ARTICLES

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

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THE INFORMALISATION OF EU READMISSION POLICY: ECLIPSING HUMAN RIGHTS PROTECTION UNDER THE SHADOW OF INFORMALITY AND CONDITIONALITY

ELEONORA FRASCA* AND EMANUELA ROMAN**

ABSTRACT: The informalisation trend in EU migration law-making is seen most often in EU readmission policy. Informal readmission agreements and multi-purpose agreements which include readmission objectives have multiplied with new third countries involved in the EU external relations on migration, beyond the EU Neighbourhood. In discussing the legal nature of informal agreements, this *Article* focuses on two main issues. First, the interplay between informal agreements and conditionality, with positive conditionality replaced by negative conditionality in a blind search for effectiveness in the EU return policy. Second, the use of informal agreements to return or push back asylum seekers are the epitome of the EU externalisation strategy. While informality is part and parcel of the EU readmission policy, increasing informalisation has significant unintended long-term effects, both for the European Union as an international organisation with law-making

* PhD Researcher in EU Migration Law, Université Catholique de Louvain (UCLouvain), eleonora.frasca@uclouvain.be.

** Researcher, Forum of International and European Research on Immigration (FIERI), emanuela.roman@fieri.it.

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capacity, and for individuals in a field of law – migration – where human rights should be protected rather than frustrated.

KEYWORDS: EU readmission policy – third-country cooperation – informality – informalisation – soft law – conditionality.

I. INFORMALITY AND THE EU EXTERNAL ACTION ON MIGRATION AND ASYLUM

In the regional normative experience of the European Union (EU), both EU migration law and the EU external migration law have always presented a certain degree of informality.[1] The emergence of migration as an internal challenge created room for the progressive building of a common policy on border, asylum and migration, at first internally to the Union and then externally. After initial intra-EU cooperation characterised by informality and inter-governmentalism, a gradual but steady process of "Europeanisation" of these policy fields witnessed a shift from discretion to law.[2] Since then, the direction of further integration through law has been driven by a series of policy and programming documents.[3] Although the declared purpose of those documents is to lay down the basis for future legislative developments, formalisation phases of policy commitments into hard law do not always follow as EU migration law is an area characterised by "legal complexities and political rationales".[4]

Externally, the EU has progressively taken up a global stance on migration. However, as much as it can act as a facilitator for inter-State dialogue, it has not yet taken the lead in international law developments. Some commentators argued that the European Commission tried to take such a lead after the adoption of the New York Declaration for Refugees and Migrants, but the Union's desire for a "unified position" in the negotiations of the Global Compacts was hijacked by its own Member States' divisions on migration.[5] Although the Union has concluded a series of international agreements with third countries, legal instruments regulating aspects of migration do not occupy a

[1] On this topic, more extensively: E Frasca and F L Gatta, 'Changing Trends and Dynamics of EU Migration Law and Governance: A Critical Assessment of the Evolution of Migration Legislation and Policy in Europe' (2022) European Journal of Migration and Law 56.

[2] E Guild and P Minderhoud (eds), *The First Decade of EU Migration and Asylum Law* (Martinus Nijhoff 2012).

[3] For an appraisal of the interplay between legal developments and programming documents: P De Bruycker, M De Somer and E De Brouwer (eds), *From Tampere 20 to Tampere 2.0* (EPC 2019).

[4] L Azoulai and K de Vries (eds), *EU Migration Law: Legal Complexities and Political Rationales* (Oxford University Press 2014).

[5] UNGA, New York Declaration for Refugees and Migrants of 3 October 2016; Communication COM(2018) 168 final from the Commission of 21 March 2018 on proposal for Council decisions authorising the Commission to approve, on behalf of the Union, the Global Compact for Safe, Orderly and Regular Migration in the area of immigration policy. For a detailed analysis of the EU's participation in the negotiation of the Global Compact for Migration, see E Guild and S Grant, 'What Role for the EU in the UN Negotiations on a Global Compact on Migration?' (2017) CEPS Research Report. See also P Melin, 'The Global Compact for Migration: Lessons for the Unity of EU Representation' (2019) European Journal of Migration and Law 194.

prominent role in the international relations of the EU. Migration cooperation is primarily conducted at the inter-governmental level, inside and outside the United Nations (UN) framework, and it is fostered by the technical work of international organisations. Most of the international cooperation on migration is informal, with rare phases of formalisation which characterise the segmentation of international migration law.[6]

I.1. Informalisation and cooperation on readmission

Readmission cooperation, which aims at facilitating the return of people irregularly residing in a country to their country of origin or transit, is no exception to this soft law/hard law trend.[7] Fully-fledged EU readmission agreements (EURAs), resulting from intergovernmental relations, are based on reciprocal obligations between the EU and third countries. With the Lisbon reform, the Union has been provided with an explicit legal basis for the conclusion of international agreements on readmission with third countries in art. 79(3) of the Treaty on the Functioning of the European Union (TFEU). The fact that this is the only express external power of the Area of Freedom, Security and Justice not only testifies to the importance of EU readmission policy at the time of the Treaty reform but also reveals the relevance of *formal* international law with regard to this policy field. Despite this, EU readmission agreements coexist with Member States' bilateral readmission agreements (hybridity) and with informal agreements concluded both by the EU and by its Member States (informality).[8]

In this *Article*, we argue that both the absence of the conditions leading to the conclusion of fully-fledged EU readmission agreements and the EU's need to make its return policy effective have paved the way for a new wave of informalisation of the EU readmission policy. Informal readmission agreements and multi-purpose agreements which include readmission objectives have reinvigorated past informal tendencies in this domain. Even though informality and hybridity have always coexisted with formalisation efforts at the EU level, the most recent wave of informalisation of EU readmission policy (triggered by the 2015 migration "crisis") presents unique features and poses new issues.[9] After presenting a partial account of informalisation of migration law-making in EU and international law literature, we clarify the link between informalisation and ex-

[6] V Chetail, *International Migration Law* (Oxford University Press 2020).

[7] S Carrera, *Implementation of EU Readmission Agreements: Identity Determination Dilemmas and the Blurring of Rights* (Springer 2016). See also T Molnar 'EU Readmission Policy: A (Shapeshifter) Technical Toolkit or Challenge to Rights Compliance?' in EL Tsourdi and P De Bruycker (eds), *Research Handbook on EU Migration and Asylum Law* (Edward Elgar 2022) 486.

[8] F Trauner and S Wolff, 'The Negotiation and Contestation of EU Migration Policy Instruments: A Research Framework' (2014) European Journal of Migration and Law 1.

[9] Informalisation in readmission has been well-documented even prior to the migration "crisis": E Roman, *Cooperation on Readmission in the Mediterranean Area and its Human Rights Implications* (2017) Doctoral thesis iris.unipa.it.

ternalisation (section I). We address the concept of informal agreements and we illustrate both the main features of informal agreements and the main functions of soft law in the readmission policy field (section II). We discuss how EU readmission policy is a prime example of informalisation in EU migration law-making (section III) and we then focus on two issues: first, the interplay between informal agreements and conditionality (section IV); second, the use of informal agreements to return or push back asylum seekers (section V).

I.2. Growing interest in informalisation: a literature review

Informalisation received scholars' attention first and foremost in political science research,[10] Cassarino being the first scholar to acknowledge the importance of informal cooperation in readmission policy.[11] The controversial adoption of the EU-Turkey Statement and the defective jurisprudence over its legality have sparked a growing interest in the study of the *nature* of EU migration cooperation with third countries also among legal scholars.[12] In the wake of this legal controversy, many EU and international law scholars have rediscovered the evergreen doctrinal concept of soft law as a means to explain the informalisation trend in EU external law-making on migration.[13] Soft law, a concept at the interplay between policy and law, is a highly debated doctrinal category with which different authors engage with different outcomes. Scholars' views on soft law are primarily influenced by their views on the law: some authors reject the concept of soft law as not pertaining to the legal sphere on the assumption that normativity has no degree (binary view).[14] Others consider normativity as "gradual" and defend that norms can carry a variety of different impacts and legal effects (*continuum* view).[15] Although not always referred to as "informalisation", comprehensive and dedicated stud-

[10] S Lavenex, *Migration and the Externalities of European Integration* (Lexington books 2002).

[11] J-P Cassarino, 'Informalising Readmission Agreements in the EU Neighbourhood' (2007) The International Spectator 179.

[12] As it is well-known, the EU-Turkey Statement was signed in 2016 and published as a press release by the European Council. In 2017, the EU General Court declared its lack of jurisdiction to hear and adjudicate over the actions brought against the EU-Turkey Statement by three asylum seekers [General Court of the EU, joined cases C-208/17 P and C-210/17 P *NF, NG and NM v European Council* ECLI:EU:T:2017:129]. In October 2018, the European Court of Justice declared inadmissible the appeal against the General Court's decision [joined cases C-208/17 P and C-210/17 P *NF, NG and NM v European Council* ECLI:EU:C:2018:705]. Widely commented upon, *ex multis*: E Cannizzaro, 'Denialism as the Supreme Expression of Realism: A Quick Comment on *NF v. European Council*' (2017) European Papers europeanpapers.eu 251; T Spijkerboer 'Bifurcation of Mobility, Bifurcation of Law: Externalization of Migration Policy Before the EU Court of Justice' (2018) Journal of Refugee Studies 216.

[13] E Kassoti and N Idriz (eds), *The Informalisation of the EU's External Action in the Field of Migration and Asylum* (Springer 2022).

[14] J Klabbers, 'The Redundancy of Soft Law' (1996) Nordic Journal of International Law 167.

[15] A Peters and I Pagotto, 'Soft Law as a New Mode of Governance: A Legal Perspective' (2006) SSRN Electronic Journal 1.

ies have shed light on this phenomenon in the external dimension of EU migration law and policy.[16] Sharing the *continuum* view, authors defend the existence of "normative transformations" in the field of EU external migration law, intended as processes of softening of the law whereby soft law becomes even softer and hard law disappears.[17]

Triggered by the urgency of providing reparation for the human costs of migration cooperation, the main area of international law studies on informalisation concerns direct and indirect State responsibility for individual human rights violations. Most of the international law scholarship focuses on violations committed as a result of the implementation of informal migration agreements by the EU solely,[18] by the EU agencies[19] or by the Union together with its "international partners".[20] This strand of research is concerned with extra-territorial jurisdiction, and it covers a wide range of human rights along with access to asylum and protection against *refoulement*.[21] One of the major issues caused by informalisation is that violations committed in the application of informal cooperation often have little recourse for complaint.[22]

Under EU law, the Open Method of Coordination provided an impetus to "new governance studies".[23] As "governance" is made of formal and informal legal acts, the distinction between those becomes less important.[24] This is equally true for the EU's external action on migration, where new tools and instruments "other" than international agreements have been widely deployed.[25] Accounts of informalisation are also

[16] F Casolari, 'The Unbearable "Lightness" of Soft Law: on the European Union's Recourse to Informal Instruments in the Fight Against Illegal Immigration' in E Bribosia and others (eds), *L'Europe au kaléidoscope. Liber Amicorum Marianne Dony* (Éditions de l'Université de Bruxelles 2019) 457; M-L Basilien-Gainche, 'L'emprise de la soft law dans la gestion des migrations en Europe' in M Benlolo-Carabot (dir.), *Union européenne et migrations* (Bruylant 2020).

[17] S Saurugger and F Terpan, 'Normative Transformations in the European Union: on Hardening and Softening Law' (2021) West European Politics 1.

[18] I Atak and F Crépeau, 'Managing Migrations at the External Borders of the European Union: Meeting the Human Rights Challenges' (2015) European Journal of Human Rights 601.

[19] JJ Rijpma, 'External Migration and Asylum Management: Accountability for Executive Action Outside EU-Territory' (2017) European Papers europeanpapers.eu 571; M Fink, *Frontex and Human Rights: Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law* (Oxford University Press 2018); L Tsourdi, 'Holding the European Asylum Support Office Accountable for its Role in Asylum Decision-Making: Mission Impossible?' (2020) German Law Journal 1.

[20] V Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control – On Public Powers, *S.S. and Others v. Italy*, and the "Operational Model"' (2020) German Law Journal 385.

[21] A Pijnenburg, 'Containment Instead of Refoulement: Shifting State Responsibility in the Age of Cooperative Migration Control' (2020) HRLRev 306; M Giuffré, *The Readmission of Asylum Seekers under International Law* (Hart Publishing 2020).

[22] M Fink and N Idriz, 'Effective Judicial Protection in the External Dimension of the EU's Migration and Asylum Policies?' cit. 117.

[23] G de Búrca and J Scott (eds), *Law and New Governance in the EU and the US* (Hart Publishing 2006).

[24] C Möllers, 'European Governance: Meaning and Value of a Concept' (2006) CMLRev 313.

[25] PJ Cardwell, 'Rethinking Law and New Governance in the European Union: The Case of Migration Management' (2016) ELR 1.

found in the ”crisis” literature.[26] The migration ”crisis” is one of the explanatory factors of these ‘normative transformations’ in EU external relations.[27] Authors observed an ”over-focus” on the external dimension[28] or ”hyperactivity”[29] linked to the Union's internal institutional crisis of 2015, despite the fact that there is no proven causality between the crisis, the increase in irregular migration to the EU and the resort to informalisation.[30]

In addition, much of EU law scholarship focuses on the impact of the informalisation process on the EU constitutional order.[31] Central issues range from the impact on the institutional asset of the EU, both in terms of distribution of powers[32] and of EU principles,[33] to the human rights compliance of informal deals.[34] Others have argued that pleading for the existence and the legality of the EU actors’ choice over informalisation would allow for the creation of a parallel universe, ”a parallel reality which favours pragmatism over some of the basic structural principles”.[35]

Among the most important consequences of the process of informalisation, there is the lack of democratic scrutiny and judicial accountability which surround informal agreements.[36] The idea that soft cooperation ”lacks something” is exemplified by the preference expressed by some scholars for the term ”de-formalisation” of the EU's ex-

[26] J-Y Carlier, F Crépeau and A Purkey, ‘From the European “Migration Crisis” to the Global Compact for Migration: A Political Transition Short on Legal Standards’ (2020) McGill Journal of Sustainable Development 1.

[27] RA Wessel, ‘Normative Transformations in EU External Relations: The Phenomenon of Soft International Agreement’ (2021) West European Politics 72.

[28] S Sarolea, ‘Asile et Union européenne face à la crise: d’une gestion interne à une gestion externe’ (2019) Revue québécoise de droit international 283.

[29] PJ Cardwell, ‘New Modes of Governance in the External Dimension of EU Migration Policy’ (2013) International migration 54.

[30] Costello explains causality as follows: “Containment contributed to the events styled as the 2015 refugee crisis in Europe, yet the crisis has generated a more intensified set of containment practices, also likely to backfire” in C Costello, ‘Overcoming Refugee Containment and Crisis’ (2020) German Law Journal 17.

[31] S Carrera, J Santos Vara and T Strik (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis* (Edward Elgar 2019); A Ott, ‘Informalization of EU Bilateral Instruments: Categorization, Contestation, and Challenges’ (2020) Yearbook of European Law 569.

[32] P García Andrade, ‘The Distribution of Powers Between the EU Institutions for Conducting External Affairs Through Non-binding Instruments’ (2016) European Papers europeanpapers.eu 115.

[33] C Molinari, ‘EU Readmission Deals and Constitutional Allocation of Powers’ cit. 15.

[34] M Giuffré and V Moreno-Lax, ‘The Raise of Consensual Containment: From “Contactless Control” to “Contactless Responsibility” for Migratory Flows’ in S Juss (eds), *The Research Handbook on International Refugee Law* (Edward Elgar 2019); V Moreno-Lax, *EU External Migration Policy and the Protection of Human Rights: In-depth Analysis* (European Parliament 2020).

[35] RA Wessel, ‘Normative Transformations in EU External Relations’ cit. 87.

[36] J Santos Vara, ‘Soft International Agreements on Migration Cooperation with Third Countries’ cit.; M Gatti, ‘The Gendarmes of Europe: Southern Mediterranean States and the EU’s Partnership Framework on Migration’ in F Ippolito and others (eds), *Bilateral Relations in the Mediterranean: Prospects for Migration Issues* (Edward Elgar 2020) 141.

ternal action in the field of migration and asylum.[37] In many words of Latin derivation, the prefix "de" indicates removal (*e.g.*, deportation) or deprivation (*e.g.*, deterrence), and it has mainly a negative value (*e.g.*, decreasing). According to Vitiello, the term proves more accurate than "in-formalisation".[38] In fact, in these diagnostic exercises, authors' views tend to converge towards the judgement that informal deals are poor copies of hard law and that informalisation is a worrisome trend in EU law-making.[39]

In this account of the process, it appears that informalisation is part of the Union's legal design of migration controls which increasingly reverts to out-of-sight negotiations to secure cooperation from third countries.[40] Surprisingly, as much as EU readmission policy is an area where informality has always existed, readmission cooperation is somehow an outlier of the EU externalisation strategy.[41] While externalisation mainly aims at migration prevention and is pursued through pre-emptive initiatives, readmission cooperation intervenes to correct the shortcomings of pre-emption. What the Union seeks is to reduce the numbers of foreigners illegally staying in the EU, individuals who have somehow "already" managed to circumvent the Union rules on international migration, either by overstaying their visa or the expiration date of their residence permits or by not securing one.

II. Informalisation, soft law and soft agreements: key concepts and definitions in the readmission policy field

Informalisation and soft law are not synonyms. As a normative transformation, informalisation is a process that concerns law-making, while soft law may be an output of the informalisation process. If informalisation is pursued in bilateral relations between the EU and third countries, its outcomes may be informal international agreements and soft international law. Since neither scholars nor Courts have offered a unanimous interpretation of what an informal agreement is, we deem it important to clarify what we

[37] 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 and N Vavoula (eds), *Securitising Asylum Flows* (Leiden 2020) 130.

[38] Treccani, preposition 'de' www.treccani.it.

[39] B Ryan, 'The Migration Crisis and the European Union Border Regime' in M Cremona and J Scott (eds), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (Oxford Scholarship Online 2019).

[40] T Gammeltoft-Hansen, 'International Cooperation on Migration Control: Towards a Research Agenda for Refugee Law' (2018) European Journal of Migration and Law 373.

[41] A definition of "EU externalisation" is provided by V Moreno Lax and M Lemberg-Pedersen: "European externalisation processes occur when European Member States, through bi-, multi- or supranational venues, complement policies of controlling cross-border migration into their territories with pre-emptive initiatives realising such control extra-territorially and/or through sub-contracting to actors and agencies other than their own". V Moreno-Lax and M Lemberg-Pedersen, 'Border-induced Displacement: The Ethical and Legal Implications of Distance-creation through Externalisation' (2019) Questions of International Law 9.

mean when we talk about informal agreements, if and how they differ from formal agreements and what are their main features.

II.1. Understanding formal and informal readmission agreements

In order to define what an informal deal is, it may be useful to recall what a fully-fledged international agreement is. The notion of "agreement" or "treaty" has a wide interpretation under international law regardless of its name or form.[42] As the language of treaties is a normative one, what matters the most is the intention to create legal obligations binding on the parties. Usually, fully-fledged international agreements envisage accountability mechanisms in case of violations of their provisions and in case of controversies, they can be brought before a court. Their negotiation and adoption require the involvement of Parliamentary Assemblies through either treaty ratification (*ex-post*) or authorisation procedures (*ex-ante*). In addition, it is usually required that treaties are made publicly available and officially published (in domestic or regional official journals).

For over a decade, the EU made extensive use of its external powers by fostering formal cooperation on readmission with countries belonging to the EU Neighbourhood.[43] Between 2000 and 2014, readmission cooperation underwent a formalisation phase with the adoption of 18 EURAs. The entry into force of an EURA was generally followed by the negotiations of an EU visa facilitation agreement, those being the two main binding instruments – fully-fledged EU international agreements – deployed for cooperation with third countries by the EU.[44] Almost all the EURAs in force include third-country nationals clauses which stipulate that third-country nationals and stateless persons who have transited through a country with whom the EU has concluded an EURA can be returned back to that country provided that a valid link with that country is established.[45]

On the contrary, informal or soft agreements or deals (we use the terms as synonyms) usually aim at establishing a series of commitments, but not under international law. Soft agreements do not create rights and obligations, but they create legitimate expectations upon the parties to comply in the application of the good faith principle in

[42] See art. 2(1) sub (a) of the Vienna Convention on the Law of Treaties.

[43] The European Neighbourhood Policy (ENP) was launched in 2004 and it governs the relations between the EU and 16 EU Southern Neighbours (Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, Palestine, Syria and Tunisia) and Eastern Neighbours (Armenia, Azerbaijan, Belarus, Georgia, the Republic of Moldova and Ukraine).

[44] So far, the EU has concluded EURAs with the following countries: Hong Kong (2004), Macao (2004), Sri Lanka (2005), Albania (2006), Russia (2007), Ukraine (2008), North Macedonia (2008), Bosnia and Herzegovina (2008), Montenegro (2008), Serbia (2008), Moldova (2008), Pakistan (2010), Georgia (2011), Armenia (2014), Azerbaijan (2014), Turkey (2014), Cape Verde (2014), Belarus (2020).

[45] E Carli, 'EU Readmission Agreements as Tools for Fighting Irregular Migration: An Appraisal Twenty Years on from the Tampere European Council' (2019) Freedom, Security & Justice: European Legal Studies 11.

international relations.[46] Usually, these agreements do not foresee the possibility of addressing a Court in case of controversies, therefore excluding formal accountability mechanisms under international law. Parliaments are often not involved in the negotiations and adoption of such deals (sometimes not even informed). Official publication is not compulsory.[47] Governments decide at their own discretion whether to make the content and, sometimes, the mere existence of a soft agreements public.[48]

In his 1991 landmark paper 'Why are some international agreements informal?', Lipson considers international agreements to be informal when "they lack the State's fullest and most authoritative *imprimatur*, which is given most clearly in treaty ratification".[49] In their broad empirical-based study on "informal international law-making", Pauwelyn, Wessel, and Wouters provide a complete definition of informality; similarly to Lipson, they consider an agreement to be informal when "it dispenses with certain formalities traditionally linked to international law".[50] However, according to the authors, these formalities may have to do with three distinct elements of international law-making: the output, the process, and the actors involved. Lipson and Pauwelyn agree that not all sorts of informal talks between public authorities at the international level amount to informal agreements or informal law-making. According to Lipson, "to be considered genuine agreements, they must entail some reciprocal promises or actions, implying future commitments".[51] In Pauwelyn's words, the output of informal international law-making "must be normative in that it steers behaviour or determines the freedom of actors".[52] It "may not, strictly speaking, be part of law but merely have legal effects or fit in the context of a broader legal or normative process".[53]

With regard to the output, international cooperation may be informal when it does not lead to a treaty but rather to a statement, declaration or even a more informal type of policy coordination. Output informality does not necessarily imply the lack of legally bind-

[46] V Chetail, *International Migration Law* cit.

[47] In the case of *Khlaifia and others v Italy*, the European Court of Human Rights acknowledged the consequences of informal cooperation: "the Court would note that the full text of that agreement had not been made public. It was therefore not accessible to the applicants, who accordingly could not have foreseen the consequences of its application. Moreover, the press release published on the website of the Italian Ministry of the Interior on 6 April 2011 merely referred to a strengthening of the border controls and the possibility of the immediate return of Tunisian nationals through simplified procedures. It did not, however, contain any reference to the possibility of administrative detention or to the related procedures". ECtHR *Khlaifia and others v Italy* App n. 16483/12 [15 December 2016] para. 102.

[48] M Gatti, 'The Right to Transparency in the External Dimension of the EU Migration Policy' cit. 97.

[49] C Lipson, 'Why are Some International Agreements Informal?' (1991) International Organization 498.

[50] J Pauwelyn, 'Informal International Law-making: Framing the Concept and Research Questions' in J Pauwelyn, RA Wessel and J Wouters, *Informal International Law-making: Mapping the Action and Testing Concepts of Accountability and Effectiveness* (Oxford University Press 2012) 15.

[51] C Lipson, 'Why are Some International Agreements Informal?' cit. 498.

[52] J Pauwelyn, 'Informal International Law-making' cit. 16.

[53] *Ibid*. 21.

ing character of the instrument as informal agreements can be binding or non-binding. Chetail stresses the importance of the distinction between the form and the substance of an instrument. He notes that, "in many cases, bother the form and substance [of soft law instruments] are devoid of legal value. [...] However, in other circumstances, the non-binding form of an instrument does not necessarily prejudice its binding content and *vice-versa*".[54] Although its legal nature remains open to discussion, the EU-Turkey statement, published in the form of a press release, is considered by some as a legally-binding treaty[55] and by others as capable of, at the very least, producing legal effects.[56] As for the process, international cooperation may be informal when it occurs "in a loosely organised network or *forum*", although this does not exclude that international law-making may take place in the context or under the auspices of a more formal organisation.[57] As to the actors involved, international cooperation may be informal when it does not engage traditional diplomatic actors (heads of State or Government, foreign Ministers) but other Ministries, domestic regulators, independent or semi-independent agencies, etc. In addition, private actors may also participate in informal law-making.

II.2. Informality in readmission agreements

As for readmission policy, since 2015, the golden age of EURAs has been replaced by a phase of ever-growing informalisation. This phase is characterised by both the proliferation of atypical instruments as well as the diversification and multiplication of the countries involved in external relations on migration with the Union due to their migration salience as countries of migrant origin or transit. In practice, when third countries cooperate informally with the Union and its Member States on readmission, they provide assistance in the identification of their own nationals, they accept return flights and operations, they issue their own travel documents or accept EU travel documents and *laissez-passer*.[58] The three-fold definition of informality proposed by Pauwelyn, Wessel and Wouters can apply to international migration cooperation, and more specifically, readmission, at both the bilateral (interstate) and EU level.

[54] V Chetail, *International Migration Law* cit. 284.

[55] M den Heijer and T Spijkerboer, 'Is the EU-Turkey Refugee and Migration Deal a Treaty?' (2016) EU Law Analysis eulawanalysis.blogspot.com; G Fernandez Arribas, 'The EU-Turkey Statement, the Treaty-Making Process and Competent Organs – Is the Statement an International Agreement?' (2017) European Papers europeanpapers.eu 6.

[56] O Corten and M Dony, 'Accord politique ou juridique: quelle est la nature du "machin" conclu entre l'UE et la Turquie en matière d'asile?' (2016) EU Migration Law.

[57] J Pauwelyn, 'Informal International Law-making' cit. 17.

[58] For instance, Joint Way Forward on migration issues between Afghanistan and the EU (2 October 2016) asyl.at. para. 3, it is written that "joint return flights will be carried out in the framework of this declaration". In the MoU between Italy and Sudan, it is written (*sub* k) that Sudan cooperates in the "identification and repatriation of its nationals present in the territory of Italy in an irregular situation with respect to immigration legislation". Both instruments are analysed and referenced below.

In terms of output, informal cooperation on migration, including on readmission, has materialised in a variety of instruments that differ from international treaties in their form and denomination. At the bilateral level, we find instruments such as Memoranda of Understanding (MoUs), exchanges of letters, administrative and operational protocols, etc.[59] At the EU level, next to fully-fledged EU readmission agreements, the EU and third countries have concluded several informal agreements which, in principle, are not governed by international law.[60] Among those, there are six informal readmission agreements whose only purpose is the regulation of readmission, and several multi-purpose informal agreements, which regulate different aspects of migration besides readmission cooperation.[61] According to the nomenclature of the European Commission, informal "non-binding readmission arrangements" (known as Standard Operating Procedures, Good Practices on Identification and Return, Admission Procedures or Joint Way Forward) fulfil the same function as EU readmission agreements. However, their text is not always accessible, and it is often purposely kept secret for reasons deemed protective of EU international relations.[62] Other than in informal readmission arrangements, readmission objectives have been integrated into different multi-purpose, proclaimed non-binding forms of partnership such as Mobility Partnerships, the EU-Turkey Statement and the Migration Compacts.[63] Even if they are not fully-fledged international agreements, all these instruments are meant to generate reciprocal commitments upon the parties and, at the very least, produce legal effects.[64]

[59] A Spagnolo, 'The Conclusion of Bilateral Agreements and Technical Arrangements for the Management of Migration Flows: An Overview of the Italian Practice' (2018) ItYBIL 209; AM Calamia, 'Accordi in forma semplificata e accordi segreti: questioni scelte di diritto internazionale e di diritto interno' (2020) Ordine internazionale e diritti umani 1.

[60] These are: the EU-Gambia Good Practices on Identification and Return, entered into force on 16 November 2018, the EU-Côte d'Ivoire Good Practices, in force since October 2018, the EU-Ethiopia Admission Procedures, agreed on 5 February 2018, the EU-Bangladesh Standard Operating Procedures, agreed in September 2017, the EU-Guinea Good Practices, in force since July 2017 and the Joint Way Forward with Afghanistan of 2 October 2016. For an analysis, J Santos Vara and L Pascual Matellán, 'The Informalisation of EU Return Policy' cit. 37.

[61] Communication COM(2021) 56 final from the Commission of 10 February 2021 on enhancing cooperation on return and readmission as part of a fair, effective and comprehensive EU migration policy, Brussels, 6.

[62] Informal agreements are often the object of request for access to EU documents pursuant to Regulation 1049/2001; the EU Institutions often deny access to informal agreements referring to one of the exceptions to disclosure allowed for by art. 4(1), namely "the protection of international relations" Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, 43.

[63] S Carrera, 'On Policy Ghosts: EU Readmission Arrangements as Intersecting Policy Universes' in S Carrera and others (eds), *EU External Migration Policies in an Era of Global Mobilities*: *Intersecting Policy Universes* (Brill Nijhoff 2018).

[64] By way of example, the EU-Turkey Statement led to a reform of the Greek Law on Asylum n. 4375 of 2016 on the organisation and operation of the Asylum Service, the Appeals Authority, the Reception and Identification Service, the establishment of the General Secretariat for Reception, the transposition into Greek legislation of the provisions of Directive 2013/32/EC [Greece], 3 April 2016, refworld.org.

With regard to the process, international law-making in the field of migration may not always take place within traditional *fora* and may not follow standard procedures, including the involvement of the European or national Parliaments. The procedure for the conclusion of international treaties by the EU, which covers EURAs, is subject to clear procedural rules enshrined in primary law (art. 218 TFEU) and accompanied by multiple safeguards, including a high degree of transparency and a clear division of roles and competences among the EU institutions. When concluding soft deals, negotiations do not follow formal procedures and may disregard constitutional safeguards. Even if formal procedures are not followed, the prerogatives of each institution in the field of readmission should be respected and "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)".[65]

As for the actors involved, in the field of migration, it has become common practice for home affairs Ministers and heads of Police to take part in informal negotiations held at the interstate level.[66] At the EU level, the staff of EU agencies such as Frontex may participate in informal negotiations along with representatives of the EU institutions and the Member States, as in the case of Frontex Working Arrangements with third countries.[67] In addition, international organisations such as the International Organization for Migration (IOM) and United Nations High Commissioner for Refugees (UNHCR) may also play a relevant role in informal policy-making.[68] By way of example, the Union has "established a partnership to organise Assisted Voluntary Returns and reintegration in Sub-Saharan Africa" with the IOM and it has "a closer cooperation" with UNHCR.[69]

II.3. Functions of soft law in EU readmission policy

As a process, informalisation symbolises a development of law-making, while soft law is a development of the law itself. A functional classification of soft law which became popular in EU law scholarship is the distinction among "pre-law", "law-plus", and "para-law" functions of soft law.[70] Soft law with pre-law functions consists of those acts which serve as an impulse for hard legislation. The example of Moldova is illustrative of the EU

[65] C Molinari, 'EU Readmission Deals and Constitutional Allocation of Powers' cit. 29.

[66] This is, for instance, the cited case of the MoU between Italy and Sudan.

[67] For example, in one of the progress reports on the Migration Partnership Framework, it is stated that "negotiations between the European Border and Coast Guard Agency and the Senegal authorities on improved working arrangements for closer cooperation have also been launched". Communication COM(2017) 205 from the Commission and EEAS of 2 March 2017, 3rd progress report on the implementation of the Migration Partnership Framework.

[68] M Geiger and A Pécoud, 'International Organisations and the Politics of Migration' (2014) Journal of Ethnic and Migration Studies 865.

[69] Communication COM(2016) 792 from the Commission of 8 December 2016, 4th progress report on the implementation of the EU-Turkey Statement, .

[70] L Senden, *Soft Law in European Community Law* (Oxford University Press 2004) 121.

unwritten requirement that a third country intending to cooperate with the EU on migration must sign an EU readmission agreement first, as only afterwards will its nationals (possibly) benefit from a visa suspension mechanism.[71] The soft instrument of the Mobility Partnership, a non-binding agreement, has led to the conclusion of an EURA with Moldova, and it has absolved the role of "pre-law" in view of the EURA.[72]

Law-plus functions of soft law complete the interpretation of existing law. Closely linked to readmission, the EU return policy is an example of this function whereby soft law interacts with hard law. EU and national actors who implement the EU Return Directive (2008/115) are also, in theory, bound by the reading of the directive provided for in soft non-legal documents, such as the EU Return Action Plan or the Return Handbook.[73] However, the European Court of Justice has recently clarified in the ruling *Westerwaldkreis* that the scope of the Return Directive cannot be altered by the Return Handbook, adopted through a Commission recommendation which has no binding effect.[74]

Finally, soft law assumes a para-law function as a substitute for non-available hard law because of divergences of views on the desirability of hard law and its content. Due to informalisation, law-making procedures can lose certain qualities, such as legal certainty, transparency, and democratic legitimacy. Informal readmission agreements concluded by the EU with several third countries could be an example of this para-law function.

II.4. Main features of informal readmission agreements

Informal agreements are characterised by a number of specific features, which make them more desirable to policy-makers.[75] These are flexibility, which allows for adaptation to changing conditions and swift re-negotiation; the possibility for rapid negotiation/adoption and immediate implementation, as they do not require parliamentary ratification or authorisation procedures, with no time lapse between signature and entry into force; reduced publicity and visibility (if not complete secrecy), as there is no

[71] L Laube, 'The Relational Dimension of Externalizing Border Control: Selective Visa Policies in Migration and Border Diplomacy' (2019) Comparative Migration Studies 29.

[72] S Brocza and K Paulhart, 'EU Mobility Partnerships: A Smart Instrument for the Externalization of Migration Control' (2015) European Journal of Futures Research 15; F Tittel-Mosser, 'The Unintended Legal and Policy Relevance of EU Mobility Partnerships' (2018) European Journal of Migration and Law 314.

[73] European Commission Recommendation C(2015) 6250 of 1 October 2015 establishing a "Return Handbook" to be used by Member States' competent authorities when carrying out return related tasks; P Slominski and F Trauner, 'Reforming Me Softly – How Soft Law Has Changed EU Return Policy since the Migration Crisis' (2020) West European Politics 93. According to the authors, the drawback of this kind of soft law is that, by exploiting legal gaps in hard, ambiguous law, it adds a new policy layer for its interpretation.

[74] Case C-546/19 *Westerwaldkreis* ECLI:EU:C:2021:432 para. 47; see J-Y Carlier and E Frasca, 'Droit européen des migration' (2022) Journal de droit européen 145.

[75] C Lipson, 'Why are Some International Agreements Informal?' cit.; J-P Cassarino, 'Cooperation on Readmission and its Implications' in J-P Cassarino (ed.), *Unbalanced Reciprocities: Cooperation on Readmission in the Euro-Mediterranean Area* (Middle East Institute 2010).

publication obligation. It follows that "the most sensitive and embarrassing implications of an agreement remain nebulous or unstated for both domestic and international audiences, or even hidden from them".[76]

Often, a partial account of the progress in external relations (ongoing negotiations, conclusion of new agreements) is provided for in non-legal documents. In the absence of official negotiating mandates of the European Commission, it is not possible to discern if the EU has engaged in formal relationships with third countries and, most importantly, what is the content of those. The exact scope of informal negotiations – and sometimes the mere existence of agreements – can only be deduced *a posteriori* from non-legal documents.

The case of the Standard Operating Procedures (SOPs) with Mali well illustrates the issues of legal certainty that arise from informal negotiations. In one of the progress reports on the Migration Partnership Framework, it was reported that "Mali has worked with the EU in view of the return of persons irregularly staying in the Union on the basis of Standard Procedures finalised between the two parties respecting their mutual obligations".[77] It was reported that the Dutch Minister for Foreign Affairs signed a "Joint Declaration" with Mali on the return of Malian migrants on behalf of the EU. However, according to Mali's Minister for Foreign Affairs, no such agreement existed.[78] Through the mechanism of Parliamentary questions, Judith Sargentini asked the former High Representative of the Union for Foreign Affairs and Security Policy, who also denied the existence of the agreement.[79]

The circumvention of the formalities traditionally linked to international law is what makes informal agreements more desirable and effective. Lipson summarises the main reasons for decision-makers to choose informal agreements as follows: "1) the desire to avoid formal and visible pledges, 2) the desire to avoid ratification, 3) the ability to renegotiate or modify as circumstances change, or 4) the need to reach agreements quickly".[80] However, it is precisely due to the circumvention of such formalities that soft agreements raise concerns in terms of the rule of law both at the national and the EU

[76] C Lipson, 'Why are Some International Agreements Informal?' cit. 501.

[77] Communication COM(2016) 960 final from the Commission and EEAS of 14 December 2016, 2nd progress report on the Migration Partnership Framework, Strasbourg, 6: "This strengthened cooperation has been enshrined in the form of a Joint Declaration that was issued in the occasion of the visit of the Dutch Minister for Foreign Affairs to Mali on behalf of the HRVP on 10-11 December 2016".

[78] J Sargentini, Question for written answer of 19 December 2016 to the Commission (Vice-President/High Representative), 'VP/HR — EU-Mali migration' E-009622-16.

[79] We report here an excerpt of the answer E-09622/201of the former High Representative of the Union for Foreign Affairs and Security Policy Federica Mogherini: "[...] contrary to media reports, no bilateral agreement on return and readmission has been signed with Mali. The EU's cooperation with Mali on this issue is based on article 13 of the Cotonou Agreement signed in the year 2000" (30 March 2017).

[80] C Lipson, 'Why are Some International Agreements Informal?' cit. 501.

levels.[81] Informality is usually associated with weaker forms of Parliamentary oversight and reduced accountability checks.[82] This has led scholars to question the role of both national and the European Parliaments *vis-à-vis* international cooperation on migration.[83] The same is true for judicial controls and the role of both the European Court of Justice and domestic Courts *vis-à-vis* EU informal, non-binding agreements.[84]

III. The intersection between EU readmission policy and the informalisation trend

Establishing formal legal relations on readmission with the EU is not always in the interest of third countries. If third countries are not willing to cooperate formally with the EU, the informal path will be tested. In the words of the European Commission, "with some partners, the EU engaged in formal dialogues or negotiations on legally binding instruments while with others more informal tools were tested, such as Standard Operating Procedures, technical missions, or identification missions".[85] However, third countries' compliance rates with both formal and informal readmission agreements remain modest and constant throughout the years.[86]

III.1. Lack of conditions leading to hard law

In the absence of the conditions which can lead to the conclusion of an EURA, the EU and its Member States have exercised their normative influence to achieve the same result (readmission cooperation) with different, atypical means, often resulting in softer forms of cooperation, including adapting "programming in terms of bilateral relations and funding to achieve our objectives".[87]

[81] C Molinari, 'The EU and its Perilous Journey Through the Migration Crisis: Informalisation of the EU Return Policy and Rule of Law Concerns' (2019) ELR 824.

[82] K Eisele, 'The EU's Readmission Policy' cit. 135; R Wessel, 'Normative Transformations in EU External Relations' cit.

[83] P García Andrade, 'The Role of the European Parliament in the Adoption of Non-Legally Binding Agreements with Third Countries' in J Santos Vara and S Sánchez Rodríguez-Tabernero (eds), *The Democratisation of EU International Relations through EU Law* (Routledge 2019) 115; N Reslow, 'Human Rights, Domestic Politics, and Informal Agreements: Parliamentary Challenges to International Cooperation on Migration Management' (2019) Australian Journal of International Affairs 546; E Olivito, 'The Constitutional Fallouts of Border Management Through Informal and Deformalised External Action: the Case of Italy and the EU' (2020) Diritto, Immigrazione e Cittadinanza 114.

[84] J Santos Vara, 'Soft International Agreements on Migration Cooperation with Third Countries' cit. 21.

[85] Communication COM(2017) 350 final from the Commission and EEAS of 13 June 2017, 4th progress report on the Migration Partnership Framework Strasbourg.

[86] P Stutz and F Trauner, 'The EU's "Return Rate" with Third Countries: Why EU Readmission Agreements do not Make much Difference' (2021) International Migration 1.

[87] Communication COM(2016) 385 final from the Commission of 7 June 2016 on Communication on establishing a new Partnership Framework with third countries under the European Agenda on Migration, 6.

The conditions that can hinder the signature of an EU readmission agreement include, among others: the lack of third State consent, lack of incentives for third countries in exchange for cooperation (*e.g.*, future membership, visa liberalisation), fear of loss of sovereignty, and unpopularity of readmission with a country's own constituency.[88] In an internal policy document, the EU clearly stated that among the challenges encountered against the conclusion of a readmission agreement, there is "the inclusion of a third-country national clause or the acceptance by the partner country of EU travel documents for return".[89] In fact, many countries strongly oppose third-country national clauses. For example, the European Commission obtained its first negotiating mandate for securing an EURA with Morocco in the year 2000.[90] No agreement has been finalised so far, despite several rounds of negotiations held in more than two decades. The case of Morocco reveals that, when the incentives are low, formal EU readmission agreements are unlikely to be secured.

III.2. The quest for effectiveness in return policy

In recent times, the EU focused on the link between return policy (mainly an internal policy) and readmission (an external policy) to make return implementation "more effective" by fostering legal relations with third countries, both formally and informally. Effectiveness justifies an increasing and pervasive recourse to atypical instruments and the use of "a mix of positive and negative incentives and of all leverages and tools" to make third countries cooperate.[91] Whether the agreements are formal or informal, it does not matter as long as "they work".[92]

In the two audits by the European Court of Auditors concerning EU readmission cooperation with third countries, "effectiveness" and "success" of readmission agreements are uncritically measured by the Court in terms of the effective return rate of third-country nationals, while other important factors, including lack of State consent, human rights compliance or lack of incentives are not taken in consideration[93]. Most of the ob-

[88] N Coleman, *European Readmission Policy: Third Country Interests and Refugee Rights* (Nijhoff 2009).

[89] Communication COM(2017) 350 final from the Commission and EEAS of 13 June 2017, 4th progress report on the European Partnership Framework, Strasbourg.

[90] Negotiations with Morocco have been on and off for the last twenty years. The example of Morocco is widely commented: T Abderrahim, 'A Tale of Two Agreements: EU Migration Cooperation with Morocco and Tunis' (2019) PapersIEMed 7; S Carrera and others, 'EU-Morocco Cooperation on Readmission, Borders and Protection: A Model to Follow?' (2016) CEPS 87; N el Qadim, *Le gouvernement asymétrique des migrations. Maroc/Union européenne* (Dalloz 2015).

[91] Communication COM(2016) 385 final cit.

[92] Communication COM(2017) 350 final cit.

[93] European Court of Auditors, Special report 17/2021 'EU Readmission Cooperation with Third Countries: Relevant Actions Yielded Limited Results'; European Court of Auditors, Special report 24/2019 'Asylum, Relocation and Return of Migrants: Time to Step up Action to Address Disparities Between Objectives and Results'.

stacles encountered in readmission cooperation are practical, such as weak enforcement of the obligation to readmit (in the case of formal agreements) or low compliance rates with the commitments taken informally (in the case of informal agreements). Even when fully-fledged readmission agreements are in place, implementation can be ineffective.[94] This gap between the rhetoric of effectiveness and the implementation of readmission cooperation in practice is particularly wide in the EU's external migration relations.

IV. Informalisation and conditionality

In this and the next section (section V), while discussing the legal nature of informal agreements, we focus on two issues: the interplay between informal agreements and conditionality and the use of informal agreements to return asylum seekers. We centre our discussion on these two issues (among other problematic aspects of informalisation in the field of readmission) as they show in an evident manner the most controversial consequences of informal readmission agreements, especially in terms of human rights protection. Such consequences are borne by those third-country nationals who see their ability to legally access the EU territory (with a valid visa) or their right to seek protection in the EU frustrated due to the informal turn of the EU readmission policy.

IV.1. Informal cooperation on readmission and conditionality mechanisms

In general terms, conditionality refers to "the quality of being subject to one or more conditions or requirements being met".[95] The EU often imposes political conditionality to development aid receiving States whereby economic assistance is conditioned upon progress in democratisation, good governance and human rights compliance.[96] The same strategy is pursued through EU membership conditionality, a particular type of legal influence that the Union exercises on the aspiring Member States in the larger context of the ENP.[97] More recently, internally to the EU, the concept of conditionality has been at the centre of the negotiations and, later, the adoption of the new conditionality mechanism for the protection of the Union budget.[98] The regulation envisages the measures to be

[94] P Stutz and F Trauner, 'The EU's "Return Rate" with Third Countries' cit. 1.

[95] Oxford English Dictionary, 'conditional' www.oed.com.

[96] O Morrissey, 'Conditionality and Aid Effectiveness Re-Evaluated' (2004) Development Financing, The World Economy 19.

[97] The conditions that must be fulfilled by candidate States to join the EU are spelled out in the Copenhagen Criteria.

[98] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, 1–10. Under the mechanism, various types of measures (*e.g.*, suspension of payments, economic advantages or commitments, etc.) are dependent on certain conditions identified as "breaches" of the principles of the rule of law (*e.g.*, fraud, corruption, etc.).

taken where breaches of the principles of the rule of law in an EU Member State affect or seriously risk affecting the financial management of the EU budget.[99]

As for EU external migration law, conditionality can be both positive (obligation to do something that will trigger a reward) or negative (obligation to do something which, if not done, will trigger a sanction), in "a fine balance of incentives and pressures [that] should be used to enhance the cooperation of third-countries on readmission and return".[100] In the words of the European Council, the "more for more" principle (another name for conditionality) "must be applied more broadly and actively used in a concerted way at both EU and national levels, linking improved cooperation on return and readmission to benefits in all policy areas".[101] However, more recently, conditionality has meant that "the greater the success in managing migration, the larger the benefits that partner countries will receive from the EU" (better trade conditions, more development aid, etc.).[102] As Lemberg-Pedersen observes, "powerful EU states have conditioned less powerful states to boost and expand their border control".[103] In most cases, under readmission cooperation, conditionality mechanisms are there to compensate for the lack of effectiveness of formal obligations (in the case of EURAs) or informal commitments (in the case of informal readmission agreements).

The kind of conditionality that emerged in recent migration cooperation differs from traditional forms of conditionality in EU foreign policy. The very essence of conditionality (better external relations and support in exchange for democratisation and human rights compliance) is eclipsed by migration control objectives and, in particular, by the search for effectiveness in the EU return policy at any cost. Two examples demonstrate this trend, the undertaking of informal cooperation on readmission with countries with poor human rights records and the instrumental use of visa policy.

a) Human rights conditionality neglected for migration control purposes

While EU conditionality is usually associated with human rights performances, conditionality linked to migration control and readmission completely bypasses a third country's human rights records. Since the main objective of the Union and its Member States is to make the EU return policy effective, it becomes irrelevant if foreign relations on migration are fostered with third countries which do not effectively respect human rights (nor protect their own nationals). Moreover, readmission cooperation is often carried out in the absence of formal readmission agreements (EU or bilateral) on the

[99] *Ibid*. art. 4.

[100] European Council Conclusions of 8 October 2015 on the future of the return policy.

[101] *Ibid*.

[102] S Poli, 'The Integration of Migration Concerns into EU External Policies: Instruments, Techniques and Legal Problems' (2020) European Papers europeanpapers.eu 71.

[103] M Lemberg Pedersen, 'Effective Protection or Effective Combat? EU Border Control and North Africa' in P Gaibazzi and others (eds), *EurAfrican Borders and Migration Management: Palgrave Series in African Borderlands Studies* (Palgrave Macmillan 2017) 37.

basis of soft agreements or practical cooperation which significantly weakens the scope of human rights protection.

Irrespective of any assessment of the human rights situation in the cooperating country, the costs of informal cooperation are exemplified by the case of *M.A. v. Belgium*.[104] The case concerns the deportation of a Sudanese national who was apprehended without documents by the Belgian Police and detained pending removal, despite an order to suspend the measure. The Belgian authorities organised an identification mission from Sudan for the purpose of deportation, thus aggravating the applicant's risk under art. 3 of the European Convention on Human Rights.[105] The European Court of Human Rights considered that identification missions by the country of origin's authorities – with a view to issuing travel documents to its nationals – are not problematic *per se*. However, the organisation of a meeting between M.A. and the authorities of Sudan with a view to positively identify him and issue documents for his return was deemed unlawful because it was not supported by sufficient procedural guarantees.[106]

Parallel cases of informal – and secret – cooperation between EU countries and Sudan at the expense of individuals can be drawn, as witnessed by the police agreement on readmission between Italy and Sudan.[107] Similar questions to those in the case of M.A. (*e.g.*, the lawfulness of detention, treatment of applicants during their arrest, lack of effective domestic remedy for the complaints) were raised in the pending cases of *A.E. and T.B. v Italy*, which concern four Sudanese nationals arrested at the French-Italian border, transferred to the Hotspot of Taranto and subsequently placed on a flight to Sudan.[108]

The case of Sudan is not isolated. However, despite the possible serious breaches of procedural guarantees, informal cooperation is rarely the object of judicial scrutiny. In the context of cooperation on readmission, when there are no fully-fledged readmission agreements in place, cooperation is left to informal, non-public and non-transparent agreements, often between the police authorities of the two countries involved in deportations. As recently suggested by the European Parliament, a human

[104] ECtHR *M.A. v Belgium* App n. 19656/18 [27 October 2020]. For a case note, see: E Frasca, '*M.A. v. Belgium*: the (in)voluntary Return of a Sudanese Migrant and the Dangers of Informal Migration Cooperation with Third Countries' (3 December 2020) Strasbourg Observers strasbourgobservers.com.

[105] *Ibid*. paras 106-112.

[106] The mission took place before a genuine assessment of the applicant's protection needs. He was not informed in advance about the meeting, and he was left alone with the Sudanese authorities during the interview. Even if the Aliens Office agent was present, it is uncontested that the officer was not in proximity of the applicant during the whole duration of the interview and that he was not fluent in Arabic, the language in which the interviews had been conducted.

[107] The Italy-Sudan MoU for the fight against crime, border management, migration control and repatriation, signed on 3 August 2016, has not been officially published. The text of the agreement is available at asgi.it.

[108] ECtHR *A.E. and T.B and others v Italy* App n. 18911/17, n. 18941/17 and n. 18959/17 [24 November 2017].

rights impact assessment should be undertaken prior to the conclusion of an agreement with a third country on readmission – both formal and informal – and human rights considerations should accompany the whole stages of the deportation procedure.[109] Although human rights issues may also arise in the case of formal agreements, the protection of human rights is lessened by informal agreements as democratic scrutiny over their adoption as well as implementation is, *de facto*, hindered and no judicial protection is available. At the EU level, in the case of formal negotiations, the European Parliament can question the conclusion of readmission agreements because of their insufficient reference to human rights. This was the case of the EURAs with Pakistan.[110] The same holds true for domestic Parliaments in bilateral agreements.

b) Visa policy (punitive) conditionality

The simple fact that the majority of EU readmission agreements have been negotiated together with EU visa facilitation agreements is a form of positive conditionality.[111] In exchange for readmission cooperation, the EU can offer the easing of the Schengen visa regime, which eventually allows the circular mobility of nationals of those countries involved in readmission cooperation with the EU through visa suspension mechanisms or liberalisation.[112] The more a country is considered by the Union a "privileged" and "reliable" partner, the more it will be "tested" in terms of its ability to apply EU legislation (*acquis*).[113] In fact, in order to benefit from visa liberalisation, after having signed an EU readmission agreement, third countries agree to adopt visa rules borrowed from the EU legal order.

On the contrary, negative conditionality in visa policy emerged when an official legal mechanism was included in the Visa Code in 2019.[114] The newly added art. 25*a* on "cooperation on readmission" turns into hard law the informal trend to use visa policy as leverage for cooperation on readmission. In practice, this provision creates hierarchies

[109] European Parliament Resolution 2116(INI) of 19 May 2021 on human rights protection and the EU external migration policy.

[110] European Parliament Briefing of April 2015 on EU Readmission Agreements Facilitating the Return of Irregular Migrants.

[111] The European Commission itself recognises that "negotiating a Visa Facilitation Agreement in parallel with a readmission agreement provides tangible incentives to third countries to cooperate on readmission". Communication COM(2015) 453 from the Commission of 9 September 2015 on EU Action Plan on return, 14.

[112] For instance, holders of biometric passports from Albania, Bosnia and Herzegovina, North Macedonia, Montenegro, Serbia, Ukraine, Moldova and Georgia are exempted from the Schengen visa for short-term stays in the EU.

[113] 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' (2010) European Journal of Migration and Law 45.

[114] Regulation (EU) 1155/2019 of the European Parliament and of the Council of 20 June 2019 amending Regulation (EC) 810/2009 establishing a Community Code on Visas (Visa Code) PE/29/2019/REV/1 [2019], 25–54.

between partner countries "depending on the level of cooperation on the readmission of irregular migrants".[115]

The Commission yearly evaluates the performance of the third countries in terms not only of readmission cooperation but of the "overall migration relations" with the Union. The assessment is based on indicators such as the number of return decisions issued by the Member States, the number of actual forced returns, the number of readmission requests accepted by the third country, as well as the level of practical cooperation in the different stages of the return procedure. Several articles of the Visa Code "shall not apply to applicants" (meaning: individuals) who are nationals of the third country that is "not cooperating sufficiently" (meaning: the Government).[116] In other words, the provision makes the conditions for issuing Schengen visas stricter for the nationals of those countries which fail to cooperate with the EU on migration in general and readmission in particular.[117] In 2021, the mechanism was applied to The Gambia; the first country judged to cooperate insufficiently on readmission.[118] The "more for more" approach has turned into a "less for less" approach.

This kind of conditionality is far from the political conditionality in EU foreign relations, which should stimulate democracy, the rule of law compliance and human rights. It is a form of punitive conditionality which directly impacts individual applicants who have to bear the consequences of non-sufficient cooperation of their Governments with the Union. In practice, applicants will be subject to higher visa fees, will have to present additional documents for their visa application and can experience slower visa procedures. The provision of art. 25(a) of the Visa Code is also likely to affect the relationship between the State concerned and its own nationals, as in many countries, readmission remains a controversial topic. Conditionality acquires a coercive dimension as the EU exercises undue pressure on third States to convince them to enforce readmission obligations.

V. The disregard for human rights in readmission cooperation

In the context of the 2015 migration "crisis", characterised by tensions among Member States on how to share equitably the responsibility for asylum seekers entering the EU territory, a pragmatic convergence was found in the cooperation with third countries. Since then, the EU and its Member States have been increasingly attempting to out-

[115] Art. 25(a) of Regulation (EC) 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas Latest consolidated version (2 February 2020).

[116] *Ibid*.

[117] S Barbou Des Places, 'Le code des visas, nouveau "levier"de la politique d'éloignement des étrangers en situation irrégulière' (2020) Revue trimestrielle de droit européen 127; E Guild, 'Amending the Visa Code: Collective Punishment of Visa Nationals?' (2019) EU Migration Law; S Peers, 'The Revised EU Visa Code: Controlling EU Borders From a Distance' (2019) EU Law Analysis eulawanalysis.blogspot.com.

[118] Decision 1781/2021/EU of the Council 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, 124.

source to third countries the responsibility not only for border and migration control but also for readmitting asylum seekers, examining asylum applications, and providing reception and protection to forced migrants. Thus, the EU has moved from the externalisation of border control to the externalisation of asylum management, promoting the shifting – rather than sharing – of the "asylum burden" to third countries.

This additional externalisation objective is mainly pursued through recourse to informal agreements. While formal (bilateral and EU) readmission agreements can only apply to third-country nationals irregularly present on the EU territory and can never apply to asylum seekers, informal multi-purpose agreements are vaguer in their wording and tend to associate different legal statuses – including potential beneficiaries of international protection – to a single "catch-all" category of migrants not having the right to enter the EU.[119] Olivito notes the striking language of the EU-Turkey Statement, where "no distinction is drawn between migrants, refugees and asylum seekers, as the levelling expression of irregular migration is preferred".[120] This wording reflects an expansion *ratione personae* of the scope of informal readmission deals to include asylum seekers along with unauthorised migrants. The EU-Turkey Statement[121] and the Joint Way Forward on migration issues between Afghanistan and the EU[122] (recently renewed)[123] are informal agreements exemplifying this expansion. Indeed, these instruments do not aim at regulating (and facilitating) the readmission of irregular migrants but they target primarily asylum seekers.

V.1. Readmitting failed asylum seekers to their war-torn country of origin

Signed in October 2016, the Joint Way Forward on migration issues between Afghanistan and the EU (JWF) regulates the readmission of Afghan nationals – rejected asylum seekers – from the EU.[124] Even if it is not in itself illegitimate to repatriate an asylum seeker whose application has been rejected – provided that all legal safeguards have been guaranteed – an agreement that aims at accelerating deportations towards a country such as Afghanistan is highly controversial. In fact, it could lead to breaches of the *non-refoulement* principle if we consider the security situation in the country at the time when

[119] P Cardwell, 'Tackling Europe's Migration "Crisis" through Law and "New Governance"' (2018) Global Policy 67; A Palm, 'The Italy-Libya Memorandum of Understanding: The Baseline of a Policy Approach Aimed at Closing all Doors to Europe?' (2017) EU Migration Law.

[120] E Olivito, 'The Constitutional Fallouts of Border Management Through Informal and Deformalised External Action' cit.

[121] European Council, EU-Turkey Statement, press release of 18 March 2016.

[122] Joint Way Forward on migration issues between Afghanistan and the EU (02 October 2016) asyl.at.

[123] Joint Declaration on Migration Cooperation between Afghanistan and the EU (26 April 2021) statewatch.org.

[124] C Warin and Z Zheni, 'The Joint Way Forward on Migration Issues between Afghanistan and the EU: EU External Policy and the Recourse to Non-Binding Law' (2017) Cambridge International Law Journal 143.

it was signed,[125] as well as after the Taliban took over the country in August 2021.[126] Furthermore, the JWF explicitly opens up to the possibility of the repatriation of Afghan unaccompanied minors and other vulnerable groups, including single women, elderly and seriously ill people (although providing assistance).[127] In doing so, the agreement sets out a practice that EU countries rarely had (if ever) implemented before.

In April 2021, the EU and Afghanistan signed a Joint Declaration on Migration Cooperation (JDMC), a renewed informal deal reiterating the purpose to facilitate "the return of irregular migrants", a category that explicitly includes rejected asylum seekers.[128] Similarly to its predecessor, despite its name, the agreement does not cover the various aspects relating to migration and mobility between the EU and Afghanistan but rather focuses exclusively on supporting and increasing deportations to Afghanistan. According to NGOs, compared to the JWF, the JDMC further reduces protection safeguards for individuals, particularly vulnerable groups (*e.g.*, by narrowing the concept of a family unit and the definition of seriously ill people), and it introduces a set of measures aimed at making it easier for the Member States to deport people to Afghanistan at a time of increasing instability.[129]

V.2. Pushing back asylum seekers to a third country deemed "safe"

The EU-Turkey Statement signed in March 2016 regulates the readmission of all migrants and asylum seekers who cross over from Turkey to the Greek islands – a majority of them being Syrian and Afghan asylum seekers.[130] The implementation of the agreement targets and actually affects mainly those who try to reach the EU to seek protection. Based on the controversial assumption that Turkey is a "safe" country for them, the readmission (or actually the push-back) to Turkey of persons who wish to apply for international protection in the EU is made possible and deemed compatible with EU and international law.[131] This assumption is grounded on the application of the concepts of a safe third country (STC) or first country of asylum (FCA) as set out, respective-

[125] Joint Commission-EEAS non-paper on enhancing cooperation on migration, mobility and readmission with Afghanistan of 3 March 2016, 6738/16; EASO, 'Afghanistan Security Situation', Country of Origin Information Report' (2016); EASO, 'Individuals targeted by armed actors in the conflict', Afghanistan Country Focus (2017).

[126] EASO, Afghanistan Security Situation Update. Country of Origin Information Report (2021); EASO, Afghanistan Country Focus. Country of Origin Information Report (2022).

[127] Joint Way Forward on migration issues between Afghanistan and the EU cit. paras 4-5.

[128] Joint Declaration on Migration Cooperation between Afghanistan and the EU cit. para. 1.

[129] European Council on Refugees and Exiles (ECRE), 'The JDMC: Deporting People to the World's least peaceful country' (2021) ecre.org.

[130] United Nations High Commissioner for Refugees (UNHCR), *Operational Portal – Refugee Situations, Mediterranean Situation* data2.unhcr.org.

[131] J Poon, 'EU-Turkey Deal: Violation of, or Consistency with, International Law?' (2016) European Papers europeanpapers.eu 1195.

ly, by arts 38 and 35 of the Asylum Procedures Directive (APD).[132] In the first case (Turkey is an STC), asylum seekers could be returned to Turkey because they allegedly face no risk of persecution, serious harm and *refoulement* in their country and could request and receive protection in accordance with the 1951 Geneva Convention. In the second case (Turkey is an FCA), asylum seekers could be returned to Turkey because they would allegedly already benefit from sufficient protection in Turkey, including from the principle of *non-refoulment*. In both cases, the asylum application is deemed inadmissible based on art. 33(2) APD before any evaluation of the merits of the claim. Both concepts draw on two assumptions: first, that there is a safe place for the asylum seekers already before they enter the EU; second, that asylum seekers do not have the right to choose to settle in the EU when there are other safe places available to them.[133]

In implementing the EU-Turkey Statement in practice, Greek authorities have never applied the FCA concept as a ground for inadmissibility.[134] Instead, they have resorted to the STC concept. However, as argued elsewhere,[135] Turkey could hardly be considered an STC, *inter alia* due to the fact that, despite having ratified the 1951 Geneva Convention and its 1967 Protocol, it maintains a geographical limitation for non-European asylum seekers, based on which it does not recognise refugee status to asylum seekers who come from outside Europe – which makes Turkey unable to satisfy the last requirement set by art. 38(1) APD.[136]

For a long time, the Greek legislator has neither declared Turkey an STC nor has it adopted a general list of STCs.[137] Thus, whether Turkey is an STC could only be assessed by Greek asylum authorities on a case-by-case basis during the initial admissibility test for asylum applications at the borders – a procedural step that was introduced in Greek law following the EU-Turkey deal.[138] Over time, different interpretations and lines of reasoning have emerged among Greek administrative and judicial authorities, sometimes leading to contradictory jurisprudence on the criteria to establish whether Turkey

[132] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, 60.

[133] R Lehner, 'The EU-Turkey-"deal": Legal Challenges and Pitfalls' (2019) International Migration 176.

[134] AIDA, Country Report: Greece, First Country of Asylum (last updated 30 November 2020) asylumineurope.org.

[135] E Roman, T Baird and T Radcliffe, 'Why Turkey is Not a "Safe Country"' (2016) Statewatch Analyses www.statewatch.org 1.

[136] However, on this issue there is disagreement among legal scholars. See: S Peers and E Roman, 'The EU, Turkey and the Refugee Crisis: What Could Possibly go Wrong?' (2016) EU Law Analysis eulawanalysis.blogspot.com; D Thym, 'Why the EU-Turkey Deal Can Be Legal and a Step in the Right Direction' (2016) EU Migration Law.

[137] C Favilli, 'La cooperazione UE-Turchia per contenere il flusso dei migranti e richiedenti asilo: obiettivo riuscito?' (2016) Diritti Umani e Diritto Internazionale 405, 417; R Lehner, 'The EU-Turkey-"Deal"' cit.

[138] Law n. 4375 of 2016 [Greece] cit.

is an STC for a certain asylum seeker.[139] In June 2021, Greece designated Turkey as an STC for asylum seekers from Syria, Afghanistan, Pakistan, Bangladesh and Somalia, based on a Joint Ministerial Decision by the Ministry for Foreign Affairs and the Ministry for Migration and Asylum.[140] Notwithstanding this, Greek authorities are still required to assess the admissibility of each asylum claim individually and consider the individual circumstances of the case. Despite the EU-Turkey deal's alleged formal adherence to EU law, it should be emphasised that a faulty application of the STC concept in daily practice may limit, when not violate, the right of many asylum seekers to seek and enjoy protection.

VI. Conclusion: eclipsing human rights protection under informal agreements

Even if its features have evolved over time, informality is part and parcel of the EU readmission policy. However, increasing informalisation is not without consequences. Short-sighted policy choices bear costs and unintended long-term effects. Informalisation contributes to the persistence and further development of informal international law-making on migration and to the diffusion of EU atypical acts, with often little recourse for complaint, in an area of law where guarantees should be stronger as the human rights of migrants are involved. The issues that arise from informal cooperation are wide and varied. We illustrated the risks in terms of legal certainty, increased by the circumvention of formalities, as well as the absence of democratic accountability which characterises informal agreements and negotiations. Moreover, informalisation is seen by the Union and its Member States as a way to reach policy effectiveness without bearing the costs of being bound by enforceable acts. As Cannizzaro notices with respect to the EU-Turkey Statement, "law, and more specifically the normative instruments offered by international law seem to be used by the Member States to pursue their objectives over and above the Constitutional framework established by the Treaties".[141]

As exemplified by the EU-Turkey Statement, since 2015, the EU has been trying to outsource its protection responsibilities to third countries in the EU Neighbourhood through migration cooperation and the labelling of those countries as "safe" for asylum seekers. EU leaders have often referred to that agreement as a model that could be

[139] E Roman, 'The "Burden" of Being "Safe" - How Do Informal EU Migration Agreements Affect International Responsibility Sharing?' in E Kassoti and N Idriz (eds), *The Informalisation of the EU's External Action in the Field of Migration and Asylum* cit. 317, 331.

[140] Hellenic Republic, Ministry of Migration and Asylum, Press Release: Greek legislation designates Turkey as a safe third country, for the first time. This decision is for asylum seekers from Syria, Afghanistan, Pakistan, Bangladesh and Somalia, 7 June 2021, migration.gov.gr.

[141] E Cannizzaro, 'Disintegration Through Law?' (2016) European Papers europeanpapers.eu 36.

replicated with other third countries, especially in North Africa.[142] When talking about the EU-Turkey Statement in its Communication on establishing a New Partnership Framework, the European Commission itself affirmed that "its elements can inspire cooperation with other key third countries and point to the key levers to be activated".[143] Since 2016, the EU and some Member States (*e.g.*, Italy and Germany) have engaged in negotiating, in a more or less public and transparent way, similar migration cooperation agreements with countries like Tunisia, Egypt and Libya.[144] However, as argued by NGOs, it is highly controversial to define those countries as "safe" without proper consideration of their capacity *de iure* and *de facto* to protect the fundamental rights of returnees and offer protection to those in need.[145]

In its attempts to outsource the 'asylum burden' to non-EU countries, the EU is pursuing a dual strategy. On the one hand, it seeks to negotiate an externalisation of asylum responsibilities by means of informal agreements whose adherence to the rule of law is questionable. The reason for that is that States may have an interest in cooperating but, in such a politically sensitive policy area, are often reluctant to commit to a strict international regulatory framework. On the other hand, the EU seeks to provide a legally-sound legitimacy to the externalisation of protection responsibilities by trying to incorporate the legal concepts of safe country of origin, safe third country and first country of asylum into these informal agreements. There seems to be a tension between, on the one hand, the need to secure a deal through an instrument that allows avoiding the formalities that are typical of international agreements and, on the other hand, the need to provide a formal legal basis to the responsibility-shifting mechanism that the informal deal aims to establish. One could hypothesise that, by providing a legal validation to such burden-shifting mechanisms, EU decision-makers aim to make both such mechanisms acceptable to the public opinion and avoid being struck out by EU, domestic or international courts.

Pragmatism and opportunism have become the main drivers of the EU's external action on migration, regardless of the human rights aspects of international coopera-

[142] E Collett, 'Turkey-Style Deals Will Not Solve the Next EU Migration Crisis' (2018) Migration Policy Institute; C Favilli, 'Nel mondo dei "non-accordi". Protetti sì, purché altrove' (2020) Questione Giustizia 143; T Strik, 'Migration Deals and Responsibility Sharing' cit. 57, 70.

[143] Communication COM(2016) 385 final cit.

[144] Euromed Rights, 'Joint Statement: Asylum down the Drain - Intolerable Pressure on Tunisia' (21 February 2017) euromedrights.org; EurActiv, 'Germany Proposes EU Rules Making Migrant Deportations Easier' (22 February 2017) euractiv.com; F Fubini, 'Tunisi accoglierà 200 migranti al mese partiti dalla Libia' (17 February 2017) corriere.it.

[145] Euromed Rights, 'Joint Statement' cit.; T Abderrahim and A Knoll, 'Egypt Under the Spotlight: can it be a safe third Country?' (17 March 2017) ecdpm.org; Forum Tunisien pour les Droits Economiques et Sociaux (FTDES), 'Politiques du non-accueil en Tunisie. Des acteurs humanitaires au service des politiques sécuritaires européennes' (9 June 2020) migreurop.org; B Rouland, 'Redistributing EU "burdens": the Tunisian Perspective on the new Pact on Migration and Asylum' (2021) ASILE Project www.asileproject.eu.

tion. The most recent and worrying trend in the EU's externalisation strategy consists in negotiating with third countries informal agreements that aim to prevent asylum seekers from entering the jurisdiction of the EU country where they intend to apply for asylum and, at the same time, delegate third countries to provide protection.