See also, P. GARCÍA ANDRADE, E. FRASCA, cit.

[713] European Council, Meeting, Conclusions, Brussels, 29 and 30 June 2023 EUCO 7/23. *Ibid.*

[714] *Ivi*, para. 37.

do not replace the need for formal approval by the Council. If the Commission had signed the MoU without this formal approval, it would have violated the institutional powers and the balance established by the Treaties[715].

This lack of clarity has a negative impact on the accountability of the institutions and undermines the democratic legitimacy of their actions. Transparency is essential to the democratic functioning of the EU. When citizens have a clear understanding of the Union's decisions, they support transparency and legitimise the actions of its institutions. Knowing who is responsible for decisions is crucial not only for accurate information but also for accountability. This ensures that EU institutions and actors are held accountable and have to explain and justify their actions, which helps to prevent arbitrary behaviour[716]. Along these lines, there is also a notable lack of clarity about the roles of the Dutch and Italian Prime Ministers. Although Rutte and Meloni seem keen to be recognised as key figures in securing this deal, it is unclear how much they actually contributed. Officially, the MoU is an arrangement between the EU, represented by the European Commission, and Tunisia, with funding coming from the EU budget. Nevertheless, the involvement of Rutte and Meloni in the process raises questions of accountability. The lack of clarity means that national leaders could play an important role in brokering a deal but remain unaccountable for its outcome[717].

As for its content, the MoU under consideration outlines a strategy to address irregular migration through a range of measures, including sustainable development, the fight against smuggling and trafficking, the strengthening of border management. Regarding readmission, the MoU states that both Parties agree to support the return of Tunisian nationals in irregular situations from the EU, in accordance with international law and with respect for their dignity and rights. It also commits to supporting the return of irregular migrants, *already present in Tunisia,* from this country to their countries of origin. This provision aligns with President Saied's stance that Tunisia will not serve as a "reception centre" for the return of irregular migrants from Europe and the explicit clarification in the MoU

[715] P. GARCÍA ANDRADE, E. FRASCA, cit.
[716] F. BATTAGLIA, *op. cit.*, p. 881.
[717] K. NATTER, "Reinventing a Broken Wheel", in *Verfassungsblog*, 5 September 2023.

that Tunisia is not intended to be a destination for TCNs[718]. In addition, in the context of readmission and return, the MoU emphasises cooperation to support the socio-economic reintegration of returnees in Tunisia: this is to be achieved primarily by supporting the development of economically viable projects that promote local growth and create jobs. This EU approach is in line with the broader international strategy described in CHAPTER I to encourage migrants to remain in their country of origin – in this case Tunisia – by addressing and mitigating the structural conditions and negative factors that drive migration[719]. Furthermore, the EU undertakes to support and facilitate the implementation of the MoU in bilateral contexts with its Member States, in particular with regard to returns and readmission. Notably, the MoU makes no reference to the stalled negotiations on the EURA with Tunisia and contains no mention of binding agreements in this regard[720].

While the EU's commitment to simplify visa procedures and promote legal channels highlights its efforts to support legal migration, the MoU raises significant human rights concerns[721]. Indeed, despite assurances of compliance with international law and respect for human dignity, EU support for Tunisia's enforcement of forced returns through capacity building and financial assistance may inadvertently contribute to potential human rights violations. Shortcomings in Tunisia's asylum system and reports of mass expulsions underline the risk of serious violations of international protection standards, including the risk of *refoulement*[722]. Furthermore, if the EU continues to manage migration by outsourcing responsibility to neighbouring countries, this may lead to these countries being left to deal with migration issues on their own. This approach makes it less likely that these third countries will improve their own systems to protect people and can also support leaders who may not respect human rights or

[718] L. O'CARROLL, *Tunisia says it will not be 'reception centre' for returning migrants*, 17 July 2023, The Guardian, available here: https://www.theguardian.com/world/2023/jul/17/tunisia-not-reception-centre-returns-sub-saharan-migrants-eu.

[719] *Supra*, CHAPTER I, SECTION 3.

[720] STRIK, R. ROBBESOM, *op. cit.*, p. 219.

[721] A. PIJNENBURG, cit.

[722] See, *inter alia*, L. BARANA, A. S. OKYAY, *Shaking Hands with Saied's Tunisia: The Paradoxes and Trade-offs Facing the EU,* IAI Commentaries, No. 40, 7 August 2023. Cfr. P.GARCÍA ANDRADE, E. FRASCA, cit.

democratic values. As a result, the situation could get worse, with more people forced to flee their countries, and the EU could end up harming its own interests. According to Strik and Robbesom, if partner countries see that the EU is relying on them to manage migration, they may use this to their advantage and force the EU to accept unfavourable conditions. In sum, the EU's current strategy could backfire, making it harder for the EU to uphold its values and achieve its goals[723].

In conclusion, in different aspects the MoU with Tunisia stands out from several other "informal" readmission arrangements examined in this CHAPTER, while it is in line with the ongoing objective of curbing irregular migration to the EU[724]. However, the haste with which the deal was concluded, driven by a strong desire to address migration issues quickly, has led to significant drawbacks[725]. In this regard, when the Commission's recently decided to allocate €127 million in aid to Tunisia, Tunisian President Saied has rejected the aid, not because of the amount, but because it contradicts the terms of the MoU signed in July[726]. This situation shows that the urgency and eagerness to tackle migration issues may have compromised the "effectiveness" of the deal: in short, so much haste, "avoiding" established legal forecasts, for "nothing".

Based on the "model" of the MoU with Tunisia, the EU and Mauritania signed a partnership declaration on irregular migration in Nouakchott on 7 March 2024. However, unlike the MoU with Tunisia and the JD with Egypt, the JD with Mauritania can be considered as a "global partnership", but it focuses primarily on the issue of migration, without going into detail on other topics. Despite this, only a small part is devoted to readmission, which is why this work has chosen to consider it in this context, rather than in the framework of "informal" agreements devoted exclusively to the issue of readmission. According to the JD, the EU will allocate €210 million to Mauritania with the aim of reducing the flow of Mauritanian irregular migrants or migrants transiting through its territory to the

[723] T. STRIK, R. ROBBESOM, *op. cit.*, p. 222.
[724] In this sense, M. DO CÉU PINTO ARENA, *op. cit.*, p. 169.
[725] T. STRIK, R. ROBBESOM, *op. cit.*, p. 221.
[726] Reuters, *EU to disburse $135 mln to Tunisia as part of migration pact*, 22 September 2023, available here: https://www.reuters.com/world/africa/eu-disburse-135-mln-tunisia-part-migration-pact-2023-09-22/; T. AMARA, *Tunisia rejects EU financial aid, casting doubt on an immigration deal*, *Reuters*, 3 October 2023, available here: https://www.reuters.com/world/tunisia-rejects-eu-financial-aid-casting-doubt-an-immigration-deal-2023-10-02/.

Canary Islands[727]. Indeed, the partnership, strongly supported by the Spanish government, responds to Spain's concerns about the surge of undocumented migrants reaching the Canary Islands, with more than 7,000 arrivals in January alone[728]. The JD underscores the effectiveness of long-standing bilateral cooperation between Spain and Mauritania, as noted by Spanish Interior Minister, Fernando Grande-Marlaska, who described Mauritania as a "priority strategic partner" in migration matters[729]. This cooperation is considered to be one of the most "strategic" examples of operational bilateral cooperation between the EU and Africa, as more than 80% of migrant boats depart from or transit through Mauritanian waters, leading to a significant number of migrants arriving in the Canary Islands and subsequently travelling to other parts of Spain and Europe[730].

Nonetheless, this is not the first attempt by the EU to "work" with this African country on migration issues. In fact, the EU's efforts to cooperate with Mauritania in this field date back to 2006, when almost 32,000 people arrived in the Canary Islands from West Africa. These measures led to a significant increase in deportations and a temporary decrease in arrivals by sea in the Canary Islands, allowing Spain to claim the operation as a success. Building on this, the EU drafted a new national migration strategy for Mauritania, which was adopted in 2010. This strategy, which had significant implications for Mauritanian sovereignty, funded numerous projects, including the training of security forces, the upgrading of border infrastructure, youth support programmes and awareness campaigns for migrants.

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[727] E. VASQUES, N. ALIPOUR, *L'UE octroie 210 millions d'euros à la Mauritanie pour lutter contre l'immigration clandestine*, 9 February 2024, Euractive, available here: https://www.euractiv.fr/section/international/news/lue-octroie-210-millions-deuros-a-la-mauritanie-pour-lutter-contre-limmigration-clandestine/.

[728] H. O. MOCTAR, *The EU-Mauritania migration deal is destined to fail*, Aljazeera, 26 March 2024, available here: https://www.aljazeera.com/opinions/2024/3/26/the-eu-mauritania-migration-deal-is-destined-to. Spain concluded also a readmission agreements with Mauritania. See, Acuerdo entre el Reino de España y la República Islámica de Mauritania, en materia de inmigración, firmado en Madrid el 1 de julio de 2003 y publicado en el B.O.E. del 4 de agosto de 2003.

[729] La Moncloa, *Grande-Marlaska destaca a Mauritania como un "socio estratégico prioritario" para España y la Unión Europea en cooperación migratoria*, 7 March 2024, available here: https://www.lamoncloa.gob.es/serviciosdeprensa/notasprensa/interior/Paginas/2024/070324-marlaska-mauritania-cooperacion-migratoria.aspx.

[730] H. KONÉ, *Mauritania – the latest target in EU migration control*, Institute for Security Studies (ISS), 23 April 2024, available here: https://issafrica.org/iss-today/mauritania-the-latest-target-in-eu-migration-control; Cridem.org, Mauritanie: l'opposition appelle à une mobilisation générale contre l'accord avec l'UE sur l'immigration, 23 February 2024, available here: https://cridem.org/C_Info.php?article=772682.

In the following years, migration routes to Europe shifted eastwards, with a significant increase in arrivals via the central and eastern Mediterranean in 2015. The EU responded by launching the EU Trust Fund for Africa (EUTF) to address the root causes of irregular migration and displacement in the continent[731]. Through the EUTF, Mauritania received further financial and technical support from the EU to manage migration, with a wider range of projects aimed at preventing movement towards Europe[732].

As part of the "Team Europe" initiative – similar to the MoU with Tunisia but with significant participation from the Spanish Government for the reasons previously mentioned – the recent JD aims to strengthen the enduring partnership with Mauritania[733]. The cooperation efforts between the EU and Mauritania on migration are shaped by a comprehensive, coherent, pragmatic, and balanced approach. This approach claims to be firmly rooted in the respect for human rights, adherence to international refugee law and international humanitarian law, and the principle of sovereignty of both Parties[734]. The JD also promises funds for job creation in the country, strengthening the asylum system and legal migration schemes by: encouraging mobility of students, researchers and entrepreneurs; working to improve the procedures for issuing visas; exploring possibilities to enhance circular mobility; supporting "Mauritanian diaspora networks in Europe and the integration of regular Mauritanian migrants in the country of residence, including in terms of remittances, in the interests of Mauritania's sustainable development"[735].

In addition, the profound emphasis on development aid is evident, particularly through the implementation of development projects. This underscores the quality of relations between Mauritania and the EU in the field of migration and acknowledges the achievements of cooperation under the 11th European Development Fund (EDF), the abovementioned EUTF, and the Neighbourhood,

[731] EU Trust Fund for Africa (EUTF) was established to address the root causes of instability, forced displacement and irregular migration in Africa. The Fund aims to contribute to better migration management by addressing the root causes of these challenges. Cfr. EU, *Emergency Trust Fund for Africa*, available here: https://trust-fund-for-africa.europa.eu/index_en. *Infra,* CHAPTER IV.

[732] H. O. MOCTAR, cit.

[733] EU–Mauritania JD, recital 5.

[734] *Ivi*, recital 6.

[735] *Ivi,* Art. 3.

Development and International Cooperation Instrument – Global Europe (NDICI), as well as the relevant bilateral agreements and instruments[736]. The arrangement with Mauritania recognises that managing migration flows cannot rely solely on monitoring measures but requires concerted action to address the root causes of irregular migration. The funds are intended to help Mauritania manage migrant flows, combat human trafficking, and support regional security and economic development initiatives[737]. Although this approach is well-established, the latest JD with Mauritania introduces a significant novelty. Indeed, the negotiated funding is significantly larger than previous externalisation efforts. For example, the 2010 national migration strategy allocated € 12 million over eight years, while the EUTF financed € 84 million of projects in Mauritania in 2019 alone. By contrast, the latest migration deal promises € 210 million to Mauritania before the end of the year, marking a substantial increase in financial commitment[738]. It should be noted that initiatives involving Mauritania can be executed at multiple levels: at the EU level, bilaterally between Mauritania and individual Member States, through the Team Europe initiative and in cooperation with EU agencies such as FRONTEX, Europol,

[736] Established by the Treaty of Rome in 1957, the European Development Fund (EDF) is the EU's main instrument for financing development cooperation with the ACP countries and the Overseas Countries and Territories. The EDF supports a wide range of projects and programmes that contribute to the economic, social and cultural development of these regions. It also supports initiatives that promote regional cooperation and integration. The EDF offers various forms of financing, including grants, procurement contracts, financial instruments (such as loans, guarantees, equity, quasi-equity, investments or participations) and risk-sharing mechanisms. See, European Development Fund, available here: https://eur-lex.europa.eu/EN/legal-content/glossary/european-development-fund.html. As for the 11th EDF, see in particular, Council Regulation 2015/322, of 2 March 2015, on the implementation of the 11th European Development Fund, OJEU, L 58, 3 March 2015. The 11th EDF came to an end in 2020, and its functions were largely incorporated into the Neighbourhood, Development and International Cooperation Instrument – Global Europe (NDICI – Global Europe). The NDICI has been designed as a funding mechanism to support "countries most in need to overcome long-term developmental challenges and will contribute to achieving the international commitments and objectives that the Union has agreed to, in particular the 2030 Agenda and its Sustainable Development Goals and the Paris Agreement". Cfr. European Commission, *Neighbourhood, Development and International Cooperation Instrument – Global Europe (NDICI – Global Europe)*, available here: https://neighbourhood-enlargement.ec.europa.eu/funding-and-technical-assistance/neighbourhood-development-and-international-cooperation-instrument-global-europe-ndici-global-europe_en; Regulation 2021/947 of the European Parliament and of the Council, of 9 June 2021, establishing the Neighbourhood, Development and International Cooperation Instrument – Global Europe, amending and repealing Decision No 466/2014/EU of the European Parliament and of the Council and repealing Regulation (EU) 2017/1601 of the European Parliament and of the Council and Council Regulation (EC, Euratom) No 480/2009.

[737] EU–Mauritania JD, recitals 6.–8. *Infra*, CHAPTER IV.

[738] H. O. MOCTAR, cit.

and the EUAA[739]. In this way, these agencies reaffirm their role as operational arms of both the Member States and the Union institutions in implementing this kind of "global partnerships".

With regard to the readmission of irregular Mauritanian migrants in EU to their country of origin, the EU and Mauritania "recall their commitments in the Samoa Agreement, which binds them, and will therefore strengthen their cooperation on return and readmission and ensure that the rights and dignity of individuals are fully protected and respected"[740]. While not intended to be a binding agreement, this provision highlights the need to rely on norms of international law, both customary and treaty based. This reliance is further demonstrated by references to international legal standards and human rights norms. Moreover, the JD acknowledges Mauritania's evolving role not only as a country of origin but also as a transit and increasingly a destination country for migration, due to the negligible number of its nationals arriving irregularly in the EU in 2022 and 2023[741]. In the context of readmission, it seems evident that the EU has used the JD with Mauritania not only to facilitate the readmission of its citizens – despite the absence of a "formal" or "informal" readmission deal –, but also to address irregular migration from other third countries, taking advantage of Mauritania's position as a "transit hub"[742]. However, according to media reports, this move has not been well received by local representatives. Historically, opposition to border externalisation in Mauritania was limited to a few civil society organisations: nonetheless, the latest migration agreement has sparked significant public outcry. Opposition parties denounce it as a ploy to resettle irregular immigrants in Mauritania, while civil society activists criticise the EU's attempt to position Mauritania as the "gendarme of Europe"[743].

[739] EU–Mauritania JD, Section "Implementation".

[740] *Ivi*, Art. 4.3.

[741] *Ivi*, recital 8. It is noteworthy that very few Mauritanian nationals arrived in Europe, especially considering the significant rise in the number of Mauritanians entering the US through the Mexico border during the same time frame. See, J. OFFENHARTZ, P. ORSAGOS, R. BRITO, *Thousands more Mauritanians are making their way to the US, thanks to a route spread on social media*, AP News, available here: https://apnews.com/article/mauritania-immigration-west-africa-united-states-tiktok-route-bbef5afc25680ad7f2704afa76f44cea.

[742] An exception to the absence of a "formal" or "informal" instrument on readmission with respect to Mauritania can be found in Annex I of the Samoa Agreement, of which Mauritania is one of the signatories. See, *supra*, CHAPTER II, SECTION 2.

[743] H. O. MOCTAR, cit.

Finally, in March 2024 the EU finalised a strategic and comprehensive partnership agreement with Egypt aimed at curbing irregular migration and boosting Egypt's economy. This partnership builds on the Association Agreement that has linked the EU and Egypt since 2004, and the partnership priorities signed in 2022[744]. Under the latter, both Parties commit to fostering and facilitating the "cooperation on the identification, return, assisted voluntary return, readmission, and sustainable reintegration of irregular migrants to their countries of origin"[745]. The "new" JD states that the EU and Egypt have agreed to upgrade their relationship to a strategic and comprehensive partnership based on equality, mutual respect and trust. Recognising the historical ties that have bound them for millennia, the two Parties reaffirm their commitment to deepen their long-standing relationship. This relationship has been characterised by close geographical, cultural, political, economic and people-to-people links, with the aim of promoting shared stability, peace and prosperity. The JD covers a range of issues including trade, investment, security and even water issues. However, even from an economic perspective, the issue of combating irregular immigration plays a fundamental role: indeed, to support this partnership, the EU has proposed a substantial financial aid package for Egypt worth € 7.4 billion for the period 2024-2027, with € 200 million allocated specifically for migration management[746]. Therefore, although the JD with Egypt is broad in scope, it aligns with the EU Commission's strategy of linking economic and financial support for North African countries to stricter migration control. However, the partnership has faced strong criticism from human rights groups, who view it as another "another EU 'cash for migrant control' deal"[747]. Furthermore, as mentioned in the INTRODUCTION of this work, it seems that the Union and Egypt

[744] Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Arab Republic of Egypt, of the other part, 25 June 2001; Association between the European Union and Egypt – The Association Council, *EU–Egypt Partnership Priorities 2021-2027*, UE-EG 2803/22 ADD 1, Brussels, 16 June 2022.

[745] *EU–Egypt Partnership Priorities 2021-2027*, cit., p. 11.

[746] European Migration Network (EMN) Belgium, The EU and Egypt agree to establish a strategic and comprehensive partnership including on migration and mobility, 17 March 2024, available here: https://emnbelgium.be/news/eu-and-egypt-agree-establish-strategic-and-comprehensive-partnership-including-migration-and.

[747] See European Council on Refugees and Exiles (ECRE), EU External Partners: Another EU 'Cash for Migrant Control' Deal Sealed with Egypt, 22 March 2024, available here: https://ecre.org/eu-external-partners-another-eu-cash-for-migrant-control-deal-sealed-with-egypt-—-civil-society-organisations-call-on-eu-to-review-association-agreement-with-israel-amidst-f/.

are negotiating a specific agreement on migration, the details of which have not yet been disclosed.

Although it does not directly and explicitly address readmission, the JD with Egypt, "guided by the principles of Partnership, shared responsibility and burden sharing" claims to adopt "a holistic approach to migration governance" including "tackling the root causes of irregular migration, combating smuggling of migrants and trafficking in persons, strengthening border management, and ensuring dignified and sustainable return and reintegration". In this regard, Egypt plays a crucial role in the EU's ongoing fight against irregular migration, especially as the largest group of migrants to reach Italy by crossing the Mediterranean in 2022 were Egyptians, accounting for 20% of the total[748]. This surge in migration is largely driven by severe state repression and human rights abuses in Egypt, exacerbated by the country's dire economic situation. The plight of migrants and refugees arriving in Egypt from neighbouring countries – such as Sudan, South Sudan, Eritrea and Ethiopia – is equally dire, worsened by the lack of an asylum system in the country[749]. In this context, the JD seems to be a "panacea" for President al-Sisi: not only it directly benefits him by ensuring that his own citizens have the opportunity to seek their fortunes in the EU – this includes legal migration pathways and mobility schemes – but it also allows him to leverage Egypt's substantial migrant population to secure additional financial aid from the EU[750].

Moreover, just as the instrument does not *explicitly* address readmission cooperation, the JD with Egypt lacks a *clear* and *explicit* focus on human rights. The only reference in this regard is a brief reference to continued cooperation between Egypt and the EU "on their commitments to further promote democracy, fundamental freedoms, and human rights, gender equality and equal opportunities, as agreed in the Partnership Priorities". The EU stands ready to support Egypt in its National Human Rights Strategy in alignment with the provisions of the Association Agreement and the Partnership Priorities, but the declaration misses a

[748] A. SCHWARZ, *Migration agreement with Egypt: EU backing the wrong horse*, 22 March 2024, Heinrich Böll Stiftung, available here: https://eu.boell.org/en/2024/03/22/migration-agreement-egypt-eu-backing-wrong-horse.

[749] See European Union Agency for Asylum (EUAA), *Egypt as a country of origin*, Migration Drivers Report, July 2022.

[750] A. SCHWARZ, cit.

critical opportunity to put human rights and democratic values at the centre[751]. By further emphasising these principles, the EU could have striven for more sustainable development and remain true to its founding ideals: human dignity, democracy and the rule of law.

In summary, despite their notable differences, the "global partnerships" described above generally follow similar trajectories. All three are declared to be non-legally binding arrangements, provide for the use of EU development aid funding mechanisms as leverage on third countries to get them to cooperate on migration issues, and work within a multifaceted framework aimed at using all available instruments against irregular migration to the Union. This pattern confirms the EU migration strategy described so far, with readmission and the fight against irregular migration serving as central pillars. The EU seems to stop at nothing to achieve these goals, as it seeks a very high level of control over migration, both through strategic partnerships and through aid conditionality, as the next CHAPTER will show in more detail.

6. Towards a strategic "institutionalisation" of the soft law mechanism in the area of readmission? The (potential) impact on international law

This CHAPTER has demonstrated how the process of "informalisation" has become the *modus operandi* for the Union to approach cooperation with third countries on readmission. While some of these partnerships do not focus *exclusively* on migration and readmission – such as those described above as "global partnerships" – they seem to reinforce and revitalise such "informality" in the overall management of irregular migration under EU law and policy. In addition, this CHAPTER has highlighted the normalisation of this trend, notably through the New Pact, which embraces the "informalisation" paradigm by promoting cooperation on readmission through both agreements and arrangements.

However, as this analysis also explicitly and implicitly shows, soft law poses a major challenge to the authoritative legal order of the EU, where hard law has

[751] See M. EL-SAYED SAID, *The National Strategy: Two Years of Denying the Ongoing Human Rights Crisis*, Cairo Institute for Human Rights Studies, Position Paper, 13 September 2023.

traditionally been central to its integration[752]. The EU is seen as an organisation based on a legal order, with a high level of compliance with law; meanwhile, moving away from traditional legal models endangers the basic constitutional principles upon which the Union was founded and loses sight of the model of "integration through law" that has always been the EU's "legal soul". This shift towards more "flexible" cooperation instruments based on the quest for efficiency may undermine an ideal type of "integration through law"[753]. By purposely diverging from adherence to its established rules, this process may in the long run risk eroding the EU's founding principles and ultimately undermining the legitimacy of the EU project, particularly with regard to the rule of law, which the Union "seeks to advance in the wider world" (Art. 21(1) TEU)[754].

For these reasons, Moreno-Lax has recently focused on the strategic and "institutionalised" use of soft law instruments to achieve an unspoken goal of EU migration policy: keeping unwanted TCNs out of the Schengen area[755]. Indeed, there appears to be a coordinated response from all EU institutions and Member States to proactively opt for, facilitate or allow the use of a soft law approach in dealing with cooperation with third countries on readmission. Although the Lisbon Treaty clearly foresees the possibility for the EU to opt for the conclusion of "formal" readmission agreements with third countries (Art. 79(4)), EU actors seem to prefer the flexibility of "informal" arrangements. This trend is worrying – as highlighted above – because it systematically weakens the common regime, undermines democratic oversight, bypasses parliamentary scrutiny, hampers judicial review and prevents the enforcement of human rights: in essence, this approach may undermine the legal foundations of EU governance. While this erosion currently affects only external migration cooperation, if unchecked, it could expand and normalise, altering the legal and legitimacy bases of the EU integration

[752] F. TERPAN, "Soft Law in the European Union–The Changing Nature of EU Law", in *European Law Journal*, Vol. 21, Issue 1, 2015, p. 82.

[753] E. CANNIZZARO, "Disintegration Through Law?", in *European Papers*, Vol. 1, No 1, 2016, pp. 3–36

[754] Art 21(1) TEU. In this sense, see also, C. MOLINARI, "Accordi di *soft law* in materia di rimpatri: carta bianca per le istituzioni UE?", in *Diritto, Immigrazione e Cittadinanza*, Fasc. n. 1/2022, pp. 51–73.

[755] V. MORENO-LAX, "EU constitutional dismantling through strategic informalisation: Soft readmission governance as concerted dis-integration", *op. cit.*

process and leading to a process of "internal disintegration"[756]. According to Moreno-Lax, "informal" arrangements may offer the illusion of efficiency, but they obscure their broader constitutional implications, signalling a return to outdated intergovernmentalism, contrary to the communitarisation goals set since the Amsterdam Treaty and reinforced by Lisbon[757]. This is in order to meet the priority of increasing return rates and ensuring rapid and operational readmission at all costs.

In our opinion, the relentless focus on operational efficiency risks creating a precedent where the legal and procedural rigor required for "formal" agreements is deemed secondary to achieving politically driven objectives. In this scenario, the EU risks not only weakening its external credibility, but also its internal cohesion and normative commitments. This trend could lead to a structural shift in the way the EU approaches its external relations, privileging power dynamics over rule-based frameworks, even if this is not expressly prohibited in the Treaties, as in the case of readmission cooperation with third countries. Ultimately, in our view, this trajectory risks altering the balance between effectiveness and legitimacy, with long-term consequences for the EU's identity as a Union based on law and shared values.

If it is true that the EU appears to be moving towards a kind of "institutionalisation" of its flexible approach to readmission cooperation, it can be argued that this "behaviour" interplays with the adoption of similar practices by other States around the world and could potentially influence other States to do so. For instance, before the self-evident consolidation of this trend at the EU level, the 2004 MoU between the U.S. and Mexico on the Safe, Orderly, Dignified, and Humane Repatriation of Mexican Nationals is a particularly significant example[758].

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[756] A similar phenomenon has been observed, *inter alia*, in the context of the Eurozone crisis: see, N. SCICLUNA, "Integration through the Disintegration of Law? The ECB and EU Constitutionalism in Crisis", in *Journal of European Public Policy*, Vol. 25, Issue 12, 2018, pp. 1874–1891; and in the context of the Economic and Monetary Union: F. COSTAMAGNA, F. CROCI, "Social rights and the disintegration of (and through) law in the Economic and Monetary Union: taking stock and looking forward", in M. GONZÁLEZ PASCUAL, A. TORRES PÉREZ (eds.), *Social Rights and the European Monetary Union*, Edward Elgar Publishing, Cheltenham, 2022, pp. 71–96.

[757] V. MORENO-LAX, "EU constitutional dismantling through strategic informalisation: Soft readmission governance as concerted dis-integration", *op. cit.*

[758] Memorandum of Understanding between the Department of Homeland Security of the United States of America and the Secretariat of Governance and the Secretariat of Foreign Affairs

According to its art. 1(1), the MoU "establishes basic criteria and principles that reaffirm and enhance local procedures [...] for the repatriation of the Mexican nationals". Art. 3 of the MoU clarifies that local readmission arrangements should ensure that repatriations are conducted in a manner consistent with the respect for the human rights and dignity of Mexican nationals. To date, nine "local" arrangements have been signed by both U.S. and Mexican government officials in this regard[759]: "local" refers to specific geographic city or area along the U.S.–Mexico border where these arrangements have been reached. These local arrangements are designed to address the unique circumstances, needs, and operational challenges of specific border crossings or areas[760]. While the EU practices cannot be said to have directly influenced this model – particularly as it predates the emergence of similar trends within the EU –, the case of U.S.–Mexico relations nevertheless provides valuable insights into the interplay between different legal systems, even across significant geographical distances. In our view, this example highlights the interconnectedness and mutual influence of international, national and European legal frameworks, challenging the notion of rigid and distinct legal boundaries. This perspective is consistent with the arguments presented in the INTRODUCTION to this thesis.

In a "more European context", Switzerland also plays a particularly interesting role. For instance, Switzerland has established with Sri Lanka an MoU aimed at fostering a regular and consistent dialogue on migration matters that benefit both countries[761]. This explicitly includes the readmission of nationals, stateless persons, and TCNs. Thus, Switzerland's practices show a clear alignment with the "European model", embracing the "informalisation process" and a willingness to achieve effective readmission processes, including not only the readmission of Sri

of the United Mexican States on the Safe, Orderly, Dignified and Humane Repatriation of Mexican Nationals, signed in Mexico City, 20 February 2004.

[759] Government of the United States of America, Homeland Security, *Updated U.S.-Mexico Local Repatriation Arrangements*, available here: https://www.dhs.gov/publication/updated-us-mexico-local-repatriation-arrangements.

[760] The areas covered so far include the cities of Brownsville, Del Rio, El Paso, Laredo, McAllen, Presidio in the State of Texas; Yuma and Nogales in the State of Arizona; San Diego, in the State of California. *Ibid.*

[761] Memorandum of Understanding between the Swiss Federal Council and the Government of the Democratic Socialist Republic of Sri Lanka on the Establishment of a Migration Partnership, signed in Colombo, 6 August 2018.

Lankan citizens – in accordance with customary international law – but also of TCNs. The case of Switzerland is illustrative of how other countries may take clue from the EU and move concrete steps to develop their own "informal" practices on readmission, rather than relying on "formal" readmission agreements. Switzerland also appears to have an "informal" deal with Ethiopia. However, while this information is mentioned in the Swiss "Sub-Saharan Africa Strategy 2021–2024", the Swiss website dedicated to readmission cooperation with other States only refers to an "Exchange of notes between Switzerland and Ethiopia regarding the application of the Admission Procedures for the Return of Ethiopians from European Union Member States"[762]. It is not very clear whether it can be seen as a "real" informal deal between Switzerland and Ethiopia or, more likely, as an implementing instruments for the above-mentioned EU readmission arrangement with Ethiopia. In any case, the text of this "Exchange of Notes" is not publicly available, as is the case for the "Exchange of notes between Switzerland and Bangladesh regarding the application of the EU–Bangladesh Standard Operating Procedures for the Identification and Return of Persons without an Authorisation to Stay"[763]. Similar to the "Exchange of Notes" with Ethiopia, it remains unclear whether the "Exchange of Notes" between Switzerland and Bangladesh merely serves as an implementation tool for EU-level agreements with the same third countries. In the case of Bangladesh, however, it is possible to lean towards the first hypothesis, as the Commission also affirmed that the third country concerned "in April 2019 agreed to extend the application of the EU SOPs to Switzerland"[764]. In contrast, there is no explicit reference to the "Exchange of notes" between Switzerland and Ethiopia. In any case, the lack of access to these texts makes it difficult to *fully* assess the extent of EU influence on the Swiss practice of concluding "informal" readmission arrangements. However, as noted above, in our view there are indications that such influence is likely to exist.

[762] Swiss Federal Council, *Sub-Saharan Africa Strategy 2021–24,* 13 January 2021, p. 3; Swiss State Secretariat for Migration (SEM), *Readmission agreements,* available here: https://www.sem.admin.ch/sem/en/home/international-rueckkehr/ch-migrationsaussenpolitik/abkommen/rueckuebernahme.html.

[763] Swiss State Secretariat for Migration (SEM), cit.

[764] COM (2022) 735 final, cit., p. 26.

In the same vein, Australia also reportedly signed an "informal" readmission agreement with Sri Lanka in 2021, although the full official text is not available online. In fact, according to a press release, the Australian and Sri Lankan foreign ministers finalised a readmission MoU in December 2021[765]. Unlike the MoU between Switzerland and the Asian country, this MoU appears to cover only the nationals of the respective Parties, with provisions for the exchange of individuals who are staying in violation of immigration laws between the two countries[766].

In the light of the above, "informalisation" can certainly be seen as a process that has clearly become the EU's preferred "strategy" for cooperation with third countries on readmission. Nonetheless, it is the author's view that this "informalisation" remains underpinned by hard law, as discussed in this CHAPTER. In fact, in almost all cases of "informal" readmission arrangements, such flexible approach is justified by the existence of a prior "formal" agreement or a framework governed by legal rules at EU level. For example, as highlighted in relation to Sub-Saharan countries, the conclusion of such "informal" agreements is often linked to Art. 13 of the Cotonou Agreement[767]. This provision serves as a legal reference point to ensure that these agreements are in line with an existing "formal" framework, as explained above. The fact that the Union and its institutions seek to provide a legal basis for these "informal" instruments suggests that the EU, its institutions and the Member States remain committed to the Treaties. Such a practice is fully in line with international norms, since, as mentioned above, soft law has always been recognised as a form of intergovernmental cooperation analogous to "standard" international treaties (also considering the fact that the content of these agreements is quite similar to that of "formal" treaties). This confirms what has been said so far: soft law serves as an alternative to, or a means of preparing for, hard law, but not as a means of circumventing the rules laid down

[765] Australian Government, The Hon Karen Andrews MP, Former Minister for Home Affairs, *Joint communique with the Hon. Chamal Rajapaksa MP, Sri Lankan State Minister of Home Affairs*, 20 December 2020, available here: https://minister.homeaffairs.gov.au/KarenAndrews/Pages/joint-communique-with-sri-lankan-state-minister-home-affairs.aspx.

[766] In this sense, see also, Office of the Cabinet of Ministers of Sri Lanka, *Press briefing of Cabinet Decision taken on 2021-01-18*, available here: http://www.cabinetoffice.gov.lk/cab/index.php?option=com_content&view=article&id=16&Itemid=49&lang=en&dID=10885.

[767] *Supra*, SECTION 3.1.

in the Treaties[768]. In any case, the concerns highlighted in this CHAPTER remain critical, both in terms of the EU's constitutional architecture and in terms of the protection of human rights. This trend, as has been repeatedly emphasised, is particularly alarming and requires much stricter monitoring and moderation.

An exception to the framework described above could be the MoU with Tunisia. As García Andrade and Frasca point out, there is already an EU–Tunisia Association Agreement which provides the overarching legal framework for their relations[769]. This raises the question of why the MoU was concluded alongside – or seemingly independent of – "formal" cooperation structures. The drafters of the MoU seem to have overlooked the existing legal framework binding the EU and Tunisia, including the ongoing negotiations for an EURA[770]. In particular, the EU–Tunisia Association Council has traditionally served as the main platform for advancing bilateral relations, as evidenced, *inter alia*, by the 2018–2020 EU–Tunisia Strategic Priorities[771]. This established mechanism could have been used again to implement the provisions of the EU–Tunisia Association Agreement, in particular Art. 69 on social dialogue. However, this approach may have lacked political visibility[772].

Regarding the interplay between international law and EU law in relation to "informal" readmission agreements, Sardu argues that the adoption by the EU of such "flexible" cooperation instruments with third countries, outside the procedure laid down in Art. 218 TFEU, can be seen as the development of a subsequent customary practice – even if a regional one – that may change the TFEU[773]. According to Sardu, Member States appear to have exploited the potential of international law to influence the legal order of the EU. This approach would allow the EU to enter genuine international partnerships outside the framework of existing

[768] *Ibid.*

[769] Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part, 17 July 1995, OJEU, L 97, 30 March 1998. P. GARCÍA ANDRADE, E. FRASCA, cit.

[770] European Commission, *The EU and Tunisia start negotiations on visa facilitation and readmission*, Press Release, 12 October 2016. *Ibid.*

[771] Decision 1/2018 of the EU–Tunisia Association Council of 9 November 2018 adopting the EU-Tunisia strategic priorities for the period 2018-2020, OJEU, L 293, 20 November 2018, ST/2604/2018/REV/1. P. GARCÍA ANDRADE, E. FRASCA, cit.

[772] *Ibid.*

[773] A. SARDU, *op. cit.*, pp. 346 ff.

primary law (Art. 218 TFEU). Such an interpretation implies that Member States have effectively amended primary law outside the ordinary or simplified procedures provided for in Art. 48 TEU. This would allow the EU to conclude arrangements with third countries on readmission without recourse to the "formal" procedures provided for in Art. 218 TFEU[774]. Under international law, treaty provisions generally prevail over customary rules in cases of direct conflict: however, customary international law can sometimes supersede treaty obligations, particularly where it can be shown that the Parties to the treaty have tacitly accepted the new practice and it has become accepted as law, or where the customary rule is a *jus cogens* norm[775]. The principle of derogation from treaty law by subsequent customary practice has been reaffirmed by the ICJ on several occasions, notably in the 1971 Advisory Opinion on Namibia[776]. As the formation of a particular customary rules within the EU is still in its early stages, it necessarily involves practices and *opinio juris* that may initially violate the existing treaty rule without being subject to the revision procedure. In this respect, the EU's practice of entering into "informal" agreements seems to meet with little or no resistance or even support from Member States.

From a strictly international law perspective, this could be seen as a normal part of the development of international sources of law. However, the ECJ has stated that the creation of a particular customary rule that deviates from a founding treaty is unacceptable ("a mere practice cannot override the provisions of the Treaty")[777]. One reason given for this attitude is that the EU Treaties are seen as "constitutional instruments" of the EU, characterised by a rigidity that makes them resistant to change by mere practice or outside the treaty procedures. Commenting on the Court's position, Sardu argues that such an assertion can only be correct in the context of the EU's *internal legal order* and relations between Member States. In international law, by contrast, the TFEU is seen as a treaty and is open to

[774] *Ibid.*

[775] See, *inter alia*, C. FOCARELLI, *op. cit.*, pp. 185 ff.

[776] International Court of Justice (ICJ), *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion 21 June 1971, I.C.J. Reports 1971, p. 16, paras. 52–53.

[777] European Court of Justice (ECJ), Case C–327/91, cit., para. 36.

modification or even derogation by customary practice that has emerged subsequently[778].

While the above arguments are interesting and thought-provoking, they may not be sufficient to establish whether there is a genuine intention to override and replace the rule laid down in Art. 218 regarding cooperation with third countries on readmission without the revision procedure provided for in Art. 48 TEU. Firstly, as mentioned above, in most cases an "aura of legality" also seems to surround the adoption of these "informal" readmission arrangements. Second, in our view, the mere use of "flexible" instruments to cooperate with third countries on readmission does not necessarily indicate an intention to change the rules laid down in the Treaties. The absence of *opinio juris* further undermines the argument that such a shift is intended or taking place. Thirdly, although the EU was described in the INTRODUCTION of this dissertation as a "creature of international law", it is true that the ECJ has confirmed that the founding treaties of the Union created a new legal order with its own institutions. Unlike ordinary international treaties, "the founding treaties of the EU, established a new legal order, possessing its own institutions, for the benefit of which the Member States thereof have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only those States but also their nationals"[779]: therefore, EU treaties cannot be compared to standard international treaties due to their distinct nature. While the EU is "immersed" in international law and bound by its norms, it does not appear that "informal" law-making practices can be seen as amending the TFEU without going through official revision procedures.

While the influence of the EU and its interplay with the practices of other States is likely, it does not appear that this influence *has significantly changed the current status of international obligations in relation to readmission*. This is particularly true given that in most cases – as shown above – such "flexible" readmission

[778] A. SARDU, *op. cit.*, pp. 348.

[779] European Court of Justice (ECJ), Opinion 2/13, cit., para. 157. See also, Court of Justice of the European Communities (CJEC), Case C–26-62, cit., p. 12; CJEC, Case 6-64, *Flaminio Costa v E.N.E.L.*, Judgment of 15 July 1964, ECLI:EU:C:1964:66, p. 593; European Court of Justice (ECJ), Opinion 1/09, 8 March 2011, EU:C:2011:123, para. 6. However, for the sake of accuracy, these judgments have been quoted by Sardu, who has pointed out that this is a view of the Court that is contrary to the ideas she presents in her paper. *Ibid.*

arrangements seem to be limited to the readmission of States' own nationals[780]. In our opinion, while these arrangements undoubtedly indicate a "*transformative trend"* in the EU's approach to readmission policy – particularly in terms of the instruments used – they do not necessarily imply the emergence of *transformative* legal obligations, *i.e.*, they do not fundamentally alter the existing international legal obligation to readmit. Instead, the "informal" dimension of EU readmission policy seems to reflect a strategic adaptation to operational challenges rather than a deliberate effort to redefine the legal framework governing readmission at the international level. In particular, this practice underscores the EU's willingness to prioritise State interests over individual rights in the pursuit of readmission objectives, with all the attendant challenges outlined above. This approach seems to be further confirmed by the increasing use of conditionality in readmission cooperation with third countries, as the next CHAPTER will show.

[780] The same reasoning could be applied to the above-mentioned "informal" readmission deals adopted by countries beyond the EU's borders, with the notable exception of Switzerland.

CHAPTER IV

CONDITIONALITY IN EU READMISSION COOPERATION

TABLE OF CONTENTS: 1. EU "readmission conditionality" and the "holistic approach". – 2. The use of visa policy in the context of readmission. – 3. The "issue linkage" between readmission and development. – 4. The link between readmission and trade. – 5. Regular pathways and resettlement as bargaining tools to manage migration. – 6. "Reversed conditionality": bargaining powers in the hands of third countries. – 7. Conditionality in EU readmission policy and the international obligations on readmission.

1. EU "readmission conditionality" and the "holistic approach"

After analysing the EU's "formal" and "informal" cooperation mechanisms in the field of readmission, this CHAPTER focuses on the use of conditionality in EU readmission policy. In particular, it examines how this approach can potentially shape both the EU and the international legal framework on readmission and, more broadly, the control of irregular migration. The aim is to assess whether conditionality affects the international obligation to readmit, including whether it affects the legal basis for States' obligation to readmit their own nationals. Moreover, this CHAPTER also examines the internal implications of conditionality for the EU. While originally designed to promote respect for human rights and the rule of law, its current application in migration policy raises concerns about its impact on EU primary law. A key question is whether this "readmission conditionality approach" risks undermining the fundamental legal norms established in the EU treaties, with particular regard to the principle of coherence,

as it appears to prioritise pragmatic migration cooperation over the EU's normative commitments.

In general, it should be noted that both EURAs and "informal" readmission arrangements entail asymmetric costs and benefits for the parties. Prior to bilateral negotiations, there is an ongoing exchange in which both Parties evaluate the expected advantages and disadvantages of such cooperation. These exchanges serve as a "learning process" to assess the costs and benefits of readmission cooperation[781]. In fact, such instruments can have negative political, economic and social consequences, especially for third countries: in many cases, migration is seen by these countries as a means to "alleviate" the consequences of domestic unemployment. At the same time, outward migration flows can boost national economies, which in many cases depend on remittances from migrant workers[782]. As both EURAs and readmission arrangements thus mostly act in the interest of the EU and its Member States, cooperation on readmission within the EU legal framework has often been defined as "eurocentrée"[783]. In this sense, these instruments seem to be more than a meeting of wills, but a "push" from one party to another. "Readmission diplomacy" comes thus at a price: the "less convinced" party generally expects some form of *do ut des* in order to agree to readmission cooperation[784]. The successful negotiation of readmission tools thus essentially depends on the EU's ability to offer a third country significant incentives to secure cooperation on readmission[785]. The use of "carrots and sticks" to achieve the Union's migration control objectives has become a (controversial) evergreen in the EU cooperation with third countries on readmission and, more broadly, on migration[786].

[781] J. P. CASSARINO, "Informalising Readmission Agreements in the EU Neighbourhood", *op. cit*., p. 183.

[782] J. P. CASSARINO, *Readmission Policy in the European Union*, cit., p. 25.

[783] C. RODIER, *Analyse de la dimension externe des politiques d'asile et d'immigration de l'UE – synthèse et recommandations*, Study for the European Parliament, 2006, p. 21.

[784] Or *qui pro quo*. N. COLEMAN, *op. cit.,* p. 38.

[785] E. ROMAN, *op. cit.*, p. 55.

[786] E. GUILD, "Negotiating with Third Countries under the New Pact: Carrots and Sticks?", in *EU Migration Law Blog*, 27 November 2020; V. RIETIG, M. WALTER-FRANKE, *Conditionality in Migration Cooperation: Five Ideas for Future Use Beyond Carrots, Sticks, and Delusions*, DGAP Report, 6 July 2023, p. 8.

Political conditionality has been traditionally used by the EU to promote its values of good governance, human rights, and democracy in its broader cooperation with third countries. According to Schimmelfennig and Sedelmeier, political conditionality may be deemed as a "bargaining strategy of reinforcement by reward, under which the EU provides external incentives for a target government to comply with its conditions"[787]. Conditionality seeks in fact to influence one party to align itself with the priorities and interests of the other party. This commitment is often reflected in the conditions the EU sets when it enters partnerships, agreements or cooperation programmes with its "foreign" partners. Indeed, respect for human rights, democratic principles and, above all, the rule of law is a key condition for cooperation with the Union. The aim is to ensure that any form of cooperation remains in line with the values that the EU holds dear[788].

In the last decades, however, there has been a significant *shift* in the focus of EU conditionality, particularly in the context of migration cooperation. Unlike traditional forms of conditionality in the EU's external relations, which typically involve reducing or suspending cooperation with partner countries that fail to uphold human rights, democracy and the rule of law, migration-related conditionality operates differently. Traditionally, the EU has relied on suspension clauses in global agreements to halt or limit cooperation when these core values are violated or has offered third countries enhanced relations in exchange for progress

[787] F. SCHIMMELFENNIG, U. SEDELMEIER, "Governance by conditionality: EU rule transfer to the candidate countries of Central and Eastern Europe", in *Journal of European Public Policy*, Vol. 11, Issue 4, 2004, p. 670. On the issue of conditionality see also, *ex multis*, H. GRABBE, "European Union Conditionality and the "Acquis Communautaire"", in *International Political Science Review*, Vol. 23, No. 3, 2002, pp. 249–268; A. MATTELAER, *Exploring the Boundaries of Conditionality in the EU,* European Policy Brief, 2018; S. POLI, "The Principle of Conditionality in the EU's Relations with its Neighbours: its Evolution and Reconciliation with the Principle of Consistency", in *Il Diritto dell'Unione Europea*, Fasc. 3, 2018, pp. 525–554; P. BECKER, "Conditionality as an Instrument of European Governance – Cases, Characteristics and Types", in *Journal of Common Market Studies*, 2024. See also, Joint Communication COM (2011) final of the European Commission and the High Representative of the Union for Foreign Affairs, New Response to a Changing Neighbourhood: A Review of the European Neighbourhood Policy, Brussels, 25 May 2011, p. 3: "[i]ncreased EU support to its neighbours is conditional. It will depend on progress in building and consolidating democracy and respect for the rule of law. The more and the faster a country progresses in its internal reforms, the more support it will get from the EU".

[788] Arts. 6 and 21 TEU. Cfr. E. FRASCA, E. ROMAN, *op. cit.,* pp. 947 ff. On this point, see also, G. HALMAI, "The Possibility and Desirability of Rule of Law Conditionality", in *Hague Journal on the Rule of Law*, 2019, Volume 11, pp. 171–188; T. NGUYEN, A. DIMITROVS, "Op-Ed: Rule of law-conditionality as interpreted by EU leaders", in *EU Law Live*, 11 December 2020; N. KIRST, "Rule of Law Conditionality: The Long-awaited Step Towards a Solution of the Rule of Law Crisis in the European Union?", in *European Papers*, Vol. 6, No. 1, 2021, pp. 101–110.

on democratisation and human rights protection[789]. Nonetheless, these "traditional aims" of conditionality have gradually been overshadowed by the EU's primary focus on migration control objectives[790]. The EU's migration policy has evolved to focus more directly on tackling irregular migration in a way that is consistent with EU-specific objectives, while at the same time appearing mutually beneficial to third countries. Nonetheless, rather than being a tool to encourage third countries to align themselves with EU values, conditionality in this area seems to focus on incentivising cooperation on readmission and, more generally, the fight against irregular migration in the interests of the EU and its Member States. Indeed, the EU is building a toolbox of incentives and sanctions to enforce their bargaining power *vis-à-vis* third countries on readmission. In this regard, over the years, the Commission has used a blend of incentives and sanctions, referred to as "positive" and "negative" instruments of conditionality, as part of its strategy to achieve its readmission objectives: this dual approach may be controversial because it mixes diplomatic incentives with coercive tactics, raising several concerns about its impact on international relations and the treatment of migrants.

"Positive conditionality" (adopting the "more for more" approach") considers the use of incentives as part of a broader EU negotiating strategy on readmission. More specifically, "positive conditionality" can be deemed as a reward that can be "offered in return" for third countries' cooperation with the Union on readmission[791]. The use of incentives to encourage third countries to cooperate on

[789] For example, the Cotonou Agreement, discussed in CHAPTER II, SECTION II, contains a suspension clause in Art. 96 that allows the EU to reduce or suspend development aid and other forms of cooperation if a partner country violates essential elements such as human rights, democratic principles or the rule of law. In 2011, for example, the EU invoked this clause against Côte d'Ivoire during its post-election crisis, suspending cooperation due to political instability and human rights violations. See, more in detail and *ex multis*, H. CUYCKENS, *Human Rights Clauses in Agreements between the Community and Third Countries The Case of the Cotonou Agreement***,** Working Paper No 147, Katholieke Universiteit Leuven Faculty of Law, Institute for International Law, March 2010, pp. 38 ff.; A. ZIMELIS, "Conditionality and the EU–ACP Partnership: A Misguided Approach to Development?", in *Australian Journal of Political Science*, Vol. 46, Issue 3, 2011, pp. 389–406. With regard to the Samoa Agreement, Art. 101(5) gives the EU the power to take "appropriate measures" in response to serious violations of the fundamental principles listed in Art. 9, which include respect for human rights, democracy and the rule of law. These measures, although not explicitly stated, may include actions such as the suspension of cooperation or financial assistance.

[790] E. FRASCA, E. ROMAN, *op. cit.,* p. 948.

[791] S. LAVENEX, "From something to "offer in return" to something to "withdraw": Retracing trade conditionality in EU readmission policy", cit.

readmission was initially central to the EU's approach to readmission conditionality since the 1990s. For instance, in the 2002 Seville Council Conclusions, the European Council recognised the importance to impose incentive-based conditionality when dealing with readmission, claiming that "[t]he Union is prepared to provide the necessary technical and financial assistance for the purpose, in which case the European Community will have to be allocated the appropriate resources"[792]. The EU's interest in the use of "positive conditionality" in this area was also demonstrated by the adoption of the programme for financial and technical assistance to third countries in the areas of migration and asylum (AENEAS)[793]. AENEAS was designed "to give specific and complementary financial and technical aid to third countries in order to support their efforts to improve the management of migratory flows in all their dimensions"[794]. One of the aims of the programme was to "stimulate third countries' readiness to conclude readmission agreements, and to assist them in coping with the consequences of such agreements"[795].

On the latter point, the use of "positive conditionality" has been in fact particularly important (but not only) in concluding "formal" EURAs, where it appears to have been strategic in negotiating and agreeing the "TCN clause". Countries along migratory routes may be indeed loath to take responsibility for readmitting people who have passed through their territory, especially if they are not the final destination of the migrants[796]. The Russian Federation, for example, was extremely hesitant to accept such obligations. In the Euro-Asian region, the burden of readmitting transit migrants would likely have fallen heavily on Russia, given its vast territory that migrants may cross during their journey[797]. It seems clear, therefore, that there are many challenges both in the negotiations between transit countries and the Union with a view to concluding EURAs and in ensuring readmission cooperation with third countries. Another example is Türkiye: the latter

[792] Seville European Council, Presidency Conclusions, cit., para. 34.

[793] Regulation 491/2004 of the European Parliament and of the Council of 10 March 2004 establishing a programme for financial and technical assistance to third countries in the areas of migration and asylum (AENEAS). The Regulation is no longer in force.

[794] *Ivi*, Art. 1(1).

[795] *Ivi*, recital (7).

[796] *Supra*, CHAPTER II, SUB-SECTION 3.1.

[797] N. COLEMAN, *op. cit.,* p. 162.

was indeed reluctant to accept the EU's proposal for cooperation on readmission because of concerns about becoming a buffer zone between the EU and countries of origin in the region. Given that the Turkish–Greek border serves as a major irregular transit route for migrants trying to reach Europe, Türkiye feared that it would inadvertently become a final destination if it signed a readmission agreement. Initially, the Turkish government was willing to readmit Turkish nationals and former permanent residents but was reluctant to accept TCNs. This reluctance contributed to delays in finalising the agreement[798]. However, Türkiye also had a strategic interest in cooperating with the EU on readmission, with *visa liberalisation* being a top priority. To facilitate this, the Turkish government pushed for accelerated negotiations on a visa-free regime for its citizens[799]. As negotiations continued and the prospect of visa liberalisation remained distant, Turkish officials made a strategic concession to secure the lifting of Schengen visa requirements for their citizens. They agreed to readmit TCNs, but only three years after ratification of the readmission agreement and on the condition that the EU provide them with the final report on the progress of the visa liberalisation dialogue in the same year[800]. When the readmission agreement was ratified in 2014, Turkish officials publicly hailed it as a "diplomatic success"[801].

In contrast, "negative conditionality" adopts a "less for less" approach whereby the EU reduces benefits or cooperation if a partner country fails to meet certain conditions. An example is restricting access to visas by making it more difficult for nationals of "non-compliant" third countries to obtain visas[802]. Thus, while "positive conditionality" seeks to "reward" third countries for effective cooperation with the EU on readmission, "negative conditionality" serves as a form of sanction for insufficient cooperation in this regard. The "less for less" approach is designed

[798] A. BÜRGIN, "European Commission's agency meets Ankara's agenda: why Turkey is ready for a readmission agreement", in *Journal of European Public Policy*, Vol. 19, No. 6, 2012, p. 888.

[799] Z. ÖZLER, "Breaking the Vicious Circle in EU-Turkey Relations: Visa Negotiations", in *Turkish Policy Quarterly*, Vol. 11, No. 1, 2012, p. 122. See also, *infra*, SECTIONS 2 and 6.

[800] A. OKYAY, J. ZARAGOZA-CRISTIANI, "The Leverage of the Gatekeeper: Power and Interdependence in the Migration Nexus between the EU and Turkey", in *The International Spectator*, Vol. 51, Issue 4, p. 55. Cited in O. JANVIER, *Negotiations in Times of Crisis: The EU-Turkey and EU-Pakistan Readmission Agreements and 'Reversed Conditionality'*, College of Europe, EU Diplomacy Paper 5/2023, p. 9.

[801] O. JANVIER, cit., p. 9.

[802] V. RIETIG, M. WALTER-FRANKE, cit., p. 8.

to pressure third countries to fulfil their obligations by withholding key benefits if they do not adequately cooperate with the EU on readmission. The idea of shifting to a more "threatening policy" was already manifested at the aforementioned 2002 Seville European Council, where it was claimed that:

"Inadequate cooperation by a country could hamper the establishment of closer relations between that country and the Union [...] The Council may unanimously find that a third country has shown an unjustified lack of cooperation in joint management of migration flows. In that event the Council may, in accordance with the rules laid down in the treaties, adopt measures or positions under the Common Foreign and Security Policy and other EU policies[803]."

This "invitation" from the Council seems to have been well received and operationalised especially in recent years, as the following SECTIONS show more in detail.

The EU and its Member States have therefore increasingly adopted this "leverage-based approach" to readmission, in both its "positive" and "negative" versions. As a proof of this, on 9 February 2023 the European Council has reaffirmed the Union's intention to use all the levers at its disposal (visas, diplomatic pressure, development cooperation and trade, but also legal and safe migration routes) to achieve effective cooperation with third countries on return and readmission[804]. This "holistic approach" seeks to increase leverage and to assist third countries in fulfilling their readmission obligations, while supporting the forthcoming negotiations with the EU on readmission instruments. This approach suggests a determination of EU to do "whatever it takes" as to address readmission of irregular migrants. The three levers most discussed in EU readmission policy – and in its migration-related policies in general – and academic writing are visas, development aid, and trade, which has been defined as the "the holy trinity of migration conditionality"[805]. However, the focus on these three levers alone appears

[803] Seville European Council, Presidency Conclusions, cit., paras. 35–36.

[804] European Council, Conclusions of the Special Meeting, 9 February 2023, EUCO 1/23, para. 22.

[805] V. RIETIG, M. WALTER-FRANKE, *op. cit.,* p. 8.

to be limited: in line with the desire to an "holistic approach", the EU may use additional and different levers, even if they are not explicitly labelled as conditionality instruments.

Moving on from this remit, the following SECTIONS examine the development of "readmission conditionality" instruments used by the EU both in the conclusion of EURAs and in the establishment of readmission arrangements, as well as in the promotion of ongoing cooperation with third countries. These findings are interesting in terms of answering the research question of this thesis. In our view, conditionality in EU readmission policy can indeed be considered a "transformative trend", as it shifts the dynamics of international cooperation on readmission from voluntary alignment to incentivised compliance. The transformative nature of this trend lies in the way it reshapes traditional notions of international cooperation on readmission. Indeed, conditionality goes beyond mere cooperation by embedding compliance in a framework of rewards and sanctions that can influence the behaviour of third countries that might not otherwise prioritise readmission. Over time, this practice could potentially reshape the international governance of readmission, as third countries adapt to the growing reality that cooperation on migration management – particularly in the area of readmission – is increasingly linked to access to key benefits from the EU. As this dissertation points out, the EU approach to "migration conditionality", similar to the trend towards "informalisation" discussed in the previous CHAPTER, has led some States to follow the EU's lead. As a result, this could influence the broader landscape of international governance on migration and readmission, positioning the EU as a central actor in setting this framework (SECTION 7).

This CHAPTER adopts a "substantive" approach, structuring the analysis around key areas – namely visas, development policy, trade and regular/legal pathways – that serve as key EU conditionality instruments to secure third country cooperation on readmission. By examining these areas, the CHAPTER illustrates how the EU uses them strategically either to establish cooperation on readmission or to put pressure on countries to implement such cooperation effectively. This CHAPTER primarily focuses on visa, development policy and trade, which have long been considered some of the most "attractive" forms of conditionality in the context of readmission

cooperation. In this regard, SECTION 2 analyses the case of visas, as they have always played a crucial role for the EU, serving as leverage in diplomatic discussions and ensuring compliance with readmission obligations. By "playing the visa card", the EU aims to incentivise third countries to cooperate in readmission, particularly through the conclusion of EURAs[806]: in the latter case, visa facilitation has been thus used as an incentive to encourage the assumption of readmission commitments by third countries. More recently, visa conditionality has also served as leverage for ensuring the implementation of readmission cooperation with third countries, particularly through the visa conditionality mechanism introduced by Regulation 2019/1155, which amended the Common Visa Code (Visa Code), as SECTION 2 analyses more in detail[807]. This dual approach reflects the EU's strategic use of visa policies both to initiate and enforce cooperation on readmission. In addition, SECTIONS 3 and 4 explore the use of the other two components of the "holy trinity described" above, *i.e.*, trade policy and development aid: in particular, the dissertation analyses how the Union grafts cooperation on readmission from its "traditional" area (AFSJ) onto these different policy areas so as to enhance cooperation on readmission at any costs.

In addition, SECTION 5 analyses the link between readmission and regular/legal pathways, a link that has been emphasised in various EU proposals over the past decades, as highlighted in the INTRODUCTION. This relationship is particularly important in light of the EU's "readmission strategy", which increasingly positions legal pathways as part of a comprehensive approach to securing cooperation on irregular migration and readmission. By offering legal migration opportunities – in particular resettlement – as an incentive, the EU aims to encourage third countries to cooperate in readmission efforts. This dissertation examines whether this

[806] European Council on Refugees and Exiles (ECRE), *Playing the Visa Card?*, Policy Note No. 35, 2021.

[807] Regulation 2019/1155 of the European Parliament and of the Council, of 20 June 2019, amending the Visa Code, OJEU, L 188/25, 12 July 2019; Regulation 810/2009 of the European Parliament and of the Council, of 13 July 2009, establishing a Community Code on Visas (Visa Code), OJEU, L 243/1, 15 September 2009. For a more general analysis of the CCV see, *ex multis*, E. GUILD, "Amending the Visa Code: Collective Punishment of Visa Nationals?", in *EU Immigration and Asylum Law Blog*, 10 May 2019; A. MELONI, "EU Visa and Border Control Policies: What roles for security and reciprocity?", in D. BIGO, S. CARRERA, E. GUILD (eds.), *Foreigners, Refugees or Minorities? Rethinking people in the context of border controls and visas*, Aldershot, Ashgate, 2013, pp. 151–169.

strategic use of regular pathways undermines the humanitarian essence of these pathways, potentially turning them into tools for the EU to achieve its readmission-related objectives.

Nonetheless, in the context of EU readmission cooperation with third countries, conditionality is not solely under the control of the EU. SECTION 6 shifts in fact the focus to the "other side of the coin" and explores how third countries can use their "migratory importance" as a bargaining tool. These countries can use their critical role in managing migration flows to put pressure on the EU to provide incentives that can be used to achieve their own national interests. This SECTION explores the concept of "reversed conditionality" and asks whether the EU has become – or risks becoming – dependent on these countries for migration management. It also analyses how such dependence could weaken the EU's influence as a global actor, both in the area of readmission and in the broader field of international migration governance.

2. The use of visa policy in the context of readmission

One of the most favoured and attractive *quid pro quos* for third countries comes from the AFSJ, in particular visas. Indeed, as mentioned above, visas are considered to be among the most successful "compensatory measures" so far[808]. The EU considers its visa policies as key tools to address a wide range of issues, *e.g.*, security, economic development, diplomacy, public health, and human rights. Visas enable the EU to manage the entry of TCNs in a way that reflects the national interests and priorities of its Member States: in this regard, both the EU and its Member States seem to consider visa regime as a "gatekeeper" between "desirable" and "less desirable" guests. In particular, the EU retains *exclusive* competence on

[808] In these terms, J. P. CASSARINO, "Informalising Readmission Agreements in the EU Neighbourhood", *op. cit*., p. 183.

short-term visas[809]; this competence derives from the "ERTA exclusivity doctrine"[810].

The visa lever exists in two different "versions": the "more for more version" (visa facilitation and liberalisation), and the "less for less version" (visa restrictions)[811]. As regards the "more for more" version, several challenges in convincing third countries to cooperate effectively on readmission in the early 2000s led the Commission to explore further ways to increase its leverage power. It became clear that compromises had to be made, and that more attractive incentives had to be linked to migration policy, in particular visa facilitations[812]. Linking Visa Facilitation Agreements (VFAs) to the conclusion of readmission agreements has quickly become the main incentive for third countries in readmission negotiations with the EU[813]: consequently, it is worth noting that this practice has mainly affected the EU's "formal" cooperation on readmission. VFAs play a key role in promoting easier and more efficient travel procedures, thus contributing to increased cross-border mobility and people-to-people contacts, in particular for the EU's neighbouring countries[814].

Coupling these "seemingly unconnected agreements" is a strategy to balance the interests of both Parties: while the EU benefits from improved border and migration management, third countries benefit from enhanced travel opportunities for certain categories of their citizens[815]. Since 2005, all negotiations on VFAs have therefore taken place in parallel with negotiations on EURAs[816]. The entry into

[809] P. GARCÍA ANDRADE, "EU External Competences in the Field of Migration: How to Act Externally when Thinking Internally", *op. cit.*, pp. 167 ff. See also, P. GARCÍA ANDRADE, "External Competence and Representation of the EU and its Member States in the Area of Migration and Asylum", in *EU Migration Law Blog*, 17 January 2018.

[810] *Supra*, CHAPTER II, SUB-SECTIONS 4.1 and 4.2. See also, Art. 77(2)(a) TFEU.

[811] Cfr. V. RIETIG, M. WALTER-FRANKE, cit., p. 28.

[812] F. TRAUNER, I. KRUSE, *EC Visa Facilitation and Readmission Agreements: Implementing a New EU Security Approach in the Neighbourhood*, CEPS Working Document No. 290, April 2008, p. 10.

[813] Please, note that VFAs are different from visa liberalisation agreements. Indeed, unlike VFAs, visa liberalisation agreements are not granted in exchange for third country cooperation on immigration and readmission. Instead, they are conditional on the third country meeting specific objectives. These objectives are set out in an action plan and form the basis of an ongoing dialogue to guide the third country towards visa liberalisation and monitor its progress. Cfr. L. C. TEODORESCU, *op. cit.*, p. 100.

[814] F. TRAUNER, I. KRUSE, cit., p. 10.

[815] A. ROIG, T. HUDDLESTON, *op. cit*., p. 376.

[816] As agreed by the Member States in the Permanent Representatives Committee (COREPER) European Court of Auditors, cit., para. 50.

force of each VFA was linked to the entry into force of an EURA. This is the general wording of a similar provision: "this Agreement shall only enter into force on the date of the entry into force of the Agreement between the European Union and [selected country] on readmission"[817]. Therefore, fourteen EURAs (out of a total of eighteen concluded) were negotiated in this way: Macao, Hong Kong, Albania, Russian Federation, Bosnia and Herzegovina, Moldova, Montenegro, Serbia, Ukraine, Georgia, Armenia, Azerbaijan, Cape Verde, and, in 2020, Belarus[818]. Conversely, there is no similar "link" with Sri Lanka and Pakistan, third countries with which the EU has concluded EURAs but not VFAs. As for the case of Pakistan, it appears that the implementation of the Cooperation Agreement on Partnership and Development was conditioned on the conclusion of a readmission agreement, eliminating the need for promises of visa facilitation[819]. However, it is evident that all negotiating partners generally seek visa facilitation as compensation for readmission commitments. Nonetheless, the negotiation mandate does not always allow for this and alternative incentives, such as broader cooperation agreements, have to be used[820].

In any case, the Commission has faced many challenges in applying this "bargaining strategy". In this context, opposition from Member States, reluctant to "open their doors" (or at least some windows!) in exchange for readmission cooperation at the EU level, has played an important role. Indeed, while Member States may theoretically benefit from a more effective cooperation with third countries on this issue, the same Member States cannot accept the idea of giving up their internal "gatekeeper policies" on visas (as far as their powers are concerned)[821]. Along these lines, in 2015 the Commission admitted that "the possibility to use [VFAs] is limited, as the EU is unlikely to offer visa facilitation

[817] See, for example, Agreement between the European Union and the Republic of Belarus on the facilitation of the issuance of visas, 8 January 2020, Art. 14(3).

[818] See, for example and for all, Agreement between the European Union and the Republic of Belarus on the facilitation of the issuance of visas, OJEU, L 180, 9 June 2020, Art. 14(2) : "this Agreement shall only enter into force at the date of the entry into force of the Agreement between the European Union and the Republic of Belarus on the readmission of persons residing without authorisation if this date is after the date provided for in paragraph 1 of this Article."

[819] Cooperation Agreement between the European Community and the Islamic Republic of Pakistan on partnership and development fields, OJEU, L 378, 23 December 2004. Cfr. C. BILLET, *op. cit.*, p. 71.

[820] K. GILLADE, *op. cit.*, p. 43.

[821] On this point, A. ROIG, T. HUDDLESTON, *op. cit*., p. 377.

to certain third countries which generate many irregular migrants and thus pose a migratory risk"[822]. It is clear from the Commission's statements that, despite the considerable efforts outlined above, the "more for more" approach, in particular with regard to visa facilitation, has often failed to effectively encourage third countries to cooperate on readmission. As noted by Roig and Huddleston, "it is highly doubtful that the Commission can devise a package of carrots that satisfies the palates of third countries and whose costs Member States are also willing to swallow"[823]. Therefore, the use of positive conditionality has not been sufficient to achieve effective readmission cooperation from third countries in concrete terms, leading the Commission to call for a fundamental change in readmission cooperation with third countries, in particular as regards incentives[824].

Due to the limited effectiveness of the "positive" version of visa conditionality in achieving an effective cooperation with third countries *on the ground*, the EU institutions have increasingly considered the use of "negative conditionality". In other words, the lack of progress through the "carrot" approach has led the EU to turn to a "stick" approach, using punitive measures in the area of visa policy. Instead of offering VFAs as an incentive, the EU has started to use visa policy as a tool of pressure. In order to improve cooperation on readmission, even in the absence of formal EURAs, the EU has introduced a "less for less" strategy, formalised in Art. 25(a) of the amended Visa Code[825]. The updated Visa Code reinforces cooperation on readmission by empowering the Commission to propose specific restrictive measures against third countries on visa processing and fees in case of non-cooperation on readmission. Hence, Art. 25(a) allows the Union to adapt the conditions for processing visa applications submitted by TCNs – *e.g.,* the issuing of multiple-entry visas or the length of time taken to process applications – to the degree of cooperation offered by their countries of nationality on readmission[826]. On closer examination, this new provision does not appear to be "so new", as it recalls the considerations yet envisaged by the Seville European Council. In

[822] European Commission, Communication COM (2015) 0453 final to the European Parliament and the Council, EU Action Plan on return, Brussels, 9 September 2015, para. 5.
[823] A. ROIG, T. HUDDLESTON, *op. cit.,* p. 379.
[824] *Ibid.*
[825] *Supra,* SECTION 1.
[826] Art. 25(a)(5) of the Visa Code.

particular, the latter considered it necessary to "systematically assess relations with third countries that do not cooperate in the fight against illegal immigration"[827]. However, this assessment did not appear to be very pragmatic: in fact, as Coleman noted, the Council conclusions contained no reference to the possible consequences of a negative assessment and could be seen as nothing more than a political endorsement of negative conditionality[828].

More in detail, according to Art. 25(a) of the Visa Code, the EU Commission is mandated to assess, at least once a year, the cooperation of third countries in the area of readmission on the basis of different criteria, such as the number of return decisions issued against nationals of the third countries concerned, the actual execution rate of these return decisions, the volume of readmission requests and the degree of practical cooperation in return procedures[829]. If, on the basis of this assessment, a country is deemed to be cooperating, the Commission *may* propose to the Council an implementing decision to facilitate the processing of visas through benefits such as reduced visa fees, shorter processing times or extended validity of multiple-entry visas for travellers from that country[830]. The use of "carrots" therefore does not seem to have been completely abandoned in favour of relying on sanctions. On the contrary, if cooperation is deemed insufficient, the Commission *shall* propose restrictive measures, including adjustments to visa processing and possible fee increases[831]. Thus, Art. 25(a) does not provide an incentive for third countries to make initial readmission commitments but is designed to ensure their effective implementation by maintaining pressure and leverage even after cooperation agreements are in place, thus exemplifying the EU's approach of conditionality to maintain ongoing compliance with established readmission commitments. However, according to the text of the provision, while the Commission is *obliged* to take restrictive measures in the case of uncooperative

[827] Seville European Council, Presidency Conclusions, cit., para. 35.
[828] N. COLEMAN, *op. cit.*, p. 136.
[829] Art. 25(a)(2) of the Visa Code.
[830] *Ivi,* Art. 25(a)(8).
[831] *Ivi,* Art. 25(a)(5).

States, the visa benefits are only *potential* in the hypothesis of "good behaviour" of third countries[832].

In this regard, the provisions outlined in Art. 25(a) appear to be disproportionately biased in favour of States. If third countries fail to cooperate on readmission, the consequences of such lack of cooperation are borne by the citizens of the third countries concerned. As notably pointed out by Guild, ordinary citizens typically have little or no influence on their State's approach to migration cooperation with the EU, making the imposition of visa restrictions based on national policy choices inherently unfair[833]. Their individual possibility to obtain a visa for the EU territory may become more complex. And all because of behaviours that do not depend on individuals' will, but on the political choices made by the States to which they belong[834]. Guild also notes that:

"[Such an approach] is likely to be counter-productive in terms of the EU's international relations with third countries. Such a policy, based on the principle of discrimination on the basis of nationality among third country nationals, is of dubious legality in international law. A policy founded on the collective punishment of people for actions beyond their control raises profound questions about the quality of the shared values of the EU"[835].

The EU's readmission policy thus demonstrates not only the importance of national interests in the context of the Union's relations with the rest of the world, but also the fact that readmission may well embody the "negative dimension" of nationality: this term refers to the diverse burdens that nationals of a State might face because of the policies and actions of their home countries, rather than due to their personal actions or characteristics[836].

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[832] Cfr. S. F. NICOLOSI, "Refashioning the EU Visa Policy: A New Turn of the Screw to Cooperation on Readmission and to Discrimination?", in *European Journal of Migration and Law*, Vol. 22, 2020, p. 470.

[833] E. GUILD, "Amending the Visa Code: Collective Punishment of Visa Nationals?", cit.

[834] *Ivi*, p. 485; M. PREVIATELLO, *La dimensione esterna della politica di immigrazione e d'asilo: competenze e strumenti, op. cit.,* p. 166. See also, more in detail, E. GUILD, M. GRUNDLER, "The EU visa policy: to deter and to facilitate", in E. TSOURDI, P. DE BRUYCKER, *op. cit.*, pp. 390–406.

[835] E. GUILD, "Amending the Visa Code: Collective Punishment of Visa Nationals?", cit.

[836] Instead, the "positive" side of nationality encompasses the benefits and privileges that individuals enjoy as citizens of a state as a result of their legal ties to that State. Consider, for

Moreover, as notably points out by Guild, it is difficult to justify penalising citizens of third countries for their governments' lack of cooperation on return and readmission issues. Ordinary citizens typically have little or no influence on their State's approach to migration cooperation with the EU, making the imposition of visa restrictions based on national policy choices inherently unfair. Such an approach risks aggravating the already tense relations between the EU and several third countries over migration.

So far, the leverage provided by Art. 25(a) of the Visa Code has only proved "effective" in practice with regard to Gambia and Ethiopia, two third countries with which the Union has concluded "informal" readmission agreements. It can therefore be said that while the strategy of concluding VFAs in exchange for formal readmission agreements has shaped the Union's "formal" cooperation on readmission, the approach introduced by the Visa Code has mainly been applied to "informal" arrangements. Regarding The Gambia, on the basis of a report by the Commission – which found that cooperation on readmission with such third country was insufficient –, the Council suspended certain provisions set out in Art. 25a(5)(a) of the CCV with regard to Gambian nationals[837]. In addition, the Council adopted the Implementing Decision 2022/2459 on the application of an increased visa fee with regard to this country[838]. Following the adoption of these measures, the Commission reported positive developments from the Gambia, in particular in facilitating communication through the appointment of a focal point for

example, the concept of passport privilege, which refers to the benefits associated with the passport a person holds, based on the country that issued it. These privileges affect various aspects of international travel, residence and even the ease of obtaining visas or conducting business abroad. See the current "strongest" and "weakest" passports here: Global Passport Power Rank 2024, available at: https://www.passportindex.org/byRank.php.

[837] Council Implementing Decision (EU) 2021/1781 of 7 October 2021 on the suspension of certain provisions of Regulation (EC) 810/2009 of the European Parliament and of the Council with respect to The Gambia. Recital (5) clarifies that "suspension of the possibility of waiving requirements with regard to the documentary evidence to be submitted by visa applicants referred to in Article 14(6), suspension of the general 15 calendar days processing period referred to in Article 23(1) (which as a consequence also excludes the application of the rule on the extension of this period up to a maximum of 45 days in individual cases), suspension of the issuing of multiple-entry visas in accordance with Article 24(2) and (2c) and, suspension of the optional visa fee waiver for holders of diplomatic and service passports in accordance with Article 16(5), point (b)".

[838] Council Implementing Decision (EU) 2022/2459, of 8 December 2022, on the application of an increased visa fee with respect to The Gambia. The implementing decision applied to citizens of The Gambia who require a visa to enter the Schengen area and who applied for a Schengen visa regardless of their place of stay.

readmission and ensuring the continuation of charter flights through the prompt issuance of landing permits. These measures led to partial improvements in operational cooperation for some Member States, including as regards an increased responsiveness from some Gambian embassies, the organisation of identification missions and the issuance of travel documents within the timeframe agreed in the readmission arrangement[839]. As a result, the Commission proposed to abolish the previously increased visa fee and to revert to the standard fee of 80 EUR for Gambian nationals[840]. Nonetheless, given that the level cooperation with The Gambia on readmission was overall still insufficient to assist in the identification of Gambian nationals irregularly present in all Member States, the Commission considers it necessary to maintain in force Implementing Decision 2021/1781[841].

As for Ethiopia, the Council has also decided to suspend certain visa requirements for Ethiopian nationals due to insufficient cooperation by the Ethiopian government on the readmission of its nationals irregularly residing in EU Member States[842]. The main changes include: the suspension of multiple-entry visas for Ethiopian nationals; Ethiopians are required to provide additional documentation when applying for visas; Ethiopians holding diplomatic or service passports are now required to pay visa fees; the visa processing time has been extended from 15 to 45 days. These measures are aimed at encouraging Ethiopia to improve its cooperation on readmission, as the EU has encountered difficulties in obtaining travel documents and organising the return of Ethiopian nationals. The decision follows an assessment by the European Commission which highlighted these challenges[843]. In this context, proposals have also been made in the case of

[839] European Commission, Proposal COM (2023) 569 final for a Council Implementing Decision on repealing Implementing Decision (EU) 2022/2459 on the application of an increased visa fee with respect to The Gambia, Brussels, 27 September 2023, p. 2.

[840] *Ivi*, p. 3.

[841] *Ivi*, p. 2.

[842] Council Implementing Decision 2024/1341, of 29 April 2024, on the suspension of certain provisions of Regulation (EC) 810/2009 of the European Parliament and of the Council in respect of Ethiopia.

[843] European Commission (EU), Proposal COM/2023/568 final for a Council Implementing Decision on the suspension of certain provisions of Regulation (EC) 810/2009 of the European Parliament and of the Council with respect to Ethiopia, Brussels, 27 September 2023.

Bangladesh and Iraq, but these have not been translated into concrete action by the Council[844].

However, there are several compelling reasons to reject the use of visa leverage in its "less for less" version, and any kind of "negative migration conditionality" more broadly, as an effective means of addressing the EU's "obsession" with securing readmission at all costs[845]. Indeed, for some opponents of conditionality, namely Rietig and Walter-Franke, the "less for less" approach is untenable and may even be described as a form of neo-colonialism. Criticism is based not only on ethical concerns, but also on the risk of collateral damage to other objectives of the EU and its Member States[846]. Indeed, the use of punitive measures can strain long-term relationships with other international actors, which may have diplomatic or strategic consequences[847]. In addition, any measures that contribute to the economic deterioration of third countries could potentially result in higher levels of immigration to the EU. This could lead to increased emigration from countries of origin, and transit countries may be less motivated to curb the flow of migrants through their territory[848]. As a result, the continued use of "negative conditionality" can affect both the EU's economic and political interests. This underlines the need for a more careful and balanced approach to the EU readmission policy as to avoid unintended consequences[849].

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[844] European Commission, Proposal COM (2021) 412 final for a Council Implementing Decision on the suspension of certain provisions of Regulation (EC) 810/2009 of the European Parliament and of the Council with respect to Bangladesh, Brussels, 15 July 2021; European Commission, Proposal COM/2021/414 final for a Council Implementing Decision on the suspension of certain provisions of Regulation (EC) 810/2009 of the European Parliament and of the Council with respect to Iraq, Brussels, 15 July 2021. See also, European Commission, *Visa Code: The Commission proposes temporary visa measures for Bangladesh, Iraq and The Gambia to improve cooperation on return and readmission*, 15 July 2021, available here: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3681.

[845] In this sense, see also, D. KIPP, N. KNAPP, AMREI MEIER, *Negative Sanctions and the EU's External Migration Policy: "Less for Less" Not Fit for Purpose,* SWP Comments, No. 34, June 2020, p. 3.

[846] V. RIETIG, M. WALTER-FRANKE, *op. cit.,* p. 18.

[847] *Ibid.*

[848] N. COLEMAN, *op. cit.,* p. 135.

[849] In this respect, Mrs. Tineke Strike, a Member of the European Parliament (MEP), also claims on *X* that: "[t]he EU abuses its power by enforcing returns and readmission in a way that is often experienced as neo-colonial. Instead of listening to the wishes of countries with which agreements are made [...] the EU opts for sanctions. [...] If countries refuse to cooperate, the EU suspends visa facilitation, development aid, or trade benefits. This perverse policy is destructive for the development of the poorest countries". T. STRIK, Member of the European Parliament, Greens/European Free Alliance Group, Statement published on *X* on 8 February 2023. Cfr. V. RIETIG, M. WALTER-FRANKE, *op. cit.,* p. 18.

Moreover, as García Andrade underlines, from a strictly legal perspective, the new mechanism under Art. 25(a) of the Visa Code seems to overlook the fact that, as mentioned above, the EU remains bound by VFAs with many of the same countries with which it has also concluded EURAs. While it is true that EURAs and VFAs are linked in terms of their entry into force – since VFAs stipulate that they only enter into force once the third country has ratified the relevant EURA, as indicated above – this link does not extend to compliance[850]. In other words, if the third country fails to meet its obligations under the readmission agreement, the EU cannot suspend the application of a VFA due to provisions in secondary legislation. Indeed, legislative reforms cannot disregard these agreements, especially given that the commitments made in them take precedence over secondary legislation, including Art. 25(a) of the Visa Code[851]. In this regard, Nicolosi argues that the revised Visa Code framework introduces an integrated mechanism for cooperation on readmission, where the benefits of VFAs can easily be replaced by measures included in the Council's implementing decision mentioned above. These measures could include reduced visa fees, shorter processing times or extended validity of multiple-entry visas. Nonetheless, this shift would progressively reduce the scope for offering visa liberalisation regimes, thus limiting the flexibility of the EU's visa policy over time[852]. Furthermore, as García Andrade points out, and we agree, the situation remains ambiguous, and the issue of the relationship between readmission agreements and VFAs should have been addressed in the Visa Code, as its recognition is likely to weaken the conditionality mechanism created by this provision. In any case, this "visa conditionality mechanisms", both positive and negative, raise serious concerns about the coherence of EU policies, in particular with regard to its external actions, as required by Art. 21(3)(2) TEU[853].

This SECTION has shown the main use of both "positive" and "negative" conditionality in the case of visas. However, at the same time, there has been a

[850] See again, for example, Art. 14(2) of the VFA concluded by the EU with Belarus.

[851] P. GARCÍA ANDRADE, "Derecho de la UE y gestión de los flujos migratorios: interacciones con el Derecho internacional y con el Derecho Interno", *op. cit.*, pp. 165–166.

[852] S. F. NICOLOSI, "Refashioning the EU Visa Policy: A New Turn of the Screw to Cooperation on Readmission and to Discrimination?", *op. cit.*, p. 489.

[853] P. GARCÍA ANDRADE, "Derecho de la UE y gestión de los flujos migratorios: interacciones con el Derecho internacional y con el Derecho Interno", *op. cit.*, p. 166. See also the considerations made *infra*, SECTION 3.

growing reliance on "readmission conditionality" that goes beyond the traditional instruments of the AFSJ[854]. This strategy ties readmission objectives to different EU policy areas, as to use different channels to strengthen cooperation on readmission with third countries[855]. In this sense, a genuine "issue linkage" is established between readmission and other aspects of the EU framework: overall, it is another form of conditionality affecting, however, different EU areas.

The origins of this "borrowing of tools" from other EU action areas must go back to the 1990s. Indeed, at its first meeting in November 1993 the JHA Council developed the concept of linking readmission objectives with other policy areas. In this context, the JHA Council explored the possibility of linking "Europe agreements, other association or cooperation agreements and third countries' practices regarding the readmission of irregular migrants"[856]. This strategic approach aimed at securing the cooperation of third countries in managing migration and facilitating the readmission of migrants[857]. In this direction, a first example of linking readmission to other policies or commitments can be seen in the EU's practice of including readmission clauses in its Association and Cooperation Agreements, which constitute privileged relations with the third countries concerned[858]. This approach has often allowed the EU to secure the commitment of third countries to negotiate and eventually conclude a specific EURA[859]. By embedding these clauses, the EU has strategically positioned readmission as a

[854] D. VITIELLO, "Il contributo dell'Unione europea alla governance internazionale dei flussi di massa di rifugiati e migranti: spunti per una rilettura critica dei Global Compacts", *op. cit*., p. 28.

[855] European Commission, Communication COM (2015) 285 final to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, EU Action Plan against migrant smuggling (2015–2020), Brussels, 27 May 2015, p. 8.

[856] Council of the European Union, Justice and Home Affairs Council, Brussels, 29–30 November 1993, Press Release PRES/93/202, p. 6. Cfr. N. COLEMAN, *op. cit*., p. 20; P. HOFFMEYER-ZLOTNIK, S. LAVENEX, P. LUTZ, "The Limits of EU Market Power in Migration Externalization: Explaining Migration Control Provisions in EU Preferential Trade Agreements", in *Journal of Common Market Studies*, 2023, p. 1361.

[857] N. COLEMAN, *op. cit*., p. 20.

[858] See, for example Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part, 24 June 1994, OJEU, L 327, 28 November 1997, Art. 84; Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and Georgia, of the other part, 22 April 1996, OJEU, L 205, 4 August 1999, Art. 75. No longer in force; Partnership and Cooperation Agreement between the European Communities and their Member States, and Ukraine, 14 June 1994, OJEU L 49, 19 February 1998, Art. 27. No longer in force.

[859] *Supra*, CHAPTER II, SECTION 2.

precondition for closer economic, political and social cooperation, thus integrating migration management, and readmission in particular, into a broader framework of partnership: this practice reflects the use of conditionality, whereby the EU links cooperation or benefits in a policy area (such as trade or development) to the commitment of third countries to cooperate on the readmission of irregular migrants. Over time, this "borrowing of tools" has become more explicit, as seen in the Seville European Council decision in 2002, which, as also mentioned above, decided that any future agreements between the EU and other countries should include rules as to readmit irregular migrants[860].

This tendency can be explained by the fact that, although it might be assumed that States cooperate on readmission with other countries for their own sake, readmission agreements may also serve as *one facet within a broader framework of bilateral cooperation.* This framework encompasses various strategic areas, which are arguably of greater importance. Often, the decision to cooperate on readmission stems "from a form of rapprochement that shapes the intensity of the *qui pro quo"*[861]. This approach seems to have been followed by individual Member States as well. For example, in January 2007 Italy and Egypt concluded a readmission agreement following increased bilateral engagement between the two countries[862]. This increased engagement enabled Egypt to secure a bilateral debt swap agreement and trade concessions for its agricultural products. Egypt also secured temporary entry quotas for its nationals in Italy[863].

The trend described so far has also been more recently reaffirmed by the Commission in 2019, which claims that "[a]dditional incentives and leverage should be sought also in other policy areas, on a case-by-case approach", but also in the 2020 New Pact on Migration and Asylum[864]. Regarding the latter, the Commission proposes in fact to use the "*embedding*" (or "*issue-linkage*") technique to promote cooperation with third countries in managing migration issues. This

[860] *Ibid.*

[861] J.P. CASSARINO, "Unbalanced Reciprocities: Cooperation on Readmission in the Euro-Mediterranean Area", in *The Middle East Institute*, 19 July 2012

[862] Cooperation Agreement on readmission between the Government of the Italian Republic and the Government of the Arab Republic of Egypt, 9 January 2007.

[863] J.P. CASSARINO, "Unbalanced Reciprocities: Cooperation on Readmission in the Euro-Mediterranean Area", *op. cit.*.

[864] COM (2019) 481 final, cit., p. 16.

strategy implies the integration of migration policy and readmission issues both in "formal" (association or trade agreements) or "informal" (various forms of partnership arrangements) contexts[865]. Therefore, by linking migration cooperation to broader areas of mutual interest, the EU seeks to create a framework that encourages more solid cooperation with third countries of origin and transit[866]. More in detail, the proposal on the Asylum and Migration Management Regulation (AMMR) allowed the Commission – when reporting to the Council on the state of play of readmission cooperation – to identify additional measures to promote and enhance cooperation on return and readmission[867]; in particular, the proposal considered looking at other policy areas of interest to the third countries concerned[868]. However, despite the Commission's intentions, the final act adopted by the Parliament and the Council did not incorporate this proposal[869].

This form of "readmission conditionality" mainly concerns two areas of EU action: development policy and trade policy, which are covered by Art. 208 and Art. 207 TFEU respectively.

3. The "issue linkage" between readmission and development

Starting with development policy, it has been one of the EU's first and most important levers to promote readmission cooperation with third countries. Indeed, development aid is often used as a leverage to strengthen readmission cooperation with countries of origin and transit, encouraging them to facilitate the return of

[865] COM (2020) 609 final, cit., para. 6.5.

[866] *Ibid.*

[867] European Commission, 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) XXX/XXX [Asylum and Migration Fund], COM/2020/610 final, 23 September 2020. See Art. 7(1) of the AMMR Proposal: "[w]here the Commission, on the basis of the analysis carried out in accordance with Article 25a(2) or (4) of Regulation (EU) 810/2009 of the European Parliament and of the Council and of any other information available, considers that a third country is not cooperating sufficiently on the readmission of illegally staying third-country nationals, and without prejudice to Article 25(a)(5) of that Regulation, it shall submit a report to the Council including, where appropriate, the identification of any measures which could be taken to improve the cooperation of that third country as regards readmission, taking into account the Union's overall relations with the third country".

[868] *Ivi*, para. 3; COM (2020) 609 final, cit., para. 6.5.

[869] Regulation 2024/1351 of the European Parliament and of the Council on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) 604/2013, OJEU, L 2024/1351, 22 May 2024.

irregular migrants. Nonetheless, the effectiveness of such measures in encouraging third countries to cooperate more on readmission depends largely on the specific context of each partner[870].

In 2016, for example, EURA negotiations with Nigeria were unsuccessful due to a lack of interest on EU development funds on the part of Abuja – unlike some other countries[871]. As a result, a €50 million vocational training project funded by the EUTF for Africa was not implemented. Nigeria has in fact other significant sources of income, with migrant remittances playing a larger role in the national budget than the total amount of development cooperation. Indeed, in many cases, recipient third countries are heavily dependent on the remittances that these migrants could send back to their families. Remittances have therefore proven to be one of the most effective mechanisms for financing development, even more so than financial aid from the "Global North": they provide crucial financial support to families and contribute to the economic well-being of recipient countries[872].

The EU's development policy, the legal basis for which can be found in Art. 208 TFEU, was designed to prioritise the reduction and eventual eradication of poverty: in particular, Art. 208(2) TFEU states that "Union development cooperation policy shall have as its primary *objective the reduction* and, in the long term, *the eradication of poverty*. The Union shall take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries". However, in response to increasing migratory pressures and the limited effectiveness of "traditional" instruments in securing readmission cooperation, the EU has gradually "recalibrated" its development cooperation policy. While poverty reduction remains a fundamental objective, elements of the policy have been reoriented to meet the Union's strategic interests, in particular in addressing migration challenges and strengthening readmission cooperation with third countries[873]. Consequently, the "exploitation" of development aid for the

[870] D. KIPP, N. KNAPP, AMREI MEIER, cit., p. 2.

[871] For example, the EU's threat to cut financial assistance persuaded Afghanistan to conclude an "informal" arrangement, the JWF. D. KIPP, N. KNAPP, AMREI MEIER, cit., p. 2.

[872] In this sense, International Fund for Agricultural Development (IFAD), *The Financing Facility for Remittances*, available here: https://www.ifad.org/en/ffr.

[873] In this sense, M. LATEK, LATEK, *Policy Coherence for Development: still some way to go*, EPRS | European Parliamentary Research Service, Briefing, 2015, pp. 7 ff.

purpose of migration management may somehow blur the "traditional" objectives of EU development policy[874]. "Preventing migration in guise of development" seems thus to have become the motto synthetising this shift[875].

This strategy also raises doubts in terms of *coherence* of the EU's development policy. Described as the absence of contradictions between EU policies, coherence is a major challenge for the Union, above all in the context of development policy[876]. The idea of Policy Coherence for Development (PCD) proposes that all EU policies with a potential impact on developing countries should take into account the objectives of development cooperation[877]. Furthermore, the Union's commitment to PCD is enshrined in the EU primary law: indeed, Art. 21(2)(d) TEU claims that: "[t]he Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to [...] foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty". As Berger illustrates, this makes development, with a focus on poverty reduction, one of the overarching objectives of the Union's external action[878].

[874] Cfr. D. VITIELLO, "Il contributo dell'Unione europea alla governance internazionale dei flussi di massa di rifugiati e migranti: spunti per una rilettura critica dei Global Compacts", *op. cit*., p. 28.

[875] J.Y. CARLIER, F. CRÉPEAU, A. PURKEY, "From the 2015 European "Migration Crisis" to the 2018 Global Compact for Migration: A Political Transition Short on Legal Standards", in *McGill International Journal of Sustainable Development Law & Policy*, Vol. 16, No. 1, 2020, p. 49.

[876] In this regard, note that, according to Art.4(4) TFEU, EU competence on development cooperation is shared without pre-emption effects on Member States' powers. Cfr. P. GARCÍA ANDRADE, "EU External Competences in the Field of Migration: How to Act Externally when Thinking Internally", *op. cit*. Moreover, Art. 209 TFEU states that [t]he European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt the measures necessary for the implementation of development cooperation policy [...] 2. The Union may conclude with third countries and competent international organisations any agreement helping to achieve the objectives referred to in Article 21 of the Treaty on European Union and in Article 208 of this Treaty. The first subparagraph shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude agreements". See also, more in detail, C. HILLION, "Tous pour un, un pour tous! Coherence in the External Relations of the European Union", in M. CREMONA (ed.), *Developments in EU External Relations Law*, Oxford, Oxford University Press, 2008, pp. 10–36; M. LATEK, *Growing impact of EU migration policy on development cooperation*, EPRS | European Parliamentary Research Service, November 2017.

[877] E. PICHON, *Understanding policy coherence for development*, EPRS | European Parliamentary Research Service, November 2023.

[878] Cfr. A. BERGER, "Development as non-migration? Examining normative and policy coherence in EU external action on migration and development", in *Development Policy Review*, 2022.

The Commission considers coherence for development as a legitimate strategy to *streamline* readmission processes and reduce migration to the EU[879]. On this point, the Commission emphasised that:

"Increasing coherence between migration and development policy is important to ensure that development assistance helps partner countries manage migration more effectively, and also incentivises them to effectively cooperate on readmission of irregular migrants. Positive and negative incentives should be integrated in the EU's development policy, rewarding those countries that fulfil their international obligation to readmit their own nationals, and those that cooperate in managing the flows of irregular migrants from third countries"[880].

The Commission's view seems to have been also endorsed by the ECJ, which, referring to the Framework Agreement between the EU and the Republic of the Philippines, clarified that provisions on readmission in different types of agreements do not create objectives completely different from those pursued by development cooperation[881]. The Court outlined that the EU development policy – as set out in Art. 208 TFEU and Art. 21(2) TEU – aims not only at poverty reduction, but also but also at fostering the sustainable economic, social and environmental development of developing countries. This comprehensive approach mandates various development efforts, including the establishment of cooperation on migration, which are incorporated into the EU's overarching development policy framework[882]. Indeed, according to the Court, "migration (including the fight against illegal migration) [is] integrated into the development policy defined in the European Consensus [on Development]"[883].

However, in our opinion, the EU has focused more on helping developing countries to manage their borders than on reducing poverty and/or supporting

[879] *Ibid.*
[880] COM (2016) 385 final, cit., p. 8.
[881] European Court of Justice (ECJ), Case C–377/12, *Commission v Council*, Judgement 11 June 2014, ECLI:EU:C:2014:1903. Framework Agreement on Partnership and Cooperation between the European Union and its Member States, of the one part, and the Republic of the Philippines, of the other part, 11 July 2012.
[882] *Ivi*, paras. 36 ff.
[883] *Ivi*, para. 49.

broader development goals. In this sense, García Andrade underlines that channelling substantial resources into capacity-building initiatives and financial assistance to improve migration management, the EU seems to have deviated from the core purpose of its development cooperation policy[884]. In this context, it is doubtful whether initiatives aimed at enhancing migration management capacity in third countries truly contribute to their development, despite the ECJ's favourable stance, as seen in the Philippine-related case mentioned earlier. García Andrade also notes that the Court's recognition of a link between migration and development, together with its broad interpretation of development – based more on the European Consensus on Development and secondary legislation than on primary law – makes this line of case law both questionable and worrying[885]. With such approach, it seems that the EU has failed to ensure that its actions and activities are coherent with the main objective of development cooperation policy, as the focus has shifted toward migration management rather than fostering long-term development in partner countries[886]. What is more, the disproportionate emphasis on managing migration flows in the EU's relations with developing countries – which, as noted above, often diverts the use of development cooperation actions towards objectives such as migration control – conflicts with EU primary law[887]. Indeed, Art. 21(3) TEU makes clear that "[t]he Union shall ensure *consistency* between the different areas of its external action and between these and its other policies". Moreover, the Union's choice to gradually using development cooperation mechanisms to facilitate readmission may be in stark contrast also to the Union's commitment to implement the Sustainable Development Goals (SDGs)[888]: for example, while SDG 10.7 claims for the facilitation of "orderly, safe,

[884] P. GARCÍA ANDRADE, "The external dimension of the EU migration policy: the legal framing of building partnerships with third countries", *op. cit.*, p. 373.

[885] *Ivi*, p. 374; P. GARCÍA ANDRADE, "The External Dimension of the EU Immigration and Asylum Policies Before the Court of Justice", in *European Papers*, Vol. 7, No. 1, 2022, p. 109.

[886] S. POLI, "The Integration of Migration Concerns into EU External Policies: Instruments, Techniques and Legal Problems", in *European Papers*, Vol. 5, No. 1, 2020, p. 93.

[887] *Ivi*, p. 91.

[888] The Sustainable Development Goals (SDGs) are a set of 17 global objectives adopted by the United Nations member states in 2015 as part of the 2030 Agenda for Sustainable Development. These goals are designed to address a wide range of social, economic, and environmental challenges facing the world. They include targets such as ending poverty and hunger, promoting health and education, ensuring clean water and sanitation, combating climate change, and fostering peace and justice. The SDGs provide a framework for countries, organizations, and individuals to work together towards a more sustainable and equitable future for all. See United Nations, Department of

regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies", the EU is more focused on reducing arrivals and increasing returns. This choice *may deprioritise development policies* and also open the EU up to pressure from third countries[889].

Furthermore, the principle of conferral is also called into question: indeed, Art. 7 TFEU clearly states that "[t]he Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers". The principle of conferral, enshrined in Art. 5(2) TEU, requires in fact that the EU's actions must remain within the limits of the competences conferred upon it by the Member States, raising further questions about the legitimacy of its current development cooperation strategies[890]. Therefore, EU institutions may not be allowed to use development cooperation agreements to impose specific obligations on third countries regarding the readmission of irregular migrants. If the EU seeks "formal" commitments from third countries on readmission, it must instead negotiate *ad hoc* readmission agreement, a hypothesis explicitly provided for by Art. 79(3) TFEU: only this approach seems to be in line with the principle of conferral[891].

Nevertheless, as García Andrade points out, the restructuring of funding instruments in the AFSJ has fortunately put an end to the controversial use of development funds for migration management purposes: indeed, under Title V of Part Three of the TFEU, AFSJ funds are now required to finance both the internal and external aspects of the EU's migration policy[892]. This shift helps to ensure that

Economic and Social Affairs, Sustainable Development, The 17 SDGs, available here: https://sdgs.un.org/goals.

[889] Which may use their "reversed conditionality". *Infra*, SECTION 6. Cfr. S. ANGENENDT, N. BIEHLER, *Bridging the Gap between EU Migration and Development Policies towards an updated Policy Coherence for Development Approach*, Foundation for European Progressive Studies (FEPS), Policy Brief, November 2023, p. 8.

[890] In this sense, P. GARCÍA ANDRADE, "The external dimension of the EU migration policy: the legal framing of building partnerships with third countries", *op. cit.*, p. 373.

[891] Cfr. S. ANGENENDT, N. BIEHLER, *op. cit.*, p. 90.

[892] Cfr. P. GARCÍA ANDRADE, "The external dimension of the EU migration policy: the legal framing of building partnerships with third countries", *op. cit.*, p. 374. For example, the Asylum, Migration and Integration Fund (AMIF) – subject to Regulation 2021/1147 of the European Parliament and of the Council, of 7 July 2021, establishing the Asylum, Migration and Integration Fund, OJEU, L 251, 15 July 2021 – is the key EU fund to specifically address migration priorities and challenge. The Regulation 2021/1147 has been amended by Regulation 2024/1351. See also, Regulation 2021/1148 of the European Parliament and of the Council, of 7 July 2021, establishing,

funds dedicated to managing migration flows and enhancing security are not taken from development cooperation funds, thus preserving the distinct purpose of each funding stream. However, García Andrade also noted that the risk of distortion of development funds remains, especially with the recent adoption of the Neighbourhood, Development and International Cooperation Instrument (NDICI)[893]. Indeed, the NDICI Regulation supports both development-oriented initiatives and activities related to migration management, including the implementation of EU migration agreements and dialogues. While the legal basis of the NDICI is linked to development cooperation as well as economic, financial and technical cooperation with third countries, it is essential to carefully monitor how funds are allocated and used. This is necessary to ensure that EU development cooperation does not deviate from its primary objective. According to García Andrade, although the NDICI also funds migration-related activities, such as improving migration management and implementing agreements with third countries, this dual focus raises concerns[894]. There is a risk that development funds could be used indirectly to support migration management, potentially leading to a "new/old" concern: the undermining of the original purpose of development cooperation. This challenge threatens the principles of coherence and consistency in EU policy, especially in light of the conditionality approach emphasised in the New Pact on Migration and Asylum and its legislative package, as exemplified by the AMMR[895]. The "issue linkage stratagem", as underlined above, underpins the practice of linking readmission not only to development policy but also to trade.

as part of the Integrated Border Management Fund, the Instrument for Financial Support for Border Management and Visa Policy, OJEU, L 251, 15 July 2021.

[893] Regulation 2021/947 of the European Parliament and of the Council of 9 June 2021 establishing the Neighbourhood, Development and International Cooperation Instrument – Global Europe, amending and repealing Decision No 466/2014/EU of the European Parliament and of the Council and repealing Regulation (EU) 2017/1601 of the European Parliament and of the Council and Council Regulation (EC, Euratom) No 480/2009 (Text with EEA relevance)Text with EEA relevance, OJEU, L 439, 2 December 2021. P. GARCÍA ANDRADE, "The external dimension of the EU migration policy: the legal framing of building partnerships with third countries", *op. cit.*, p. 374

[894] *Ibid.* See also, E. FRASCA, cit.

[895] For similar concerns, S. POLI, "The Principle of Conditionality in the EU's Relations with its Neighbours: its Evolution and Reconciliation with the Principle of Consistency", *op. cit.*, pp. 537 ff.

4. The link between readmission and trade

As for trade, since the 1990s the EU has begun to explore the possibility of linking trade and readmission obligations in its Preferential Trade Agreements (PTAs)[896]: the latter are concluded between the EU and third countries in order to facilitate and promote trade by reducing barriers while granting preferential treatment to the Parties[897]. Indeed, as mentioned above, in 1995 the JHA Council endorsed a standard readmission clause to be included by the EC in trade agreements[898]. In 2004, the General Affairs Council explicitly stated that the conclusion of a EURA must be a precondition for initiating negotiations on a PTAs[899]. Nonetheless, certain countries that are crucial for irregular migration, such as Morocco and Tunisia, are also not covered by such commitments[900].

A renewed emphasis on the use of trade instruments as to enhance readmission cooperation has emerged in a 2021 Commission proposal regarding the EU's Generalised Scheme of Preferences (GSP)[901]. Under this system, third countries are granted preferential access to the EU market on the basis of certain criteria, such as

[896] S. LAVENEX, F. JURJE, *Issue-Linkage in International Migration Governance: Trade Agreements as Venues for "Market Power Europe"?*, NCCR Trade Regulation, Working Paper No. 2013/11, April 2013, p. 3.

[897] See, *ex multis*, D. KLEIMANN (ed.), *EU preferential trade agreements: commerce, foreign policy and development aspects*, European University Institute (EUI), 2013. See also the Agreement with the Russian Federation and Ukraine, *supra*, CHAPTER II, SECTION 3.

[898] *Supra*, CHAPTER II, SECTION 2.

[899] Council of the European Union, 2576th Council meeting, General Affairs, Luxembourg, 26 April 2004, 8566/04 (Presse 115), Conclusion no. 5. However, despite these "calls", recent research shows that there has been no *systematic* inclusion of migration control and readmission clauses in purely trade agreements. Cfr. S. LAVENEX, cit.; P. HOFFMEYER-ZLOTNIK, S. LAVENEX, P. LUTZ, "The Limits of EU Market Power in Migration Externalization: Explaining Migration Control Provisions in EU Preferential Trade Agreements", in *Journal of Common Market Studies*, 2023. A valuable resource for understanding the integration of migration provisions within trade agreements is the Migration Provisions in Trade Agreements Database (MITA). The MITA Database covers provisions related to international mobility, migrant rights, and migration control. The temporal scope of the database spans trade agreements concluded globally between 1960 and 2020. See, S. LAVENEX, P. LUTZ, P. HOFFMEYER-ZLOTNIK, "Migration governance through trade agreements: insights from the MITA dataset", in *The Review of International Organizations*, Vol. 19, 2023.

[900] S. LAVENEX, cit.; P. HOFFMEYER-ZLOTNIK, S. LAVENEX, P. LUTZ, *op. cit.* See also, *infra*, SECTION 6.

[901] European Commission, Proposal COM (2021) 579 final for a Regulation on applying a generalised scheme of tariff preferences and repealing Regulation (EU) 978/2012 of the European Parliament and of the Council, Brussels, 22 September 2021.

low or lower middle-income status and a demonstrated need for trade benefits[902]. The proposed Art. 19(1)(c) seeks to withdraw GSP benefits in the event of, *inter alia*, "serious shortcomings in customs controls related to the obligation to readmit the beneficiary country's own nationals". The proposal thus links certain conditions related to readmission obligations to the enjoyment of benefits under the GSP system, relying on "negative conditionality". In other words, if a beneficiary country does not meet certain criteria or does not address certain concerns related to the Union's fight against irregular migration, it may face negative consequences in terms of its access to GSP benefits.

However, the proposal has been rejected by many NGOs and civil society representatives. One of the criticisms made is that, since its creation in 1971, the sole objective of the EU's GSP has been to promote the sustainable development of low and middle-income countries. It is important that this remains its sole objective and that any attempt to blur it is avoided[903]. Moreover, the aim of the GSP is also to promote respect for human rights standards and support for sustainable development in third countries. By introducing the contentious issue of readmission in this context, the space for progress on human rights standards, climate change targets and sustainable development goals may be reduced. In addition, the EU's credibility in upholding these standards globally risks being inexorably eroded[904].

This proposal also raises questions in terms of the potential violation of the EU's obligations under the rules of the World Trade Organization (WTO). Indeed, according to international trade regulations, GPSs serve as an exception to one of the fundamental principles of the global trading system: the "most-favoured nation" treatment. Essentially, this means that WTO members are generally required to extend any trade benefits they offer to one country to all WTO members[905].

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[902] European Commission, Generalised Scheme of Preferences, available here: https://policy.trade.ec.europa.eu/development-and-sustainability/generalised-scheme-preferences_en.

[903] Focsiv, *Piegare la politica commerciale europea alla riammissione dei migranti*, 3 March 2023, available here: https://www.focsiv.it/piegare-la-politica-di-cooperazione-europea-alla-riammissione-dei-migranti/; Human Rights Watch, *Lettera ai governi dell'UE sulla riforma dell'SPG*, 23 June 2023, available here: https://www.hrw.org/it/news/2023/06/23/letter-eu-governments-gsp-reform.

[904] Focsiv, *Piegare la politica commerciale europea alla riammissione dei migranti,* cit.

[905] World Trade Organisation (WTO), *Principles of the trading system*, available here: https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm.

However, a special provision known as the "enabling clause" allows GPSs to be granted to developing and least-developed countries. This clause was achieved after years of advocacy and efforts by these countries[906].

The "enabling clause" allows WTO members to adjust their trade policies as to facilitate trade with developing and least-developed countries (allowing them to grant preferential treatment to products from these countries), without necessarily extending these benefits to more advanced economies[907]. In order to prevent potential abuse of this exception, the "enabling clause" imposes certain conditions for GSPs to be considered legitimate. Indeed, para. 3 of the "enabling clause" states that any differential treatment granted under this provision *should aim to promote and facilitate trade for developing countries* without creating barriers or undue difficulties for other trading partners. Where such treatment is offered by developed countries to developing countries, it should be designed and adjusted to meet the development, financial and trade needs of such developing countries[908].

The question is whether the proposed Art. 19(1)(c) meets the needs of developing countries and is consistent with their objectives so as to be considered consistent with the EU's obligations under the WTO. While it is thus recognised that GSP schemes can include conditions to meet development needs, the withdrawal of preferences for readmission failures does not seem to meet these needs. In fact, linking the readmission of irregular migrants to trade preferences may not benefit developing countries. Therefore, conditioning trade preferences on the readmission of migrants seems to be contrary to WTO rules and undermines the development purpose of the GSP scheme, thus jeopardising the rules-based treatment of developing countries in EU trade policy[909].

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[906] General Agreement on Tariffs and Trade (GATT) Contracting Parties, Decision of 28 November 1979 (L/4903). See World Trade Organisation (WTO), *Differential and more favourable treatment reciprocity and fuller participation of developing countries*, available here: https://www.wto.org/english/docs_e/legal_e/enabling1979_e.htm. G. VIDIGAL, "Passing Political Pressure for a Development Agenda? WTO Law Limits to the Trade-Migration Linkage in the Proposed EU GSP Regulation", in *EU Migration and Law Blog*, 28 April 2023. See, more in detail, G. VIDIGAL, *Legal opinion on the lawfulness of proposals to include migration-related conditionalities in the EU GSP*, 27 February 2023.

[907] More in detail, L. BARTELS, "The WTO Enabling Clause and Positive Conditionality in the European Community's GSP Program", in *Journal of International Economic Law*, Vol. 6, Issue 2, 2003, pp. 507–532.

[908] *Ivi*, para. 3. G. VIDIGAL, "Passing Political Pressure for a Development Agenda? WTO Law Limits to the Trade-Migration Linkage in the Proposed EU GSP Regulation", *op. cit.*

[909] *Ibid.*

Overall, this proposal shows that the EU continues to use trade policy as another instrument for migration control, blurring its main objectives. This "exploitation" (again) could potentially endanger the stability of the international trade framework and undermine the central objective of the EU trade policy, *i.e.*, to facilitate and regulate the exchange of goods and services between the EU and the rest of the world[910]. Despite the various legal criticisms outlined above, at the time of writing the proposal is still under negotiation. More precisely, at the beginning of 2024, the current GSP framework was extended until December 2027 due to delays in reaching a final agreement[911]. However, in March 2024, the Commission reiterated its inclination towards the proposed Art. 19(1)(c), describing it as a "potential tool to secure cooperation on returns and readmission" that "would increase the incentive for third countries to uphold their international obligations and foster better migration management"[912]. Thus, the proposal remains in the negotiation phase and its final form, including whether readmission will remain a conditional element, is still under discussion[913]. The "worrying future" of this proposal is further highlighted in the recent statement by the President of the European Commission, Ursula von der Leyen: "[e]xtending the current Generalised Scheme of Preference Regulation to December 2027 without readmission conditionality, despite the Commission's proposal, is a missed opportunity that should be corrected at the first possible occasion"[914].

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[910] E. SCHMIEG, *Connections between Trade Policy and Migration A Sphere of Action for the EU*, SWP Research Paper 15, November 2019, p. 24. In this respect, it is also interesting to note that in the international scenario, the inclusion of clauses in trade agreements to enforce migration control is a feature often associated only with the EU, which exploits "its reputation as 'market power'". Cfr. S. LAVENEX, P. LUTZ, P. HOFFMEYER-ZLOTNIK, *op. cit.*

[911] European Commission, *EU scheme of generalised tariff preferences (GSP) extended until 31 December 2027*, available here: https://trade.ec.europa.eu/access-to-markets/en/news/eu-scheme-generalised-tariff-preferences-gsp-extended-until-31-december-2027; European Parliament, Legislative Train Schedule, *Review of the Generalised Scheme of Preferences (GSP) Regulation*, 20 September 2024, available here: https://www.europarl.europa.eu/legislative-train/spotlight-JD21/file-new-gsp-regulation.

[912] European Commission, Communication COM (2024) 126 final to the European Parliament, the European Council and the Council, Striking a balance on migration: an approach that is both fair and firm, Brussels, 12 March 2024, p. 18.

[913] Council of the European Union, Presidency discussion paper on making the return system more effective: a reflection towards the future of the EU return policy, LIMITE 8751/24, Brussels, 16 April 2024, p. 5.

[914] President of the European Commission Ursula von der Leyen, Letter to Member States, Ref. Ares (2024) 7288990, Brussels, 14 October 2024, p. 4.

In our opinion, the re-emergence of the link between readmission and trade may represent a "strategic legal manoeuvre" on the part of the EU. As a sample, the conclusion of trade agreements in this context falls under the EU's common commercial policy (Art. 207 TFEU), which is an area of exclusive Union competence. This means that the Commission primarily oversees these agreements, leaving Member States with limited scope to directly influence these negotiations[915]. When it comes to trade, the Commission has greater negotiating power. This approach allows the EU to "break the deadlock" that can arise in areas where Member States have more sway. This approach allows the EU to advance its objectives in a more strategic way. By linking its readmission policy to trade, the EU can use alternative legal frameworks, in particular those established under the EU common commercial policy, to achieve readmission-related objectives that may be difficult to secure through "traditional" mechanisms such as, for instance, the conclusion of EURAs.

5. Regular pathways and resettlement as bargaining tools to manage migration

Over the recent decade, the EU has increasingly recognised the strategic importance of linking readmission with legal pathways as a means of securing cooperation with third countries on this matter. In practice, the EU is placing greater "conditionality emphasis" on regular pathways, alongside the levers analysed so far, such as visas, trade and development. "Regular" or "legal" pathways refer to the mechanisms, practices or agreements that allow individuals to leave, travel to and enter their countries of destination legally. States consider these pathways to be essential for the safe and orderly management of migration. They provide practical alternatives to irregular migration and contribute to the successful integration of migrants into their new communities[916]. These pathways offer regulated entry options for various purposes, including work, education, family reunification and

[915] Art. 3(1)(e) TFEU.

[916] E. GUALLAR ARIÑO, R. ROCA PAZ, E. MOSLER VIDA, *Migration Governance Insights on Regular Pathways: Delivering on the Promise of Migration*, IOM Publications, 2024, pp. 1 ff. See also, V. STOYANOVA, "Addressing the Legal Quagmire of Complementary Legal Pathways", in *European Journal of Migration and Law*, 2023, Vol. 25, Issue 2, pp. 178 ff.

international protection. Both the 2030 Agenda for Sustainable Development and the GCM recognised that well-managed migration benefits migrants and societies. The impacts of migration depend on where and how people migrate, which in turn depend largely on the options available to them[917]. In particular, in the GCM States committed to "adapt options and pathways for regular migration in a manner that facilitates labour mobility and decent work reflecting demographic and labour market realities, optimizes education opportunities, upholds the right to family life, and responds to the needs of migrants in a situation of vulnerability, with a view to expanding and diversifying availability of pathways for safe, orderly and regular migration" (Objective 5).

In the EU framework, regular migration is regulated by Art. 79 TFEU, which – with the aim of ensuring effective management of migration flows and fair treatment of TCNs legally residing in Member States (Art. 79(1) TFEU) – gives the Union competence to determine the conditions of entry into Member States, including long-term residence (Art. 79(2)(a) TFEU) and intra–EU mobility (Art. 79(2)(b) TFEU)[918]. As far as Member States are concerned, they retain the power to "determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed" (Art. 79(5) TFEU). However, the "EU's powers" in this area have only been partially exercised, as EU secondary legislation has been introduced in a fragmented manner and lacks a coherent structure. The system regulates specific aspects such as family reunification, long-term residence, seasonal work, and highly skilled workers[919]. Other Directives cover issues such as the single permit for work

[917] United Nations General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, resolution 70/1UN Doc A/RES/70/1, 21 October 2015, para. 29 and Goal 10, para. 10.7.; International Organization for Migration (IOM), *Migration Governance Insights on Regular Pathways: Delivering on the Promise of Migration – Executive Summary*, 2024, p. 1.

[918] M. BORRACCETTI, "Le vie legali di accesso all'Unione nel nuovo Patto su asilo e migrazione della Commissione europea", in *Annali AISDUE*, 10 December 2020, p. 101.

[919] Council Directive 2003/86/EC, of 22 September 2003, on the right to family reunification, OJEU, L 251, 3 October 2003; Council Directive 2003/109/EC, of 25 November 2003, concerning the status of third-country nationals who are long-term residents, OJEU, L 016, 3 January 2004 (see also, European Commission, Proposal COM/2022/650 final for a directive of the European Parliament and of the Council concerning the status of third-country nationals who are long-term residents (recast), Brussels, 27 April 2022); Directive 2014/36/EU of the European Parliament and of the Council, of 26 February 2014, on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, OJEU, L 94/375, 28 March 2014; Directive 2021/1883 of the European Parliament and of the Council, of 20 October 2021, on the conditions of

and conditions of entry and residence for research, study, traineeships and voluntary work[920]. While this fragmentation allows Member States to tailor policies to their national context, it also poses challenges in terms of harmonising migration policies across the Union. As a result, the "shredded" legal framework has had a limited impact, as demonstrated by the review of the regular migration legislation, which aimed to simplify the legal framework in order to strengthen the management of regular migration flows[921]. This disjointed approach, also observed at the institutional level, does not prevent competition between national legal systems, which is not always virtuous[922].

Alongside this fragmented legal framework, strengthening legal migration pathways, as also mentioned above, is increasingly seen by the EU as a way to deter irregular migration by offering safe, regulated and humane alternatives in line with international standards and human rights protections. The regulatory theory behind this approach is straightforward, based on the assumption that migration is shaped by identifiable "push" and "pull" factors that States can influence through strategic interventions. The idea is that governments can encourage "more desirable" migration outcomes by providing safe and legal pathways, while deterring irregular migration by reducing the demand for "illegal" or dangerous alternatives[923]. As former European Commission President Jean-Claude Juncker stated in his 2017 State of the Union address, "irregular migration will only stop if there is a real

entry and residence of third-country nationals for the purpose of highly qualified employment, and repealing Council Directive 2009/50/EC, OJEU, L 382, 28 October 2021.

[920] Directive 2011/98/EU of the European Parliament and of the Council, of 13 December 2011, on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, OJEU, L 343, 23 December 2011; Directive 2016/801 of the European Parliament and of the Council, of 11 May 2016, on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing (recast), OJEU, L 132, 21 May 2016.

[921] European Commission, Staff Working Document SWD (2019) 1055 final, Fitness check on EU legislation on legal migration, p. 4 and 105, 29 March 2019. Cfr. M. BORRACCETTI, "Le vie legali di accesso all'Unione nel nuovo Patto su asilo e migrazione della Commissione europea", *op. cit.*, p. 102. See also, M. LÜCKE, "The European Commission's legal migration 'policy': good intentions, limited impact", in *Foundation for European Progressive Studies*, 16 May 2022.

[922] European Parliament, Committee on Civil Liberties, Justice and Home Affairs (LIBE), "Draft Report on new avenues for legal labour migration", 2020/2010 (INI), 16 April 2021, para. 4.

[923] M. ZAGOR, *op. cit.*, p. 45.

alternative to dangerous journeys"[924]. Similarly, former Commissioner Johansson emphasised that "replacing irregular migration with legal migration should be our strategic goal"[925]. The link between fighting irregular migration and offering legal migration pathways has become an interesting element of the EU's readmission strategy, which increasingly uses this link as a form of conditionality to encourage third countries to cooperate on readmission. The origin of this "idea" can be traced back to the introduction of the GAM and later the GAMM and the establishment of Mobility Partnerships. These initiatives were based on the premise of offering legal migration opportunities in exchange for commitments by third countries to improve migration management[926]. While the practical implementation of these frameworks often fell short of providing substantial incentives for legal migration, the conditionality that underpinned them laid the groundwork for subsequent EU strategies. Over the last decade, this approach has indeed gained considerable momentum: since 2016, the provision of legal migration opportunities has increasingly been used as a bargaining tool, serving as part of the *quid pro quos* used by the EU to secure third country cooperation on readmission[927].

More recently, the new Pact on Migration and Asylum seems to reinforce this link between irregular migration and legal pathways. Under the Pact, third countries that cooperate in the management of irregular migration – particularly in the areas of readmission and return – can gain improved access to legal migration opportunities within the EU. As emphasised by the Commission, "developing legal pathways should contribute to the reduction of irregular migration [...] The Commission will reinforce support to Member States to scale up legal migration together with partner countries as a positive incentive"[928]. In our opinion, this

[924] European Commission, 2017 State of the Union address, "Ensuring Effective Legal Pathways to Europe", available here: http://briguglio.asgi.it/immigrazione-e-asilo/2017/ottobre/nota-comm-ue-vie-legali.pdf.

[925] European Commission, Talent Partnerships: Commission launches new initiative to address EU skills shortages and improve migration cooperation with partner countries, Press Release, 11 June 2021. Cfr. L. RASCHE, *EU Talent Partnerships: Fit for purpose?*, Policy Brief, Hertie School, Jacques Delors Centre, 16 June 2021, p.1. https://www.esteri.it/en/sala_stampa/archivionotizie/comunicati/2024/02/partecipazione-italiana-ai-partenariati-per-il-talento-della-ue-per-lattrazione-di-manodopera-qualificata-dallestero/.

[926] *Supra*, CHAPTER II, SECTION 1; CHAPTER III, SECTION 2.

[927] S. POLI, "Flexible" cooperation between the European Union and third countries to contain migration flows and the uncertainties of "compensation measures": the case of the resettlement of refugees in EU Member States", in *DPCE online*, 2020/4, p. 5278.

[928] COM (2020) 609 final, cit., para. 6.1.

approach is in line with the overarching objectives of the New Pact, which emphasises the need for consistent and effective responses to non-cooperation on readmission from key countries of origin and transit[929]. In order to improve the success of return and readmission efforts, the EU has called for the mobilisation of all available incentives at both EU and Member State level: the provision of regular migration opportunities, including pilot projects, was seen as useful been crucial in encouraging third countries to cooperate on readmission[930].

Among these pilot projects, initiatives like the Talent Partnerships highlight this link between readmission and legal pathways. Talent Partnerships aim to increase legal migration channels to the EU while strategically engaging partner countries in migration management. They aim to provide a comprehensive policy framework and financial support to promote mutually beneficial international mobility by improving the matching of labour market needs and skills between the EU and its partner countries[931]. However, while Talent Partnerships "will also ensure capacity building assistance to partner countries", their main objective seems to be to "engage with non-EU country partners strategically on migration management"[932]: the Commission in fact emphasises that a key aspect of the Talent Partnerships is their "strategic" focus[933]. The initiative aims to address irregular migration by providing structured pathways for legal migration, which in turn may act as a disincentive to irregular routes. Nevertheless, these opportunities for legal migration are designed to work in tandem with enhanced commitments on readmission cooperation, reinforcing a balanced approach that combines mobility

[929] *Supra*, SECTION 5.

[930] L. RASCHE, cit., p. 1.

[931] European Commission, Migration and Home Affairs, *Talent partnerships*, available here: https://home-affairs.ec.europa.eu/policies/migration-and-asylum/legal-migration-and-integration/talent-partnerships_en.

[932] *Ibid*. European Commission, Talent Partnerships: Commission launches new initiative to address EU skills shortages and improve migration cooperation with partner countries, Press Release, 11 June 2021. See also, more in detail, O. CHIRITA, D. STEFANESCU, *Tapping into Global Talent – Putting the EU Talent Partnerships in Motion*, International Centre for Migration Policy Development (ICMPD), 18 January 2021, available here: https://www.icmpd.org/news/import-news-september/tapping-into-global-talent-putting-the-eu-talent-partnerships-in-motion; M. DI SALVO, *Talent Partnership and Future Skills Needs*, European Institute of the Mediterranean (EuroMesco), Policy Report, 2022.

[933] COM (2020) 609 final, cit., para. 6.1.

opportunities with the objective of migration management[934]. Indeed, according to the Commission, a key objective of the Talent Partnerships is to enhance cooperation on return and readmission, with a particular focus on facilitating voluntary return and supporting reintegration efforts[935]. This means that the Partnerships will serve as a complementary tool in the EU's external migration strategy, helping to engage partner countries on issues such as readmission and border management. The Commission has announced the launch of Talent Partnerships with five key countries: Tunisia, Morocco, Egypt, Bangladesh and Pakistan[936]; in this context, the former Commissioner Johansson also thanked the Member States that have played a key role in the development of these partnerships, highlighting in particular the contributions of France, Italy, Germany, Spain, Sweden and Portugal[937]. As regards Italy in particular, in line with the approach promoted by the EU's Talent Partnerships, the THAMM Plus programme was launched as a 36-month interregional initiative funded by the EU and implemented by IOM. This programme aims to facilitate the mobility of skilled and trained workers between North African countries and Italy in order to address labour shortages jointly identified by the Moroccan and Tunisian authorities and three Italian regions: Lombardy, Veneto and Emilia-Romagna[938]. Meanwhile, discussions on possible Talent Partnerships with Nigeria and Senegal, updated to 2023, clearly underline the EU's priority on the readmission of irregular migrants: while the Commission is exploring the feasibility of a Talent Partnership with Nigeria, the timing for a similar partnership with Senegal is considered "not ripe"

[934] European Commission, *Commission proposes new measures on skills and talent to help address critical labour shortages*, Press Release, Brussels, 15 November 2023.

[935] European Commission, *Talent Partnerships: towards enhanced cooperation between the EU and partner countries*, available here: https://www.rabat-process.org/fr/component/repo/document/385-talent-partnerships-towards-enhanced-cooperation-between-the-eu-and-partner-countries-dg-home-european-commission?task=document.preview&Itemid=959&ml=1, p. 2

[936] European Commission, Commissioner Johansson's Speech at the Online Ministerial Meeting on Talent Partnerships, Brussels, 1 December 2023.

[937] *Ibid.*

[938] International Organization for Migration (IOM), Italy, *THAMM Plus: Towards a Holistic Approach to Labour Migration Governance and Labour Mobility in Italy and North Africa*, available here: https://italy.iom.int/it/thamm-plus-towards-holistic-approach-labour-migration-governance-and-labour-mobility-italy-and-north-africa.

due to the current level of cooperation, including readmission[939]. This strongly indicates that deportations remain the EU's foremost interest in its cooperation with African countries, as clearly noted[940]. In our opinion, by integrating the Talent Partnerships into the broader set of EU external migration instruments, the proposal continues to position the external dimension of EU migration policy primarily as a means to achieve internal policy objectives[941].

Moving from the "macro" to the "micro" level, the strategy of "readmission conditionality" has been particularly explicit in relation to resettlement. Resettlement refers to the legal admission of TCNs in need of international protection from a third country, where they have been displaced, to an EU country where they are granted protection[942]. The growing importance of resettlement underlines its role as one of the few legal means for asylum seekers to access EU territory, particularly following the adoption of Regulation 2024/1350 establishing a Union Resettlement and Humanitarian Admission Framework[943]. While, as mentioned above, legal migration falls primarily under Art. 79 TFEU, resettlement pertains to the EU asylum policy and is governed by Art. 78 TFEU, which gives the EU the power to establish common procedures for granting and withdrawing a uniform asylum or subsidiary protection status and to promote partnerships with

[939] Council of the European Union, Update on the state of play of external cooperation in the field of migration policy, LIMITE 11434/23, Brussels, 14 July 2023, pp. 10 ff.

[940] Migration Control.info, *Internal EU-Document: Update on State of Play of External Cooperation*, July 2023, available here: https://migration-control.info/en/blog/internal-eu-document-update-on-state-of-play-of-external-cooperation-july-2023/#header-the-update.

[941] In this sense, E. GUILD, "Negotiating with Third Countries under the New Pact: Carrots and Sticks?", cit.; P. GARCÍA ANDRADE, "EU cooperation on migration with partner countries within the New Pact: new instruments for a new paradigm?", cit.; L. RASCHE, cit., p. 1.

[942] European Commission, Migration and Home Affairs, *Resettlement and other pathways to protection*, available here: https://home-affairs.ec.europa.eu/policies/migration-and-asylum/legal-migration-and-integration/resettlement-and-other-pathways-protection_en. On resettlement, see also, more in detail and *ex multis*, A. GARNIER, L., L. JUBILUT, K. BERGTORA SANDVIK (eds.), *Refugee Resettlement: Power, Politics, and Humanitarian Governance. Studies in Forced Migration*, Berghahn Books, New York, 2018; UNHCR, *UNHCR Resettlement Handbook*, 2018; H. SCHNEIDER, "Implementing the Refugee Resettlement Process: Diverging Objectives, Interdependencies and Power Relations", in *Frontiers in Political Science*, Vol. 3, 07 May 2021; M. ZIECK, *Resettlement as Protection*, Edward Elgar Publishing, Cheltenham, 2024.

[943] Regulation 2024/1350 of the European Parliament and of the Council, of 14 May 2024, establishing a Union Resettlement and Humanitarian Admission Framework, and amending Regulation (EU) 2021/1147, OJEU, L 2024/1350, 22 May 2024. G. CRISTIANO, "Canali legali di accesso all'Unione europea nell'area del Mediterraneo: questioni aperte e sviluppi recenti", in *Quaderni AISDUE*, Fasc. 3/2024, p. 22. For a critical analysis of the new Regulation, see, *inter alia*, C. LECLERCQ, "The new EU Resettlement Framework: A flexible harmonization undermining fundamental rights", in *EU Immigration and Asylum Law and Policy Blog*, 8 October 2024.

third countries to manage the influx of asylum seekers[944]. In this context, resettlement should serve as an important component of the EU's framework for providing international protection to refugees[945].

The current Regulation on resettlement mentioned above was originally presented as a proposal, which was later amended. On 13 July 2016, the Commission presented this first proposal for a Regulation establishing a Union framework for resettlement[946]. This framework aimed to provide safe and legal alternatives to irregular migration, while demonstrating the EU's solidarity with third countries hosting large numbers of people fleeing conflict or persecution[947]. The proposal outlined the general objectives of the EU resettlement policy and introduced common EU rules for the admission of TCNs through resettlement. In particular, it defined eligibility and exclusion criteria, standard procedures for all stages of the resettlement process, the status to be granted to resettled persons, decision-making procedures and financial support to Member States[948]. Under the proposal, the resettlement quota would have been set annually by the Council on the basis of a plan proposed by the Commission, setting out Member States' participation and geographical priorities. The Commission would then have drawn up targeted resettlement programmes for specific regions or countries, specifying their scope, procedures and duration. In this context, the selection of priority regions and countries was closely linked to the EU's migration management objectives, particularly in relation to readmission. These programmes were seen as strongly influenced by the level of cooperation of third countries in controlling irregular migration and facilitating the return and readmission of migrants[949]. The link between cooperation with third countries on readmission and resettlement was evident: the 2016 proposal would have made the selection of regions or countries

[944] The designation of Art. 78 TFEU as the legal basis for the EU resettlement framework can be confirmed in Regulation 2024/1350, cit. "[h]aving regard to the Treaty on the Functioning of the European Union, and in particular Article 78(2), points (d) and (g), thereof".

[945] In this regard, see also M. SAVINO, "Refashioning Resettlement: from Border Externalization to Legal Pathways for Asylum", in S. CARRERA et AL. (eds.), *op. cit.*, pp. 81–104

[946] European Commission, Proposal COM/2016/0468 final for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) 516/2014 of the European Parliament and the Council, Brussels, 17 July 2016.

[947] *Ivi*, para. 1.

[948] *Ivi*, para. 5.

[949] *Ibid.*

for resettlement dependent on the level of cooperation of third countries in reducing irregular crossings into the EU and in the readmission and return of TCNs or stateless persons residing irregularly (Art. 4(c)(d) of the proposal)[950].

According to Amnesty International, the proposal framed resettlement as a policy serving both humanitarian needs and the goal of strengthening EU border control, although the humanitarian dimension often appeared secondary to the overarching objective of migration management and security[951]. In the proposal, the focus on targeted resettlement programs was seen as *explicitly* being influenced by the cooperation of third countries with the EU in curbing irregular migration and facilitating the return and readmission of migrants. The underlying rationale behind the EU's choice was to reduce pressure on Member States' asylum systems, deter irregular migration and streamline the return process, while appearing to maintain a commitment to humanitarian protection through resettlement programmes; however, the emphasis on security and migration control suggested that these humanitarian efforts were primarily seen as a means to achieve more strategic goals[952]. Fortunately, thanks to the opposition of the European Parliament, this provision was removed from the final legislative act of Regulation 2024/1350, establishing a Union Resettlement and Humanitarian Admission Framework[953]. The final version of Art. 4 of Regulation 2024/1350 only refers to the improvement of protection in third countries and the resettlement obligations they assume, as this could create synergies to jointly address global resettlement needs. However, as noted by García Andrade, no mention is made of the role of third countries in resettlement and humanitarian admission procedures, although their cooperation is likely to be required in practice[954].

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[950] *Ivi*, recital (20). Cfr. E. BRATANOVA VAN HARTEN, "The new EU Resettlement Framework: the Ugly Duckling of the EU asylum acquis?", in *EU Law Analysis*, 3 February 2023.

[951] Amnesty International, *The proposed EU Resettlement Framework*, Position Paper, 15 December 2016, pp. 1–2.

[952] *Ibid.*

[953] See, European Parliament, Committee on Civil Liberties, Justice and Home Affairs, Report on the proposal for a regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) 516/2014 of the European Parliament and the Council, Document A8-0316/2017, 19 October 2017.

[954] P. GARCIA ANDRADE, "Cooperation with third countries within the EU legislative reform on migration and asylum", cit.

In any case, the EU's approach to resettlement as reported in the 2016 proposal, which combines humanitarian and strategic migration objectives, also appears to have been "influenced" by the 2016 EU–Türkiye Statement, which, as noted in the previous CHAPTER, functions as an "informal" readmission arrangement and was adopted some months before the proposal for an EU resettlement framework[955]. As also mentioned in the previous discussion, the Statement aimed to curb irregular migration from Türkiye to the EU, presenting it as both a measure to save lives and enhance border security. Through the "one-to-one" resettlement mechanism, the EU committed to resettle one refugee from Türkiye for every migrant returned to Türkiye from the Greek islands, giving *priority* to those who had not previously attempted irregular entry into the EU. In practice, this policy contrasted spontaneous asylum seekers with those admitted through formal resettlement channels, portraying the former *as less deserving of protection*[956].

Indeed, the mix of humanitarian, border security and integration criteria, as in particular evident in the "one-to-one" resettlement scheme, influences perceptions of who is considered worthy of protection: individuals who are not only vulnerable and at risk, but who have not attempted irregular migration to the EU and who are seen as having "integration potential" – *i.e.*, they are not perceived as a threat to the social, economic or cultural stability of the EU[957]. Moreover, in this case, by limiting access to resettlement only to a group of Syrians who have not attempted to reach the EU by "illegal" means, the mechanism also risks penalising individuals for their irregular entry, thus criminalising the intention to seek effective protection, contrary to Art. 31(1) of the 1951 Geneva Convention[958].

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[955] *Infra*, CHAPTER III, SECTION 3.

[956] M. INELI-CIGER, O. ULUSOY, "Why the EU-Turkey Statement should never serve as a blueprint", in *ASILE*, Forum on the new EU Pact on Migration and Asylum in light of the UN GCR, 7 October 2020. In practice, however, the EU has fallen short of its promises, resettling around 28,000 Syrians from Türkiye by 2021, only 40% of the 72,000 initially promised. Cfr. R. ARAR, D. S. FITZGERALD, *The Refugee System*, Polity Press, Cambridge/Hoboken, 2023, p. 149. Cited in N. WELFENS, "The EU's normative justifications of refugee resettlement", in *Journal of Refugee Studies*, Vol. 37, Issue 2, 2024, p. 562.

[957] N. WELFENS, ""Promising Victimhood". Contrasting Deservingness Requirements in Refugee Resettlement", in *Journal of Ethnic and Migration Studies*, Vol. 49, Issue 5, 2023, p. 1104.

[958] "The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened [...], enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence." J. CINQUINI, *Safe and regular pathways for the admission of third-country nationals on the territory*

This trend suggests that assistance to migrants is increasingly influenced by strategic considerations, with a focus on aligning humanitarian assistance with broader political and economic objectives, rather than simply addressing the needs of the most vulnerable ones[959]. This security-driven focus thus ignores the humanitarian principles that underpin resettlement, as defined by the UNHCR, whose rationale is primarily humanitarian: indeed, the Agency advocates resettlement as a "life-saving tool" to protect those most at risk or with special needs[960]. By ignoring this humanitarian dimension, the *raison d'etre* of resettlement within the legal protection framework for migrants and asylum seekers is undermined. This redefinition of the objectives of resettlement by the EU and its Member States risks significantly reducing the space for protection[961]. In addition, beyond its "humanitarian" dimension, resettlement can be seen as an instrument of international solidarity. Indeed, through resettlement, Member States show solidarity both with people in need and with overburdened countries of first refuge[962]. Therefore, resettlement reflects the principle of responsibility-sharing enshrined in international law, which emphasises the need for fair and equal contributions from all States[963]. Nonetheless, linking resettlement and readmission within the "EU conditionality framework" may undermine the spirit of solidarity at the heart of resettlement efforts. In our opinion, this approach may easily threaten to turn resettlement into a tool driven by the strategic interests of the EU and its Member States, jeopardising the balance of international burden-sharing and weakening the EU's credibility as a genuine advocate of international solidarity.

Although, as mentioned above, the adopted text of the Regulation does not explicitly include this provision, we believe – based on a "disturbing intuition" –

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of the European Union: a critical analysis under human rights law and the UN Global Compacts, Ph.D. Thesis, University of Pisa, 2021, p. 327.

[959] K. B. SANDVIK, I. BJØRHAUG, A. ESPEGREN, A. GARNIER, "Protecting Skilled Afghan Women: Brain Save and the Politics of Vulnerability", in *Global Policy*, Vol. 14, Issue 1, 2023, p. 6. Cfr. N. WELFENS, "The EU's normative justifications of refugee resettlement", *op. cit.*, p. 564.

[960] UNHCR, *Resettlement is critical lifeline for refugees and needs strengthening*, Press Release, 1 July 2019.

[961] N. WELFENS, "The EU's normative justifications of refugee resettlement", *op. cit.*, p. 562.

[962] European Commission, *Delivering on Resettlement*, December 2019. Cfr. J. PRANTL, "Shaping the Future Towards a Solidary Refugee Resettlement in the European Union", in *European Papers*, Vol. 6, No. 2, 2021, p. 1028.

[963] E. KASSOTI, N. IDRIZ, (eds.), *The Principle of Solidarity International and EU Law Perspectives*, Springer, T.M.C. Asser Institute, The Hague, 2023

that the underlying idea and principle remain intact. This reality paves the way for a particularly questionable and unconvincing approach, not only at EU level, but also as a potential model for international practice. This concern echoes the observations of Peers, who points out that:

"The final text of the Regulation focusses on the needs of individuals and the capacity and willingness of Member States, dropping the provisions from the original text that aimed also to link resettlement to the source countries' submission to EU external migration policy: cooperation on readmitting people, controlling their border crossings, becoming a 'safe third country' or 'first country of asylum' for the EU to send asylum seekers back to, and development of their reception capacity. But a cynic may well imagine that these criteria could nevertheless end up playing a role in the application of the Regulation in practice[964].

The current reformulation makes the link between the establishment of legal pathways and the control of irregular migration less obvious, and thus *officially* and *formally* less problematic from a human rights perspective, as Bratanova van Harten notes[965]. Nonetheless, the concerns raised by Peers in our view rightly emphasise the need for vigilance to ensure that the legal frameworks are implemented in a way that truly upholds the agreed rules.

From the above, it can be affirmed that the link between readmission and the provision of legal pathways within the framework of "readmission conditionality" has become evident in recent years. This "conditional approach" may however undermine the very purpose of these pathways. The latter are indeed intended to provide safer, regulated alternatives to irregular migration, particularly for vulnerable people seeking protection or better opportunities. However, by linking these pathways to a third country's willingness to cooperate on readmission, the EU risks turning them into bargaining tools rather than genuine humanitarian or development mechanisms. Moreover, this conditional approach seems to be in stark contrast to the views of the IOM, which argues that regional and international

[964] S. PEERS, "The New EU Asylum Laws, part 3: the Resettlement Regulation", in *EU Law Analysis*, 2 January 2024.
[965] E. BRATANOVA VAN HARTEN, cit.

cooperation should focus on improving the availability, flexibility and effectiveness of pathways for vulnerable migrants. According to the organisation, such mechanisms should not be linked to a country of origin's willingness to cooperate on readmission. Instead, the focus should be on providing meaningful protection and migration opportunities, independent of political or transactional conditions, to better address the needs of vulnerable individuals and promote more humane migration policies[966].

To ensure that legal pathways contribute to fair and balanced cooperation with third countries, the EU must avoid using conditionality, which would otherwise erode their potential as mechanisms for protection and human rights. This not only shifts the focus away from the needs of migrants, but also potentially restricts access to legal migration for those most in need, as readmission cooperation becomes the primary criterion. In doing so, the conditionality approach could undermine the fundamental goal of providing accessible and flexible migration opportunities and undermine the long-term effectiveness of migration partnerships.

Although global awareness of the need for legal, orderly, and safe migration has grown in recent years, these pathways continue to be viewed as secondary to measures aimed at curbing irregular migration[967]. This reinforces a narrative where deterrence takes precedence, overshadowing the "real" objectives of legal migration routes. By incorporating conditionality into its migration partnerships, the EU risks extending this approach beyond its borders, as it has done with other migration-related policies such as the TCNs clause. Unlike obligations anchored in binding international law, the EU's approach to legal pathways grants it discretionary control over the design and allocation of these pathways, allowing the EU to tailor access to meet its strategic priorities[968]. This gives the EU considerable leverage in its negotiations with third countries, allowing it to use legal pathways as a tool to secure cooperation on other migration-related issues. Notably, this discretion is also prevalent *within the Union itself*: as a sample, Member States

[966] United Nations Network on Migration, *Regular Pathways for Admission and Stay for Migrants in Situations of Vulnerability*, Guidance Note, UN Network on Migration Thematic Working Group 3 on Regular Pathways, 15 July 2021, para. 42.

[967] M. BORRACCETTI, "Le vie legali di accesso all'Unione nel nuovo Patto su asilo e migrazione della Commissione Europea", *op. cit.*, p. 104.

[968] United Nations Network on Migration, cit., para. 15.

retain the prerogative to participate in resettlement schemes, making resettlement a political decision rather than an obligation[969]. Indeed, the New Resettlement Framework emphasises that Member States' participation is voluntary, allowing them to set their own priorities[970]. As Bratanova Van Harten points out, "[t]his raises the question of the benefit of adopting a "toothless" regulation (almost entirely) devoid of a binding power"[971]. This approach is open to criticism: as mentioned above, from a legal perspective, the EU has clear competences to act on resettlement, as set out in Art. 78 TFEU and *should* bind Member States in this area. It is therefore arguable that the voluntary nature of Member States' participation in the resettlement programme does not fully exploit the potential of the EU to establish binding obligations in this area[972].

Ultimately, in our opinion making regular migration pathways conditional on cooperation in migration control risks transforming these pathways from instruments of mutual benefit into tools to promote EU-centric objectives. This conditional approach risks setting a precedent where regular pathways are seen less as avenues for joint progress on migration governance and more as leverage, potentially pressuring third countries to adopt EU-driven migration standards at the expense of a cooperative approach. In our view, this approach raises concerns about the long-term implications of such a conditional strategy, as it could entrench a dependency on conditional incentives, making it more difficult to pursue more balanced partnerships focused on sustainable migration management, labour needs and regional development.

[969] C. LECLERCQ, cit.

[970] Regulation 2024/1350, cit., Art. 1(4).

[971] E. BRATANOVA VAN HARTEN, "The new EU Resettlement Framework: the Ugly Duckling of the EU asylum acquis?", cit.

[972] See also the considerations made by P. GARCÍA ANDRADE, "Derecho de la UE y gestión de los flujos migratorios: interacciones con el Derecho internacional y con el Derecho Interno", *op. cit.*, pp. 180–181.

6. "Reversed conditionality": bargaining powers in the hands of third countries

Up to now, the concept of conditionality has mainly been viewed from a strictly "Eurocentric" perspective, with the EU using its position of strength to persuade third countries to cooperate on readmission. The previous pages have explained that that cooperation between the EU and third countries on readmission is characterised by an imbalance of bargaining power, with the EU typically being the more "equal" partner[973]. However, while the EU often uses both "positive" and "negative" conditionality to secure cooperation from third countries, this dynamic may shift in times of "migration crisis", potentially reversing the balance of power. In such circumstances, third countries may find themselves in a stronger bargaining position and use the urgency of the crisis to influence the terms of cooperation with the EU.

What Professor Cassarino called "reversed conditionality" means that third countries may try to change the balance of power in the context of readmission cooperation with the Union by using their political importance to the EU[974]. In other words, the more important a third country is to the EU in managing border security and migration flows, the more it can use this leverage to advance its own interests[975]. This dynamic suggests that a third country could take advantage of the EU's dependency on its cooperation to address migration-related challenges. In doing so, the third country may seek to negotiate favourable terms in areas unrelated to migration, potentially gaining economic, political or security benefits. It goes without saying that the effectiveness of "reversed conditionality" depends on the specific circumstances and the degree to which the third country is truly indispensable to the EU's interests. The use of "reversed conditionality" thus provides third countries with the opportunity to put forward their own interests and

[973] "All animals are equal, but some are more equal than others". G. ORWELL, *Animal Farm*, First Edition, Secker and Warburg, London, 1945, p. 112.

[974] J. P. CASSARINO, "Informalising Readmission Agreements in the EU Neighbourhood", *op. cit*., p. 192

[975] Which may not be directly related to migration or readmission. F. TITTEL-MOSSER, "Reversed Conditionality in EU External Migration Policy: The Case of Morocco", in *Journal of Contemporary European Research*, Vol. 14, Issue 4, 2018, p. 350.

to counterbalance the disadvantages associated with their cooperation with the EU on readmission[976]. Consequently, the EU has recognised the need to adapt the way it cooperates with third countries on this area: this adaptation is crucial for establishing more effective partnership in fighting irregular migration flows[977].

In recent years, the concept of "reversed conditionality" in readmission cooperation has received considerable attention in relation to several third countries, including Russia, Pakistan, Türkiye, Morocco and Tunisia. In this context, the EU has developed a certain "migratory dependency" on these third countries to manage migration flows, which allows these countries to exert pressure and secure concessions based on their own national interests. In the first three cases – Russia, Pakistan and Türkiye – this refers to the EU's "formal" cooperation, as it involves the establishment of EURAs; in the case of Türkiye, this includes both the conclusion of an EURA and an "informal" readmission arrangement, namely the EU–Türkiye Statement. For Morocco and Tunisia, however, neither a "formal" EURA nor an "informal" arrangement has been adopted[978].

As for Russia, during the EURA negotiations with the EU, the third country concerned used its geopolitical influence and control over migration flows, particularly with regard to TCNs seeking to enter the EU. As mentioned in SUB-SECTION 3.1 of CHAPTER III, the vastness of Russia's territory, especially in its southern regions, poses significant challenges for border control, resulting in porous borders that complicate the readmission process. By using its ability to facilitate or restrict the movement of migrants through its territory, Russia has effectively shifted the power dynamics in negotiations, allowing it to impose conditions based on its ability to manage migration. This was evident when Russia successfully delayed the implementation of the TCN clause by three years, reflecting its strategic

[976] *Ivi*, p. 358.

[977] J. P. CASSARINO, L. GABRIELLI, D. PERRIN, cit., p. 26.

[978] While Morocco and Tunisia have no "formal" or "informal" readmission deal with the EU, they are engaged with the Union in forms of cooperation on migration management. This is reflected above all in the Mobility Partnerships signed with the EU. See, European Commission, *Migration and mobility partnership signed between the EU and Morocco*, Press Release, Brussels, 7 June 2013; European Commission, *EU and Tunisia establish their Mobility Partnership*, Press Release, Brussels, 3 March 2014. See more in detail and *ex multis*, M. LIMAM, R. A. DEL SARTO, *Periphery under Pressure: Morocco, Tunisia and the European Union's Mobility Partnership on Migration*, EUI Working Paper, RSCAS 2015/75. Moreover, as analysed *supra*, in CHAPTER III, the EU also agreed a MoU with Tunisia that deals, *inter alia*, with migration-related issues.

advantage[979]. Consequently, the Russia's control over migration flows towards the EU has significantly strengthened its bargaining position in the negotiations, allowing it to negotiate more favourable terms for cooperation on readmission[980].

As for the cases of Pakistan and Türkiye, the latter countries share some significant similarities, particularly in the context of political instability and the hosting of large numbers of refugees. Both countries in fact share borders with States experiencing tremendous domestic conflicts[981]. Indeed, Türkiye shares its southern border with Syria, which is in the midst of a complex and protracted civil war. Pakistan, for its part, shares its western border with Afghanistan, a country that has faced protracted internal conflict and insurgency. Pakistan hosts (officially) more than 1,4 million Afghans who have been forced to flee their homes, with the number rising after the return of the Taliban[982].

In both cases, the EU had an interest in concluding EURAs as to avoid "undesirable" migration flows to its territory. On the one hand, Türkiye was a key EU interlocutor in the region with the capacity to deal directly with migrant flows, given its role as a major transit country and its shared borders with the EU: indeed, Türkiye's strategic geographical position makes the country a key stopover on irregular migration routes towards the EU. On the other hand, the more remote Pakistan has been and continues to be one of the most important countries for "secondary migration flows". While Pakistan is obviously a country of origin and transit, it is indeed also a country from which migrants move for various reasons in order to seek protection or permanent resettlement elsewhere (most often, in the EU)[983].

The cases of Pakistan and Türkiye illustrate that, in the realm of readmission, the EU is reliant on the political will of third countries for cooperation. The EU lacks a viable alternative to effectively curb migration flows without the

[979] Art. 23(3) of the EURA concluded with Russia.

[980] K. GILLADE, *op. cit.,* pp. 71 ff.

[981] In this sense, H. SIDDIKOGLU, A. ZAFER SAGIROGLU, "The Responses of Pakistan and Turkey to Refugee Influxes: A Comparative Analysis of Durable Solutions to Protracted Displacements", in *Journal on Migration and Human Security*, Vol. 11, Issue 1, 2023, p. 41.

[982] UNHCR, *Pakista*n, available here: https://www.unhcr.org/countries/pakistan. About the difficult situations of Afghan people in Pakistan in 2023, see, *inter alia*, Human Rights Watch, *Pakistan: Widespread Abuses Force Afghans to Leave*, 28 November 2023, available here: https://www.hrw.org/news/2023/11/28/pakistan-widespread-abuses-force-afghans-leave.

[983] O. JANVIER, cit., p. 21.

cooperation of these countries. By taking advantage of their indispensability as regards the readmission of irregular migrants, third countries may use their power to cooperate with the EU "as a 'carrot' and non-cooperation as a 'stick'"[984]. In such a context, while the EU's dependency is stronger, its leverage became weaker. Within this "readmission dependency", the EU was thus forced to yield to the demands of Pakistan and Türkiye in order to persuade them to cooperate in concluding EURAs. Indeed, during the EURAs negotiations, the EU formulated conditionality differently for these two countries, reflecting the specific political and economic interests of each party[985]. In this regard, Özler argued that Türkiye had used "reversed conditionality" in its negotiations with the EU on the EURA claiming that it would only conclude the agreement if the EU offered it visa liberalisation in return, as also alluded to above[986]. In the case of Pakistan, the EU had however fewer negotiating levers but tried to compensate by offering the renewal of the EU's Generalised Scheme of Preferences Plus (GSP+) status and the conclusion of the abovementioned Cooperation Agreement[987].

However, although the EU offered an apparently more attractive conditionality terms for Türkiye, the readmission agreement took quite four years longer to conclude than the one with Pakistan[988]. This situation shows that the speed with which an EURA is concluded should not be seen as an indicator of the strength or weakness of the conditionality set by the EU during the negotiations[989]. The complexity of the negotiations, the specific circumstances surrounding the conclusion of the EURA and the interests of the Parties involved can all influence the time taken to reach an agreement. The effectiveness of conditionality is better assessed by examining the terms, obligations, and commitments in the agreement rather than the speed of its conclusion.

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[984] *Ivi*, p. 23.
[985] *Ivi*, p. 7.
[986] Z. ÖZLER, *op. cit*., p. 122. *Supra,* SECTION 1.
[987] GSP+ offers special trade preferences to countries that meet specific eligibility criteria related to the implementation of international conventions on human rights, labor rights, environmental protection, and good governance. Cfr. European Commission, *Generalised Scheme of Preferences Plus (GSP+),* available here: https://trade.ec.europa.eu/access-to-markets/en/content/generalised-scheme-preferences-plus-gsp. It is more selective than "normal" GPS. See *supra,* SECTIONS 2 and 4.
[988] The EU-Pakistan readmission agreement was concluded in 2009, while the one with Türkiye in 2013. O. JANVIER, cit. p. 19.
[989] *Ibid.*

It should also be borne in mind that both Pakistan and Türkiye do not properly have high standards of respect for human rights, democracy, and the rule of law, – as recently reported by Amnesty International[990]. In this respect, the EU's use of conditionality in readmission appears to have been "double reversed". On the one hand, it is "reversed" because, as clarified, third countries may try to change the balance of power in the negotiations by using their political importance to the EU. In this context, the EU's use of conditionality in readmission has undergone a "double reversal". First, third countries can now seek to shift the balance of power in negotiations by exploiting their political importance to the EU. Second, there has been a shift in the EU's approach to conditionality itself. Previously, conditionality was used primarily to ensure that partner countries conformed to EU values, particularly in terms of human rights and the rule of law. Now, however, in our opinion it is increasingly being used to secure cooperation on readmission and, more broadly, migration control[991].

All in all, one could consider "reversed conditionality" from a win-win perspective, with both Parties benefiting from this "migration of power"[992]: the EU gets what it desires, third countries reap economic and diplomatic benefits. Nevertheless, the Union has undoubtedly incurred considerable costs in economic terms, while the implementation of the EURAs concluded with Pakistan and Türkiye has been decidedly unsuccessful[993].

As far as Türkiye is concerned, according to the Commission, one of the main reasons for the failure of the EURA with Türkiye was the non-implementation of the provisions related to of TCNs, in particular Art. 4: this article establishes Türkiye's obligation to readmit TCNs and stateless persons, a provision that entered into force only in October 2017[994]. In addition, as of 2024, Türkiye maintains its position that it will not implement the provisions on TCNs under the EU–Türkiye EURA until the visa requirement for Turkish citizens travelling to the Schengen

[990] See Amnesty International, *Report 2022/2023*, pp. 285 ff.; pp. 369 ff.

[991] *Supra*, SECTION 1.

[992] E. PAOLETTI, *The Migration of Power and North-South Inequalities: The Case of Italy and Libya,* Palgrave Macmillan, London, 2016.

[993] European Commission, *EU irregular migration*, Atlas of Migration, available here: https://knowledge4policy.ec.europa.eu/atlas-migration_en.

[994] European Commission, Staff Working Document SWD (2023) 696 final, Türkiye 2023 Report, Brussels, 8 November 2023, p. 7.

area is lifted[995]. This "EURA failure" can also be demonstrated, among other things, by the Union's choice to arrange the more flexible EU–Türkiye deal in 2016. Even within this "informal" arrangement, the exercise of "reversed conditionality" by Türkiye – already evident during the negotiations of the previous "formal" EURA – can be deducted, effectively shifting the bargaining power in favour of Türkiye.

At the height of the migration crisis in 2016, when Europe was facing an unprecedented influx of refugees from the Middle East and Africa, EU officials, under considerable pressure, renegotiated the terms of cooperation with Türkiye, shifting from reliance on a "formal" readmission agreement to a more flexible political statement[996]. In addition, as mentioned above, the TCNs clause was not in force until 2017, which was a significant issue for the EU in the context in which the Statement was adopted[997]. In an attempt to do everything possible to resolve such a crisis, the EU went beyond "standard" agreements and sought a more adaptable solution that could address the immediate challenges posed by the situation: this shift reflected the urgency of the crisis, even if it meant departing from established legal frameworks. Since the adoption of the Statement, however, the slow pace of returns to Türkiye has been a persistent problem. Despite significant financial support from the Union, Türkiye retained significant control over the implementation of the arrangement. For example, in 2019 Türkiye suspended the Statement in retaliation for EU sanctions related to its gas drilling activities in Cypriot waters, halting efforts to manage irregular migration to the EU[998]. In March 2020, Türkiye further suspended readmission under the EURA concluded with the EU in 2013, citing COVID-19 restrictions, and despite repeated appeals by the Greek authorities and the Commission, the issue remains unresolved[999]. Nevertheless, at least until last year, the EU continued to regard

[995] Cfr. G. OVACIK ET. AL., "Taking Stock of the EU-Turkey Statement in 2024", in *European Journal of Migration and Law*, Vol. 26, 2024, p. 167. See also, A. APAN, "The Readmission Agreement Between EU and Turkey: The Visa Liberalisation Dialogue Knot", in *Türk İdare Dergisi*, Vol. 90, 2018, pp. 425–458.

[996] G. OVACIK ET. AL., *op. cit.*, p. 159.

[997] *Supra*, SECTION 1; *supra*, CHAPTER II, SUB-SECTION 3.1.

[998] European Union Agency for Asylum (EUAA), *Asylum Report 2022*, para. 4.15.7.

[999] Joint Communication JOIN (2023) 50 final from the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy to the European Council, State of play of EU–Türkiye political, economic and trade relations, Brussels, 29 November 2023, p. 7. See also, European Court of Justice (ECJ), Case C–134/23, cit., analysed *supra*, CHAPTER II, SUB–SECTION 3.2.

Türkiye as a key partner in the management of migration flows. The EU seems to remain committed to a more effective and mutually beneficial implementation of the 2016 EU–Türkiye Statement[1000]. This situation underlines the EU's dependence on Türkiye Statement for migration management, especially in times of crisis. In our view, the EU's decision to continue the 2016 EU–Türkiye Statement, despite its mixed results, suggests that the deal was not just a short-term response to a temporary crisis. Instead, it suggests that the EU aims to establish it as a long-term mechanism for managing migration[1001].

In the cases of Morocco and Tunisia, "reversed conditionality" has been applied in the area of readmission but has not led to the conclusion of readmission agreements or any arrangement *specifically* focused on this issue. This suggests that in these cases "reversed conditionality" has not produced the desired or expected results for the EU. For example, while the EU has signed the MoU with Tunisia, this agreement does not explicitly address readmission – even if it deals with it – and the results from the EU perspective remain limited. This lack of success is further evidenced by the Tunisian President's rejection of EU funding, signalling a reluctance to fully align with EU readmission objectives despite significant incentives[1002]. This situation highlights the risks for the EU of "reversed readmission conditionality", as both Morocco and Tunisia have resisted entering into "formal" or "informal" readmission deals. As their demands have not been fully met, Morocco and Tunisia maintained a firm stance, using their "indispensable" role in readmission to continue to extract concessions from the EU.

As for Morocco, the third country concerned has effectively exercised "reversed readmission conditionality" in its negotiations with the EU, taking advantage of its strategic position as a country of origin and transit for migrants. As also mentioned in CHAPTER II, although the EU gave the Commission a mandate to negotiate an EURA with Morocco in 2000, the agreement remains unsigned more than two

[1000] European Commission, DG NEAR, Press remarks by High Representative Borrell and Commissioner Várhelyi on the state of play of EU–Türkiye political, economic and trade relations, 29 November 2023.

[1001] D. ALBANESE, *The Renewal of the EU–Turkey Migration Deal*, ISPI Online, 27 May 2021, available here: https://www.ispionline.it/en/publication/renewal-eu-turkey-migration-deal-30509.

[1002] *Supra,* CHAPTER III, SECTION 5.

decades later[1003]. Aware of its importance to the EU in the context of migration, Morocco has consistently used migration as a bargaining chip to extract economic and political concessions from the EU. An emblematic example of Morocco's position is the public statement made by Taieb Fassi Fihri, the former Moroccan Minister Delegate for Foreign Affairs and Cooperation, at the Euro–African Conference on Migration and Development in Rabat in July 2006:

"No country has the capacity to control its own migration flows... [The European Union] should not externalise its actions towards a country [*i.e*, Morocco] on the pretext that it is the last transit country for migrants heading towards the European coasts. If readmission agreements are concluded with every partner [in Africa], Morocco will no longer have to face the challenges it is facing"[1004].

Fihri's message was clear: he called on the EU and its Member States to conclude readmission agreements with other transit and origin countries as a prerequisite for Morocco to strengthen its cooperation on readmission with the EU. This position illustrates the conditionality that the Moroccan government has steadfastly defended for some 20 years. Such "reversed conditionality" would likely have been neither acceptable nor justifiable if Morocco had not secured a strategic position, along with international credibility in the areas of bilateral police cooperation and border controls[1005].

In addition, on several occasions, Morocco has threatened to relax its border controls, thereby increasing irregular migration flows to Europe and pressuring the EU to meet its demands[1006]. For example, after the partial annulment of the agricultural and fisheries agreements in 2015, Morocco implicitly threatened to relax migration controls, which was soon followed by a significant increase in

[1003] *Supra,* CHAPTER II, SECTION 3.

[1004] Moroccan Ministry of Foreign Affairs, ''Speeches, Declarations and Interviews''. Cited in J. P. CASSARINO, "Informalising Readmission Agreements in the EU Neighbourhood", *op. cit.*, p. 192.

[1005] *Ibid.*

[1006] F. PEREGIL, J. CAÑAS, *Incursions at Spain's North African exclaves triple after Moroccan threats*, El País, 27 February 2017, available here: https://english.elpais.com/elpais/2017/02/27/inenglish/1488185422_295555.html.

border crossings to Spain[1007]. This partial annulment was the result of the so-called *Front Polisario* case saga before the Court of Luxembourg. This saga concerns the legality of EU agreements concluded with Morocco that included Western Sahara, a disputed territory claimed by Morocco but recognised by the UN as non-self-governing. In 2012, the Front Polisario, which represents the Sahrawi people, challenged the Council's decision to approve an agreement with Morocco on agricultural and fisheries products that included resources from Western Sahara[1008]. The Front Polisario argued that these agreements violated international law by exploiting Western Sahara's resources without the consent of its people. In a landmark ruling in 2016, the ECJ declared that the EU–Morocco agreements could not legally apply to Western Sahara, as the territory has a distinct and separate status under international law, which requires the consent of the Sahrawi people[1009]. This ruling reaffirmed the principle of self-determination for Western Sahara and imposed limits on Morocco's claims over the region, with implications for future EU–Morocco agreements, including in relation to migration and readmission negotiations. In a significant continuation of this legal saga, on 29 September 2021, the General Court annulled two Council decisions approving trade and fisheries agreements concluded between the EU and the Kingdom of Morocco, ruling that they were invalid because they applied to Western Sahara without the consent of its people, as represented by the Front Polisario[1010]. These rulings marked a positive

[1007] Council Regulation 764/2006, of 22 May 2006, on the conclusion of the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco, OJEU, L 141, 29 May 2006; Fisheries Partnership Agreement between the European Communities and the Kingdom of Morocco, 28 July 2005, OJEU, L 294M, 25 October 2006. Cfr. K. KAISER, cit., pp. 14 ff. See also, S. CARRERA et AL., *EU-Morocco Cooperation on Readmission, Borders and Protection: A model to follow?*, CEPS Papers in Liberty and Security in Europe No. 87, January 2016, pp. 5 ff.

[1008] European Court of Justice (ECJ), Case C–104/16 P, *Council v Front Polisario*, Judgement 21 December 2016, EU:C:2016:973, paras. 38 ff.

[1009] *Ivi*, paras. 81 ff.

[1010] Court of Justice of the European Union (CJEU), General Court, Case T–278/19, *Front Polisario v the Council*, Judgement 29 September 2021, ECLI:EU:T:2021:639; Council Decision (EU) 2018/1893, of 16 July 2018, regarding the signature, on behalf of the European Union, of the Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco on the amendment of Protocols 1 and 4 to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part, OJEU, L 310, 6 December 2018; Council Decision (EU) 2019/217, of 28 January 2019, on the conclusion of the agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco on the amendment of Protocols 1 and 4 to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other

shift in the Western Sahara litigation, resolving the question of the standing of the Front Polisario and demonstrating the Court's willingness to bring the EU's external action into line with international legal obligations[1011]. More recently, in 2024, the ECJ reaffirmed its position, ruling in favour of the Sahrawi people and confirming that the 2019 EU–Morocco fisheries and agricultural agreements required the consent of the people of Western Sahara, which had not been obtained[1012]. In our view, this latest ruling is another major setback for Morocco and is likely to complicate its future negotiations with the EU, particularly on migration and readmission.

Instead of signing a EURA or an "informal" readmission arrangement, Morocco has capitalised on the EU's "dependence" on its cooperation in managing irregular migration, securing significant financial aid and political benefits, such as migration-related assistance and support for its National Strategy for Immigration and Asylum (NSIA). The latter, launched in 2013, has played a central role in its negotiations with the EU, further strengthening the country's leverage through "reversed conditionality". The NSIA aims to improve the management of migration flows while providing legal pathways for migrants, particularly from sub-Saharan Africa, and promoting the integration of migrants already in Morocco[1013]. However, Morocco has consistently argued that it cannot implement this ambitious strategy

part, OJEU, L 34, 6 February 2019. Cfr. E. KASSOTI, "The Long Road Home: The CJEU's Judgments in Joined Cases T–344/19 and T–356/19 and in Case T-272/19 – Front Polisario v Council", in *Verfassungsblog*, 6 October 2021.

[1011] A. CARROZZINI, "Working Its Way Back to International Law? The General Court's Judgments in Joined Cases T-344/19 and T-356/19 and T-279/19 Front Polisario v Council", in *European Papers*, Vol. 7, No. 1, 2022, p. 38.

[1012] European Court of Justice (ECJ), Joined Cases C–778/21 P and C–798/21 P, *Front Polisario v the Council*, Judgement 4 October 2024, ECLI:EU:C:2024:833. For a preliminary comment of the 2024 judgement, see J. ODERMATT, "Whose Consent? On the Joined Cases C–779/21 P, Commission v Front Polisario and C–799/21 P, Council v Front Polisario", in *Verfassungsblog*, 5 October 2024. See more generally on this saga, *ex multis*, E. MILANO, "The new Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco: fishing too south?", in *Anuario Español de Derecho Internacional*, Vol. XXII, 2006, pp. 413–457; J. A. GONZÁLEZ-VEGA, "El poder taumatúrgico de la interpretación: el Tribunal de Justicia de la UE y la 'sorprendente' no aplicación de los acuerdos pesqueros UE-Marruecos a las aguas del Sahara Occidental (Comentario a la sentencia TJUE de 27 de febrero de 2018, Western Sahara Campaign UK, Asunto C-266/16)", in *Ordine internazionale e diritti umani*, 2018, pp. 402–427; Á. SUÁREZ-COLLADO, D. CONTINI, "The European Court of Justice on the EU-Morocco agricultural and fisheries agreements: an analysis of the legal proceedings and consequences for the actors involved", in *The Journal of North African Studies*, Vol. 27, Issue 6, 2021, pp. 1160–1179.

[1013] Moroccan Ministry of Foreign Affairs, African Cooperation and Moroccan Expatriates, *National Immigration and Asylum Strategy*, available here https://marocainsdumonde.gov.ma/en/national-immigration-and-asylum-strategy/.

without substantial external financial and technical support[1014]. The EU, recognising the importance of the NSIA in reducing irregular migration to Europe, has responded by providing significant funding to support its implementation. For example, in December 2018, Morocco received an additional €148 million in migration-related assistance, much of which was allocated to support the NSIA[1015]. According to Tittel-Mosser, this demonstrates how Morocco has successfully used the NSIA as a bargaining tool, positioning itself as a key partner for the EU in migration management, while linking its cooperation to financial support. By aligning its domestic migration priorities with EU interests, Morocco has secured continued assistance without committing to "formal" or "informal" readmission cooperation. This shift highlights a reversal of the traditional power dynamic in migration negotiations, with Morocco dictating terms and the EU unable to withhold benefits, despite Morocco's consistent refusal to sign a EURA or agree to an "informal" readmission arrangement. In essence, the EU has become more dependent on Morocco than *vice versa*, to the point where Morocco can set its own terms that the EU must accommodate[1016].

While Morocco may not prioritise the conclusion of a readmission agreement or arrangement, Tunisia presents a different case: Tunisian policymakers see in fact themselves as cooperative with the EU on readmission and seek to balance this cooperation with their legitimate national interests. Indeed, Tunisian policymakers have sought to balance their willingness to engage in readmission discussions with the need to protect the social rights of their citizens and address domestic economic concerns[1017]. Although Tunisia has shown openness to bilateral agreements with individual EU Member States, its refusal to readmit TCNs is often misinterpreted by the EU as a lack of cooperation[1018]. In reality, Tunisia's benchmarks for success differ from those of the EU, as Tunisia focuses on protecting its nationals and

[1014] F. TITTEL-MOSSER, *op. cit.*, pp. 355 ff. In this sense, see also, K. KAISER, cit.,

[1015] EuroMeSCo.net, *EU reinforces support to Morocco to address irregular migration*, 15 December 2018, available here: https://www-euromesco-net.translate.goog/news/eu-reinforces-support-to-morocco-to-address-irregular-migration/?_x_tr_sl=en&_x_tr_tl=it&_x_tr_hl=it&_x_tr_pto=sc.

[1016] F. TITTEL-MOSSER, *op. cit.*, pp. 357 ff.

[1017] H. SHA'ATHN, F. RAACH, "Cooperation within Reason: Tunisia's Approach to Asylum and Readmission" in *European Journal of Migration and La*w, Vol. 26, Issue 2, pp. 188 ff.

[1018] As regards this refusal, see *supra,* CHAPTER II, SUB–SECTION 3.1. As also mentioned in CHAPTER II, a mandate for the negotiation of a formal agreement has also been adopted for Tunisia.

dealing with domestic issues. This divergence has led Tunisia to resist the EU's utilitarian approach, which emphasises quantitative measures of success such as the number of people readmitted. However, the political crisis and growing authoritarianism since 2021, as well as Tunisia's deteriorating economic situation, have changed the dynamic[1019]. The surge in irregular departures from Tunisia in 2023, largely due to economic decline and anti-migrant rhetoric, has created new leverage for Tunisia. President Saied's government has used this situation to negotiate economic aid from the EU, resulting in the EU–Tunisia MoU – described in the previous CHAPTER –, which links cooperation on border control and readmission to broader economic support and other policy benefits[1020]. This strategic use of conditionality illustrates how Tunisia, despite its previous cooperative stance, has used its position to extract critical concessions from the EU.

In light of the above, it can be argued that the EU's "readmission obsession" may lead it to prioritise partnerships with countries that are willing to cooperate with containment objectives, including those with questionable human rights records. In situations of "reversed conditionality", third countries could exploit their asymmetric advantage by exploiting of the EU's dependence on them. For example, they could respond to EU demands for increased cooperation – or to political developments not in line with their interests – by tightening border controls, as in the case of Morocco. Underestimating the willingness of these partners to manipulate migration cooperation for their own strategic ends could backfire, especially when dealing with autocratic or unstable regimes, as the case of Tunisia shows. Indeed, the perceived balance between costs and benefits in both "formal" and "informal" readmission cooperation is crucial in shaping reciprocity, but this balance may change over time, especially in response to unfavourable or unexpected circumstances[1021]. Moreover, even if third countries genuinely fulfil their obligations under these agreements, this dependence could escalate future

[1019] H. SHA'ATHN, F. RAACH, *op. cit.*, p. 195; I. WERENFELS, *No Time to Lose as Tunisia's President Consolidates Authoritarian Turn*, SWP Comment, 2022.

[1020] Cfr. T. STRIK, R. ROBBESOM, *op. cit.*, pp. 200 ff. *Supra*, CHAPTER III, SECTION 5.

[1021] J.P. CASSARINO, M. BEN JEMIA, *The Implication of Readmission and Enforced Return on Euro-Mediterranean Relations and Beyond*, 9th MRM Meeting 2008, Work Shop no. 1, Description, p. 3, available here: https://www.eui.eu/Documents/RSCAS/Research/Mediterranean/Mrm2008/01WS-Description.pdf.

financial and political demands, especially if the EU remains heavily dependent on these partners. Such an approach would not only undermine efforts to develop efficient and resilient asylum systems, but also undermine the EU's strategic autonomy. By cultivating critical dependencies for migration management, the EU reduces its capacity to act independently and pursue its own strategic interests. This "migration" dependency creates a cycle of vulnerability, making the Union more susceptible to external pressures and jeopardising both its internal cohesion and long-term strategic objectives[1022]. It is therefore more urgent than ever to move towards a truly balanced relationship where readmission cooperation is mutually beneficial *in toto*. The EU should view its partners not only as tools to achieve its own objectives, but as long-term collaborators, fostering an environment of mutual trust to achieve more stable and mature results.

7. Conditionality in EU readmission policy and the international obligations on readmission

The previous SECTIONS have shown that the EU has relied heavily on a conditionality-based approach to promote readmission cooperation with third countries. This approach was very recently reaffirmed by the last European Council, underlining the Union's unwavering commitment to this strategy:

"[t]he European Council calls for determined action at all levels to facilitate, increase and speed up returns from the European Union, using all relevant EU policies, instruments and tools, including diplomacy, development, trade and visas. It invites the Commission to submit a *new legislative proposal*, as a matter of urgency"[1023].

[1022] In this sense, A. DE LEO, E. MILAZZO, *Responsibility-sharing or shifting? Implications of the New Pact for the future cooperation with third countries*, Policy Study, Foundation for European Progressive Studies, Friedrich-Ebert-Stiftung and European Policy Centre, Brussels, June 2024, p. 19.

[1023] European Council, Meeting, Conclusions, Brussels, 17 October 2024, EUCO 25/24, para. 37.

Therefore, the latest Council position not only reaffirms the EU's commitment to conditionality in readmission and return policy, but also underlines the relevance of the present analysis to current developments in the EU legal framework.

Conditionality, however, is not a new concept, either in EU policy or on the international stage[1024]. Institutions such as the International Monetary Fund (IMF) have long used conditionality to ensure that financial assistance is managed effectively and that recipient countries meet their loan repayment obligations[1025]. Nonetheless, in the EU context, as this CHAPTER has demonstrated, conditionality has become a key element of long-term governance, no longer limited to short-term political decisions. It has become a strategic tool across different policy areas, with migration at the centre. This governance through conditionality has strengthened cooperation between the EU and third countries on migration and asylum, in particular on readmission. The New Pact and its legislative package further entrench the controversial use of conditionality, extending it to any measures aimed at enhancing third countries' cooperation on migration and especially readmission[1026]. Conditionality, originally designed for emergencies, now seems to be demanded and applied more routinely to deal with migration issues. In our opinion, therefore, while CHAPTER III has shown the "crystallisation" of "informal" mechanisms in readmission and the control of irregular migration, it can be argued that this "crystallisation" has also happened to conditionality in EU migration policy – particularly in readmission[1027].

In the context of the readmission of TCNs, the role of conditionality is clear: it is primarily used to secure acceptance of commitments to readmit TCNs. By linking readmission cooperation to incentives – such as financial assistance, visa facilitation or trade benefits – the EU encourages partner countries to accept the readmission of TCNs. A key question is whether this EU conditionality-based

[1024] R. RICH, "Applying Conditionality to Development Assistance", in *Agenda*, Vol. 11, No. 4, 2004, pp. 321–334; J. BACHTLER, M. FERRY, "Conditionalities and the Performance of European Structural Funds: A Principal-Agent Analysis of Control Mechanisms in European Union Cohesion Policy", in *Regional Studies*, Vol. 49, No. 8, 2015, pp. 1258–1273.

[1025] Q. H. BEAZER, B. WOO, "IMF Conditionality, Government Partisanship, and the Progress of Economic Reforms", in *American Journal of Political Science*, Vol. 60, No. 2, 2016 pp. 304–321. Cfr. P. BECKER, *op. cit.*, 2024.

[1026] *Supra*, SECTIONS 3–5 ff. See also the consideration made *supra*, CHAPTER III, SECTIONS 5 ff.

[1027] *Supra*, CHAPTER III, SECTION 6.

approach to cooperation with third countries on readmission might affect the *status quo* of customary international law on readmission. In this respect, the question arises in particular with regard to "informal" readmission agreements, which, unlike EURAs, focus primarily on the return of third countries' own nationals[1028]. These "flexible" deals are indeed based on a conditional approach where the EU offers significant incentives to ensure cooperation. An example is the JDMC with Afghanistan: in this case, the EU not only offers to cover all expenses related to the return and reintegration of migrants but also pledges to support sustainable reintegration efforts. The EU commits to developing and financing programs aimed at assisting Afghan nationals returning to their country and supporting their host communities. Reintegration efforts should be closely aligned with broader development cooperation initiatives between Afghanistan and the EU, focusing on aid effectiveness and coordinating interventions[1029]. While these incentives may seem to mainly serve and be "ancillary" to the readmission and reintegration phases, they may represent significant economic leverage for Afghanistan. Indeed, they clearly play an important role in incentivising the country to both reach an arrangement on readmission and effectively cooperate, thereby increasing return rates[1030]. In addition, in the case of Mali, the EU adopted nine projects totalling €145.1 million to secure the 2016 readmission arrangement[1031].

Therefore, it is not clear why States should offer incentives when it comes to the readmission of *the other Party's own nationals*, a customary norm that all States, in theory, should respect regardless of treaty law or any other kind bilateral cooperation. Consequently, the question arises as to whether the inclusion of "*do ut des*" provisions in readmission agreements and "informal" arrangements – which includes the readmission of a State's own nationals – may have an impact on the customary norm regarding readmission[1032]. According to Giuffré and Coleman, while it is true that receiving States often seek explicit benefits in exchange for

[1028] *Supra*, CHAPTER III, SUB–SECTION 3.2.

[1029] JDMC, Part IV.

[1030] However, the impact of these incentives on Afghans readmitted remains unclear following the change in government due to the return of the Taliban.

[1031] Euractiv, EU, *Mali sign deal to return refugees*, available here: https://www.euractiv.com/section/justice-home-affairs/news/eu-mali-sign-deal-to-return-refugees/.

[1032] M. GIUFFRÉ, *Seeking Protection in Europe: Refugees, Human Rights, and Bilateral Agreements Linked to Readmission*, Ph.D. Thesis, University of Trento, 2014, pp. 310–311.

agreeing to these conditions, the existence of this exchange does not necessarily diminish the receiving State's belief in its obligation to readmit its own citizens, nor can it affect existing customary international law in this regard. Cooperation with third countries on readmission – in particular through EURAs – not only formalises the obligation to readmit citizens, but also establishes specific procedures and timeframes, thereby limiting the sovereignty and administrative discretion of the receiving State. Any benefits derived from agreeing to these conditions can be seen as a fair compensation for this loss of discretion. "Formal" agreements and "flexible" arrangements may therefore not undermine the customary obligation to readmit citizens, but rather serve as a form of compensation for the limitation of States' sovereignty. Consequently, on the basis of such considerations, it can be concluded that this *modus operandi* on the use of "readmission conditionality", which is typical of the EU in particular, should not affect the international obligation of States to readmit their own nationals[1033].

According to the above-mentioned scholarship, another factor supporting the argument that the customary obligation to readmit nationals is not weakened by "*quid pro quo* practices" is that requesting countries are increasingly refraining from offering specific compensatory benefits in exchange for cooperation in the return of their own nationals. These countries generally regard the readmission of their nationals as an inherent obligation under customary international law – one that is unconditional and non-negotiable. From this perspective, refusing to offer compensatory benefits is seen as essential to uphold and ensure the validity of this international norm[1034]. Nonetheless, we believe that the recent practice of "informal" readmission agreements has shown that this consideration is not entirely correct, as the EU also applies conditionality in this context, which only provides for the readmission of third countries' own nationals. In our view, recent practice has shown that while third countries recognise this international obligation, they still welcome – and increasingly demand – additional incentives. In other words, while recognising the existence of this legal norm, they do not reject incentives, but actively seek and use them to their advantage. Readmission cooperation, even of

[1033] N. COLEMAN, *op. cit.*, pp. 30 ff.; M. GIUFFRÉ, "Obligation to readmit? The relationship between interstate and EU readmission agreements", *op. cit.*, pp. 267 ff.

[1034] *Ibid.*

nationals only, is often not in the interest of third countries for a number of reasons, as highlighted earlier in this CHAPTER. The costs of implementing readmission agreements or arrangements can be substantial, requiring structural and institutional reforms as well as the socio-economic reintegration of returnees. In addition, such cooperation can disrupt the role of migration as a safety valve that relieves pressure on local economies, and it can reduce the long-term benefits of migration, such as remittances, which are an important source of income[1035].

In any case, also in our view the EU's "readmission conditionality" does not *per se* undermine relative international norms, mainly because, as discussed in the first CHAPTER, both EU institutions and Member States support the existence of a customary international norm that obliges States to readmit their own citizens: the *opinio juris* underpinning this obligation thus *currently* remains intact. While the dynamic of conditionality – often subject to criticism, as noted above – functions as a *modus operandi* to address the political and operational challenges of migration management, it does not negate the existence or undermine the validity of the customary obligation. In brief, the "core legal principle" of the State's obligation to readmit its own nationals endures, even as the methods of securing cooperation may evolve. Nevertheless, there is no denying that there is a worrying trend towards some form of standardisation in this practice. Indeed, the EU increasingly appears to take for "granted" the need to offer third countries *something in return* in order to secure their cooperation on readmission. This dynamic, while ostensibly aimed at curbing irregular migration, has led to third countries taking advantage of this assumption, as can be seen in the case of "reversed conditionality": third countries, aware of the EU's perceived urgency in tackling irregular migration, now expect to demand – and often receive – ever greater concessions in return for cooperation.

The EU's standardised approach to migration conditionality appears to have shaped migration policy beyond its borders. By linking, *inter alia*, visa-related incentives, trade benefits and development aid to partner countries' cooperation on migration and readmission, the EU has established a model that other nations and

[1035] O. SUNDBERG DIEZ, "Readmission conditionality", in MEDAM (Mercator Dialogue on Asylum and Migration), *2020 MEDAM Assessment Report on Asylum and Migration Policies in Europe. European and African perspectives on asylum and migration policy: Seeking common ground, Kiel Institute for the World Economy*, 2020, p. 27. *Supra,* SECTIONS 1. and 3.

regions are increasingly "emulating". The influence of EU conditionality has even reached "nearby" countries such as Norway, which, has aligned its migration policy with EU-wide practices[1036]. Similarly, Switzerland's cooperation with Nigeria provides a clear example of the EU's influence on migration governance, illustrating how the EU's approach has been adapted outside the Union, both in terms of conditionality and "informalisation". Following a serious diplomatic incident during a forced return operation in 2001, Switzerland initiated a high-level dialogue with Nigeria, using positive incentives to encourage cooperation. Indeed, Switzerland offered substantial support, ranging from police cooperation initiatives to major infrastructure investments, aimed at addressing migration challenges while strengthening bilateral ties. This relationship was "consecrated" in 2011 through a MoU, similar in structure to the EU's approach with third countries but tailored to Switzerland's specific interests[1037]. Across the Atlantic, the EU's "less-for-less" approach to conditionality also appears to have been mirrored and adopted by U.S., which in 2019 used the threat of tariffs to secure Mexico's cooperation on the Migrant Protection Protocols (MPP, or "Remain in Mexico")[1038]: this arrangement required asylum seekers to wait in Mexico until their cases could be processed[1039].

[1036] European Migration Network (EMN), *Contested Conditionality in Return and Readmission: EU policy and the case of Norway, EMN Occasional paper*, October 2022, p. 12.

[1037] Memorandum of Understanding between the Swiss Federal Council and the Government of the Federal Republic of Nigeria on the Establishment of a Migration Partnership, 14 February 2011. Cfr. V. RIETIG, M. WALTER-FRANKE, *op. cit.*, p. 48.

[1038] U.S. Department of Homeland Security, *Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration*, 20 December 2018, available here: https://www.dhs.gov/archive/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration; U.S. Department of Homeland Security, *Court Ordered Reimplementation of the Migrant Protection Protocols*, 8 August 2022, available here: https://www.dhs.gov/archive/court-ordered-reimplementation-migrant-protection-protocols; American Immigration Council, *The "Migrant Protection Protocols"*, Factsheet, February 2024.

[1039] See, more in detail, M. CHISHTI, C. PUTZEL-KAVANAUGH, cit. The parallelism between the EU and U.S. frameworks as for "migration conditionality" has also been highlighted elsewhere, particularly in relation to their reliance on aid conditionality as a strategic tool in migration governance. See, T. TONASSI, *Conditioning or Cutting Aid Is Not Effective Against Irregular Migration*, gmfus.org, available here: https://www.gmfus.org/download/article/15164. However, it is important to note that, at least with regard to aid conditionality in the "more for more" version, the sources consulted by the Author of this thesis point to a long tradition in U.S. policy dating back to the 1980s. See, A. MARTÍN GIL, "Managing Migration Through Foreign Aid in Mexico and Central America: The Role of U.S. Conditionality on Mexico's Migration Policies", in *Journal of Immigrant & Refugee Studies*, 2025, pp 1–16. This suggests that the U.S. "conditionality framework" of migration cooperation through financial assistance has deep historical roots. In contrast, the Autor found no evidence in the available literature to suggest a similar tradition in the United States with respect to the "less-for-less" approach described in the text.

In our view, the EU's approach to conditionality demonstrates its potential influence in shaping the global migration governance and positions it as one of the key actors in this type of policy, in line with a global trend observed among various world powers and reflected in the policies of the "Global North". However, this approach does not seem to prioritise the protection of individuals at its core.

This raises a fundamental question: where do individuals fit within the framework of EU "readmission conditionality"? Individuals subject to readmission are in practice sidelined in the broader framework of negotiations between the EU and third countries. These agreements and arrangements focus primarily on ensuring cooperation between States, with the central aim of managing irregular migration and controlling borders. As a result, the individual rights and protection of those to be readmitted often receive limited attention, overshadowed by the geopolitical and strategic interests of both the EU and its partner countries. This approach reflects (again) the EU's preference for a "State rights-based perspective" in defining the legal basis for readmission obligations under international law, as also highlighted in previous CHAPTERS[1040]. Under this perspective, the obligation to readmit nationals is framed as a sovereign right of States to control their borders, rather than as a framework based on the protection of individuals' fundamental rights. Indeed, the conditionality attached to readmission agreements and arrangements seems to reinforce this dynamic. Third countries often use the EU's perceived "urgency" in controlling irregular migration to extract further concessions, which can sometimes lead to reduced safeguards for individuals involved in the process. As a result, while individuals are directly affected by readmission agreements and arrangements, their role is largely passive; they are treated as subjects of State policy rather than as rights holders whose protection should be paramount. This perspective reinforces the views expressed in previous pages on the need to prioritise the rights and welfare of individuals in discussions on migration and readmission. This is also consistent with the discussion in CHAPTER I on the use of development aid, which is identified here as one of the EU's "preferred" instruments of conditionality. Through development aid, the EU seeks to cultivate a *jus manendi*, which effectively takes the form of an obligation

[1040] See, in particular, *supra*, CHAPTERS I and II.

on States to create conditions that allow individuals to remain in their home countries in safety and dignity (or, more precisely, to prevent migratory flows), rather than establishing a genuine individual right[1041]. Instead of recognising their agency and addressing their specific needs, the focus remains on the interests of States, further marginalising those most affected by these policies.

In our view, the EU should move away from a transactional approach that links funding, legal migration pathways and trade to border control and deterrence. Instead, the focus should shift to promoting comprehensive cooperation on issues of mutual concern such as poverty reduction, sustainable development, education and trade – areas that should receive the political attention and financial commitment they deserve. By prioritising these broader objectives, the EU could strengthen its position as a credible and responsible global actor. A key element of this strategy would be the expansion of legal migration pathways, such as Talent Partnerships, focusing on their "human" facade: indeed, these Partnerships truly offer a promising mechanism for promoting regular migration while also addressing labour market needs. By adopting this approach, the EU could set an example and demonstrate its commitment to establishing best practices in international migration law. For instance, rather than continuing to use legal pathways as a tool to *mainly* secure cooperation on readmission, the EU could promote these pathways as a fundamental mechanism to promote safe and legal migration – thus aligning its practices with the stated goals of ensuring humane and orderly migration. Such a shift would not only meet the EU's migration management objectives, but also provide a more sustainable and rights-based foundation for international cooperation in this area. Although States consistently present this framework as their objective on paper, it often remains an unfulfilled commitment in practice.

Nonetheless, developing international migration law in a "virtuous" way for the rights of individuals does not seem to be a priority for the EU at present, which, despite its external values, remains focused on advancing its own internal migration agenda rather than a global one[1042]. Rather than an effective multilateral approach based on solidarity, human rights and a rules-based international legal order,

[1041] *Supra*, CHAPTER I, SECTION 3.
[1042] E. FRASCA, cit.

international cooperation on migration is often used by the EU to affirm its own (regional) migration law's objectives – grounded on paradigms of differentiation and containment – to the detriment of a constructive progressive development of international migration law. This "tactic" exposes refugees, asylum seekers and vulnerable migrants to being treated as bargaining chips in readmission cooperation with third countries[1043]. If migration conditionality continues to gain prominence in EU relations with third countries, its credibility and financial leverage when demanding States' respect for human rights, good governance, or international law will continue to suffer[1044].

[1043] M. INELI-CIGER, O. ULUSOY, cit.
[1044] O. SUNDBERG DIEZ, "Readmission conditionality", cit., p. 31.

CONCLUSION

A WORRYING "WAY FORWARD"?

At a time when legal orders are increasingly interplaying, the relationship between the EU and international law remains both complex and multifaceted, in particular in the context of readmission and, more generally, migration[1045]. The thesis thereof explored the dynamics of the EU's readmission policy and its "transformative trends", as well as its interplay with international law in the area of readmission. Contrary to some expectations, the EU's readmission policy does not appear to have *fundamentally* altered customary international obligations on readmission. Indeed, both the EU institution and its Member States continue to "officially" and "publicly" uphold existing international norms, while *selectively adapting these principles to achieve their own migration control objectives* (what we can described as an "adaptive" approach to international norms).

As highlighted in CHAPTER II, the EU's "formal" readmission policy remains aligned to the customary international norm regarding the readmission of States' own nationals; at the same time, the EU considers the readmission of TCNs to be dependent on treaty obligations and has structured its approach accordingly. In our opinion, this "conservative" stance reflects a commitment to maintaining the *status quo* regarding international obligations on readmission. The inclusion of human rights clauses in EURAs and the formal emphasis on rights protection further demonstrate the EU's adherence to international law; however, the lack of effective monitoring mechanisms raises concerns about the implementation of these commitments[1046]. Similarly, the "informal" readmission arrangements discussed in CHAPTER III seem to primarily focus on the readmission of a State's own nationals, maintaining existing international obligations without aiming explicitly to alter them. These arrangements, however, exemplify the EU's "adaptive" approach to international norms to meeting its migration and readmission objectives, prioritising State interests over individual rights[1047]. Furthermore, as explored in

[1045] In this sense, T. MOLNÁR, *The Interplay between the EU's Return Acquis and International Law*, *op. cit.*, p. 219.
[1046] *Supra*, CHAPTER II, SECTIONS 3 and 5.
[1047] *Supra*, CHAPTER III, SECTION 6.

CHAPTER IV, "readmission conditionality" does not in itself alter international legal norms in this area, but its increasing standardisation raises significant concerns. This trend highlights the EU's reliance on offering incentives to third countries to secure readmission cooperation, treating these concessions as almost essential to this kind of cooperation. While the dynamic seeks to address irregular migration, it also enables third countries to exploit the EU's perceived urgency, often through "reversed conditionality". In this scenario, third countries leverage their cooperation to extract increasingly favourable concessions, reflecting a shift in power dynamics that complicates the EU's ability to manage migration effectively while maintaining a rights-based and protective approach[1048].

Nonetheless, this research contributes to the understanding of how EU practices in the area of readmission extend their influence beyond the Union's borders and, in theory, demonstrate an intriguing capacity to shape the policies of "neighbouring" States. The most notable example is Switzerland, which, as analysed in previous CHAPTERS, has adopted several elements of the EU's "trends" on readmission. In particular, Switzerland has often resorted to the "informalisation" of readmission arrangements and has increasingly relied on conditionality as a tool to incentivise cooperation from partner countries on readmission, mirroring in fact the EU's main strategies in this area[1049]. Countries that are geographically distant from the EU, such as the U.S., also show the use of "informal" instruments and conditionality to promote cooperation on readmission and, more generally, on migration[1050]. This may suggest that such practices may reflect broader trends in international law. In our view, while the EU undoubtedly has significant potential to influence other States through its readmission policy, this approach is consistent with a general pattern in international relations in which States shape and are shaped by each other's practices. In this sense, the EU's use of "informality" and migration conditionality mirrors the behaviour of other global actors and emphasises the reciprocal and interconnected nature of State interactions in the international arena.

[1048] *Supra*, CHAPTER IV, SECTION 7.
[1049] *Supra*, CHAPTER III, SECTION 6; CHAPTER IV, SECTION 7.
[1050] *Ibid.*

Although the EU is constitutionally bound to respect international law, it simultaneously claims normative autonomy from it[1051]. This duality, in which the EU is both a participant in and a self-proclaimed autonomous entity from the international legal order, points to a deeper tension that characterises its external action on migration. The EU's efforts to influence the international legal framework on readmission have been characterised by varying degrees of ambition: at times, however, its contribution to international law remains more symbolic than substantive. This thesis has highlighted the nuanced balance between the EU's normative *aspirations* and its pragmatic *choices* in readmission policy. It underlines that EU readmission policy, as a sectoral area of law, does not fit neatly into the broader theoretical frameworks that define the relationship between EU law and international law: the legal reality in this area is far more fragmented and complex. Indeed, while the doctrine of the autonomy of EU law is a defining feature of the EU's legal identity, its application varies considerably across different policy areas – especially in sensitive and contested areas such as migration.

In this sense, while the EU's adherence to international law in the area of readmission can be interpreted as a positive commitment to existing norms, in our view, it also represents a *missed opportunity*. Indeed, the EU could have played a more constructive role, particularly in advancing human rights protections in this domain. Instead, what emerges from the analysis so far is a "worrying" pattern: while on paper the EU appears to fully comply with the dictates of international law, in particular with regard to the protection of human rights, in practice it appears to prioritise its internal objectives of migration control over broader "humanitarian" concerns. This is evident in both the negotiation and the conclusion of EURAs, where the focus is often on securing cooperation from third countries that may not have a strong human rights record, thus subordinating the protection of rights to the primary objective of facilitating returns. In the context of these agreements, human rights standards are often insufficiently taken into account, resulting in inadequate procedural safeguards for vulnerable groups such as readmitted persons[1052]. Moreover, the increasing reliance on "informal" arrangements has further

[1051] *Supra*, INTRODUCTION.
[1052] *Supra*, CHAPTER II, SUB–SECTION 3.2.

marginalised human rights in favour of practical solutions to migration control. These "informal" practices often lack "proper" oversight, leaving vulnerable individuals with limited legal recourse and protection[1053]. The use of regular pathways as bargaining tools to enhance cooperation on readmission further illustrates this trend and highlights the EU's focus on controlling migration flows rather than upholding "humanitarian reasons", as shown in the last CHAPTER[1054]. This dichotomy – ostensibly upholding international norms while at the same time pursuing a restrictive and securitised approach to migration – raises significant concerns about the Union's real and future role in shaping the international legal landscape on readmission.

In this context, the research thereof demonstrates that the EU's approach to readmission, particularly its growing reliance on "informal" instruments and the use of conditionality to achieve migration control objectives, reflects a "State-centric" – or in the case of the EU, an "organisation-centric" – understanding of readmission obligations. The "informalisation" of readmission practices, discussed in CHAPTER III, has become a consistent strategy for managing irregular migration. This pragmatic and politically expedient approach, often characterised by the EU's use of conditionality and a "whatever it takes" mentality, highlights a strategy that prioritises EU interests over the progressive normative development of international migration law. In this sense, it could be argued that that the EU officially upholds and actively seeks to reaffirm the customary obligation to readmit a State's own nationals; but it is also aligning itself with the "State rights-based perspective" discussed in detail in the first CHAPTER. According to this perspective, readmission obligations should extend to involuntary returnees as a reflection of the State's right to regulate the entry, residence and exit of TCNs from its territory. However, this approach emphasises the primacy of State interests in the management of migration, at the expense of individual rights and a view of readmission as a process focused on the individual to be returned.

In addition, while it is true that readmission obligations are loosely defined in customary international law, creating legal loopholes and giving States

[1053] *Supra,* CHAPTER III, SUB–SECTION 3.3.
[1054] *Supra,* CHAPTER IV, SECTION 5.

considerable leeway in how they deal with these obligations, the EU has not "virtuously exploited" this flexibility to develop a more human rights-responsive framework. Instead, in our opinion, this shortcoming forms part of the broader framework of "missed opportunities" outlined above. For example, while the customary obligation of States to readmit their nationals remains undisputed, we believe that the EU could have taken the opportunity to adopt a "human rights-based approach" to this obligation under international law. Instead of interpreting readmission primarily (or solely) as a sovereign prerogative, the Union could have supported the perspective of the Council's Legal Service in the 1990s described in CHAPTER II, which suggested that the readmission obligation should apply only to voluntary returns[1055]. However, as shown in this research, the EU did not adopt this approach, which ultimately remained an isolated opinion with consequences for the implementation of a "State-centred" readmission policy.

The EU's approach to migration management, driven by an overarching goal of containment, risks reinforcing a *status quo* that prioritises States' interests over the creation of legal and policy frameworks that better protect the rights of readmitted individual. Indeed, in our view, EU law in recent years seems to have increasingly prioritised the sovereignty of individual Member States and their national interests, especially in migration-related issues. In this context, EU law can be seen as a clear reflection of the growing emphasis on national interests. While the EU's primary law emphasise the importance of contributing to the development of international law, in particular through a commitment to human rights, the reality of its readmission practices shows that these aspirations often remain unfulfilled. Instead, the EU has at times adopted the less virtuous aspects of migration policy – outwardly demonstrating respect for international law while implementing practices aimed at achieving narrow political objectives, often at the expense of the most vulnerable ones.

In reality, this EU approach seems to be in line with the current geopolitical scenario worldwide, where national interests have taken precedence, often overshadowing the fundamental principles of international law and human rights. The ongoing conflicts in different areas of the globe, including continental Europe,

[1055] *Supra*, CHAPTER II, SUB–SECTION 3.1.

easily illustrate this trend, where international legal frameworks, particularly those designed to protect human rights, are increasingly marginalised. While these rights remain formally and officially recognised, their enforcement in practice is proving elusive. As a sample, both Russia's invasion of Ukraine and Israel's military response to the 7 October 2023 terrorist attacks have not only reshaped the geopolitical landscape but also raised serious questions about the effectiveness of international legal norms. These conflicts have caused significant displacement, exacerbated global food and energy insecurity, and further destabilised the post-Cold War multilateral order. In such a fractured global environment, where State interests dominate, the "resilience" of international law, including those governing migration, appears increasingly fragile[1056].

These conflicts have demonstrated the complex interplay between migration policy, State interests, and international law, where the protection of human rights often takes a back seat to more immediate political, security and containment considerations. The EU's focus on containing migration flows – an approach that emphasises the return and readmission of irregular migrants *über alles* – may, in the long run, weaken the already tenuous protection of human rights within international law. With the growing prominence of State-led policies, there is a risk that international legal standards, particularly those relating to the treatment of migrants and asylum seekers, could be undermined by the prioritisation of urgent political agendas. The focus on containment can therefore easily lead to a "worrying way forward" of erosion of migrants' fundamental rights.

Furthermore, while the "formal" legal basis of the EU's readmission policy is firmly rooted in treaties and agreements, its practical implementation often reveals a dissonance between the EU's stated commitment to human dignity, human rights and the rule of law, and the realities of migration management. The formal "EURAs", while intended to provide a structured, legally binding framework for readmission cooperation, reveal a significant tension between the EU's normative principles and the operational realities of migration management. These agreements impose clear obligations on partner countries, but the Union's operational focus

[1056] In this sense, P. D'ARGENT, "International law as a system of claims. What can international justice do to stop the war?", in *Question of International Law*, Special Issue 107, 2024, pp. 9–14.

often prioritises the return of irregular migrants over the protection of fundamental rights. This can result in accelerated return procedures with limited safeguards, leaving returnees vulnerable to rights violations that undermine the EU's own legal standards. As discussed above, mere references to human rights and monitoring mechanisms in readmission agreements are not sufficient to ensure the protection of returnees. The involvement of third countries, particularly transit countries that may not properly respect the principle of *non-refoulement* or lack effective asylum systems, further complicates the situation and risks violating international human rights standards[1057]. The "dissonance" described above is also exemplified by the EU's increasing use of "informal" readmission arrangements, which have raised concerns about accountability, transparency and the erosion of basic protections for migrants. Indeed, this work has shown that "informal" readmission arrangements pose significant challenges to established individual and human rights safeguards under both EU and international law, creating significant accountability and rights protection gaps. The research highlights how this circumvention affects fundamental principles of international law, in particular *non-refoulement* and the right to an effective remedy, by enabling the adoption of deals with third countries that lack adequate safeguards. For example, the JDMC with Afghanistan, renewed despite escalating instability, illustrates how "informal" arrangements prioritise deportation over compliance with international obligations under the Refugee Convention and customary norms[1058].

A key driver of this policy is also the use of conditionality, whereby the EU links migration cooperation, including readmission, to incentives in other areas such as development aid, trade and legal pathways for migration. This transactional approach offers short-term diplomatic leverage but also risks reducing essential areas of cooperation to mere bargaining chips. The combination of these "strategies", coupled with the virtual absence of a credible regular migration pathways system, creates significant legal and practical barriers for migrants seeking access to EU territory and its international protection regime. In our opinion, rather than increasing opportunities for safe, regular and orderly migration,

[1057] *Supra,* CHAPTER II, SUB–SECTION 3.3.
[1058] *Supra,* CHAPTER III, SUB–SECTION 3.3.

these policies effectively reduce them – contrary to the core objectives outlined, *inter alia*, in the GCM[1059]. By linking migration control to broader policy areas, the EU potentially undermines the integrity of these areas and "exploits" them in pursuit of narrow migration objectives. Additionally, the rise of "reversed conditionality" – where third countries impose their own conditions – further complicates the EU's ability to align its external migration policies with its human rights commitments and the rule of law. This dynamic may easily challenge the EU's role as a global leader in upholding and promoting these values.

On this basis, it is possible to affirm that the EU's willingness to address the inconsistencies in its own policies will determine its ability to make a positive contribution to the evolving framework of international migration law, particularly in relation to readmission. "Rebuilding" the EU's reputation in the international legal arena may be possible through a more balanced approach that prioritises *genuine* cooperation with third countries on global issues like development and human mobility, rather than focusing solely on migration containment. The Union has the potential to make a significant and lasting impact in the sensitive area of readmission. To achieve this, the Union needs to engage proactively with third countries, fostering long-term partnerships that go beyond "urgent", declared, emergency-driven political gains. This might involve establishing binding, multi-annual agreements with key countries of origin and transit, while ensuring transparent and fair readmission processes. In an international landscape where geopolitical interests often dominate, the EU's influence on migration law may hinge on its ability to balance state sovereignty, migration control, and the protection of individual rights. Ultimately, in order to maintain its legal authority and credibility, we believe that the EU needs first and foremost a broader and significant rethink of how it can cooperate with third countries on migration-related issues, and, in particular, readmission.

In conclusion, there is a sense that the regulation of migration has become, more than ever, one of the greatest challenges facing the EU[1060]. The outcome will affect

[1059] J. CINQUINI, *op. cit.*, p. 337.

[1060] P. DE PASQUALE, "Pensare al futuro, restando ancorati al passato: riflessioni sulla determinazione dello Stato competente alla luce del regolamento 2024/1351", in *Quaderni AISDUE*, Fasc. 4/2024, p. 25.

not only the proper management of its borders, but also the preservation of the "spirit" that has driven European integration since 1957, when Member States committed themselves to a set of common values[1061]. At first glance, these values appear to remain broadly consistent with those established during the founding period[1062]. Nevertheless, as current trends continue to unfold, there is growing uncertainty about the EU's ability to uphold this founding "spirit", particularly in light of the evolving dynamics of migration policy and cooperation discussed throughout this research.

[1061] Cfr. G. TESAURO, "Una nuova revisione dei Trattati dell'Unione per conservare i valori del passato", in *I Post di AISDUE,* III, 2021, p. 5.
[1062] P. DE PASQUALE, *op. cit.*, p. 25.

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