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Cooperation on Readmission in the Mediterranean Area and its Human Rights Implications

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CHAPTER 1

AIMS, SCOPE AND METHODOLOGY OF THE RESEARCH

1.1. Object and purpose of the research

The necessity to develop an external dimension of European migration policies through partnerships with countries of origin and transit has firmly been included in the official agenda of the European Union (EU) since the end of the last century, following the entry into force of the Amsterdam Treaty in 1999 and the Tampere European Council the same year, which opened the way to the Europeanisation of migration and asylum policies.

Cooperation with third countries on the management of migration flows is a key component of the external dimension of the European migration policy and it includes cooperation on readmission. Readmission agreements may be generally defined as legal instruments that facilitate the removal of unauthorised migrants by establishing reciprocal obligations and procedures between the contracting parties in a treaty of international law. Readmission agreements have been concluded at a bilateral level between European States and third countries since the early 1990s.

Since the end of the 1990s, when (with the Amsterdam Treaty) the EU gained competence in the area of readmission, not only have the Member States continued to conclude bilateral readmission agreements, but also the EU has started to negotiate European readmission agreements as part of the common European readmission policy. EU readmission agreements (EURAs) are international treaties of a reciprocal nature, negotiated by the European Commission on the mandate of the Council, setting out detailed administrative and operational procedures to facilitate the return or transit of persons (including own nationals, third country nationals and stateless persons) who do not, or no longer fulfil the conditions of entry to, presence in or residence on the territory of the third country or one of the EU Member States.

Between the late 1990s and the early 2000s the development of cooperation on readmission in the Mediterranean area became more and more important, in light of the

intensification of migration flows across the Mediterranean Sea and into Europe, and the increasingly crucial role played by the North African countries and Turkey as countries of origin and/or transit. This trend has continued throughout the first decade of the years 2000s (although with significant evolutions and shifts in migration routes) and has recorded a further boost since 2011, when the uprisings in Tunisia and Egypt and the civil wars in Libya and in Syria caused a major geopolitical fracture in the whole area, whose consequences, *inter alia* on the management of migration flows, are still felt loud and clear by the EU and its Member States. Against this background, researching cooperation on readmission with a specific focus on the Mediterranean area and on Euro-Mediterranean relations appears to be of particular relevance.

Given this object (cooperation on readmission at the European and bilateral level) and this geographical scope (the Mediterranean area), the crucial development analysed by this research is the emergence during the years 2000s of what Cassarino calls 'informal patterns of bilateral cooperation on readmission' (2007, 185). This expression refers to the increasing use of informal bilateral agreements linked to readmission (such as memoranda of understanding, exchanges of letters, 'oral processes', operational protocols, administrative arrangements, etc.) rather than formal readmission agreements. I argue that this very process can be identified also at the European level, where cooperation tends to be increasingly based on policy instruments such as Mobility Partnerships, and on informal agreements and concrete practices aimed at ensuring the effectiveness and rapid implementation of readmission, rather than on legal instruments such as EURAs.

Mobility Partnerships (MPs) are political declarations signed at the ministerial level by the EU, the partner country and the interested Member States. They were introduced in 2007 (European Commission 2007a) as the primary instrument for the implementation of the Global Approach to Migration and Mobility (GAMM) – the new overarching framework for the EU external migration and asylum policy launched by the EU in 2005 (European Commission 2005b; European Council 2005) and renewed in 2011 (European Commission 2011e). MPs establish a number of cooperation initiatives

in four policy areas, including readmission[1]; they are usually accompanied in annex by a list of projects which the EU, its agencies and its Member States commit to implement as part of the cooperation established with the partner country.

The further step of this research consists of analysing whether and how the increasing use of informal instruments of cooperation on readmission both at the bilateral and European level impacts on the human rights of (to be) readmitted migrants, determining a restriction or a violation in particular of their asylum-related rights.

To sum up, the object of this research is cooperation on readmission in the Mediterranean area and its purpose is to critically analyse readmission policies both at European and bilateral level by investigating the increasing use of informal legal, quasi-legal and policy instruments of cooperation as well as the effects that the use of such instruments may have in terms of limiting or violating migrants' human rights.

Considering the added value of this research compared to the existing literature on this topic, the following can be noted. This research is the first to analyse the use of informal cooperation on readmission not only at the bilateral level, but also at the European level, emphasising the interdependence between the two levels. This is also the first work to compare the use of EURAs and MPs in light of a process of informalisation. In addition, this study is the first to compare specifically the use of formal and informal instruments of bilateral cooperation on readmission in three case studies (cooperation between Italy and Libya, Spain and Morocco, and Greece and Turkey), thus providing a comprehensive picture of cooperation on readmission in the Mediterranean and its increasingly informal nature. Finally, this research originally undertakes to prove, based on the evidence provided by the case studies at both the bilateral and European level, the existence of a relation between the effects of the use of informal cooperation in the field of readmission and the protection of the human rights of (to be) readmitted migrants.

[1] The policy areas included in MPs were originally three: legal migration, mobility and integration; illegal migration, trafficking, border control and readmission; and migration and development. The fourth policy area, international protection, was added in 2011 (European Commission 2011e).

1.2. Research questions and hypotheses

The scope of this research is determined by two leading questions, which may be phrased as follows:

1. Has there been a shift towards 'informalisation' in cooperation on readmission in the Mediterranean area, both at European and bilateral level?

2. If so, what are the features of this 'informalisation' process and its implications on migrants' human rights?

For each question I have formulated a set of hypotheses that I aim to prove throughout the following chapters.

Research question 1: Has there been a shift towards 'informalisation' in cooperation on readmission in the Mediterranean area, both at European and bilateral level?

Hypothesis 1

My first hypothesis is that in the last decade in the Mediterranean area there has been a gradual shift from formalisation to informalisation of readmission policies. While throughout the 1990s and early 2000s cooperation on readmission was established mainly (although with significant exceptions) by means of formal legal instruments (typically, international law treaties), more recently the use of informal quasi-legal or policy instruments has significantly increased.

Hypothesis 2

My second hypothesis is that this informalisation process is 'multi-level' because it occurred both at European and bilateral level. At the bilateral level, over the last decade (i.e. indicatively since the mid-2000s) countries on the northern and southern shores of the Mediterranean have increasingly grounded their migration cooperation policies and practices on a set of informal instruments, whose legal status is of an uncertain nature[2]. Examples of such informal quasi-legal instruments are: memoranda of understanding, exchanges of letters, 'oral processes', operational protocols and other

[2] The distinction between formal and informal instruments of cooperation will be discussed in Chapter 6, section 6.1.

kinds of (written or unwritten) agreements or arrangements between governments, ministries or other officials (e.g. heads of police forces). These instruments have been increasingly used to regulate (or re-regulate) and operationalise bilateral cooperation in the field of readmission.

At the European level, despite the attempts to implement a common readmission policy through the negotiation of EU readmission agreements (EURAs), the limited results achieved in the Mediterranean area led the EU to gradually downscale the role of EURAs in multilateral cooperation on migration[3]. Following the launch in 2005 of the Global Approach to Migration and Mobility (GAMM – the second M was added in 2011), readmission was included into a more comprehensive policy framework for migration cooperation with third countries. In particular, this research focuses on the use of Mobility Partnerships (MPs), the policy instrument introduced to implement the GAMM through cooperation initiatives in different areas, including readmission. The fact that in the aftermath of the 2011 Arab Spring, the EU resorted to MPs as an instrument to establish cooperation on migration (and especially on irregular migration and readmission) with Maghreb countries rather than pushing forward with EURAs is seen as an instance of informalisation at the European level[4]. Besides MPs, in the latest years the EU has been increasingly prioritising the effectiveness of concrete readmission practices, while neglecting whether such cooperation practices are based on formal or informal, bilateral or European, agreements[5].

Hypothesis 3

My third hypothesis is that, however, informalisation at the European level may

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[3] As it will be discussed in details in Chapter 3, the only existing EURA in the Mediterranean area is the EURA with Turkey, which was recently signed (on 16 December 2013; and entered into force on 1st October 2014) following a long and troubled negotiation process. Conversely, negotiations with Morocco (which started in 2000) are officially still ongoing (but are not progressing) and negotiations with Algeria (for which the Commission received the mandate in 2002) never actually took off.

[4] As analysed in Chapter 4, following the 2011 uprisings, the EU – faced with the instability of its southern neighbourhood and increased migration flows – reacted with the launch of negotiations for MPs with Morocco, Tunisia and Egypt. While the latter refused, Morocco and Tunisia signed MPs with the EU in June 2013 and March 2014, respectively.

[5] This may be inferred from several recent documents from the European institutions, e.g. the Commission Communication on a EU Action Plan on Return (European Commission 2015b) and the Council Conclusions on the expulsion of illegally staying third country nationals (Council of the EU 2016).

not produce the expected results if it is not adequately supported and pursued at the Member States level. Indeed, the effectiveness of a European instrument of informal cooperation depends on how it is implemented by Member States at the bilateral level[6]. European policy instruments, like MPs, provide only a very general framework for cooperation and need to be implemented by individual Member States through bilateral arrangements with the third country concerned. The same is true for informal readmission agreements, which may be encouraged, facilitated and supported at the European level, but are ultimately put in practice by Member States.

Hypothesis 4

My fourth hypothesis is that informalisation at the European level should not be regarded as a linear irreversible process and the occurrence of dynamics of 're-formalisation' should not be excluded. As a matter of fact, EURAs have never disappeared from the Commission's and the Council's official documents and the opening of new negotiations is from time to time suggested, rarely with a follow up. A significant exception, relevant to this research, is the recent opening of negotiations for an EURA with Tunisia, for which the Commission received mandate in December 2014 and which formally began on 12 October 2016. Interestingly, this was one of the initiatives suggested in the MP signed with Tunisia in March 2014; this shows how European informalisation and re-formalisation processes may be fluid and intertwined.

Research question 2: If so, what are the features of this 'informalisation' process and its implications on migrants' human rights?

Hypothesis 5

My fifth hypothesis concerns the features that I consider to characterise multi-level informalisation of cooperation on readmission. I identify three main sets of features, as follows.

a. The prioritisation of the informality, flexibility and operability of cooperation,

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[6] With 'effectiveness of cooperation' I refer to the capacity of cooperation policies and practices (both formal and informal, both at European and bilateral level) to facilitate the actual removal of the third country nationals concerned, accordingly with the explicit aim they have been established for. This definition corresponds to the institutional view of the EU and its Member States. However, I agree with critical views promoting a broader concept of 'effectiveness', which includes not only the capacity of an instrument to actually 'produce' returns, but also its ability to ensure the respect for the fundamental rights of (would be) readmitted migrants (see Cassarino 2010c, 43-46; 2010b, 25).

ensured by the possibility to rapidly adopt, immediately implement and easily modify an agreement.

b. The lack of accountability and transparency of cooperation, due to the fact that informal agreements are negotiated at the executive/administrative level (by governments and ministries), are not discussed and voted by national parliaments, are not published on official journals and may often remain secret.

c. The role played by non-state actors and international organisations (e.g. IOM and UNHCR) who are actively involved not only in the implementation but also in the adoption of readmission policies. As part of a process of governance expansion, these actors are not mere executors but rather contribute to and influence national and European policy-making in the field of migration cooperation (and readmission).

Hypothesis 6

My sixth hypothesis is that this process of multi-level informalisation has negative implications for the protection of migrants' human rights. In particular, I consider how the use of informal cooperation instruments or initiatives by the EU and its Member States limits the scope of the human rights of (to be) readmitted migrants. I choose to focus on the legal status and rights of (to be) readmitted migrants as potential asylum seekers. Thus, when considering the human rights which may be subject to limitation (or violation) due to informalisation, I limit my analysis to four asylum-related human rights, namely: the right to seek asylum, the *non-refoulement* principle, the prohibition of collective expulsion and the right to an effective remedy[7].

As concerns the content of these rights, I mainly consider them as they are established in the European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights of the EU (CFR) and interpreted by the European Court of Human

[7] Whilst one may consider the implications of cooperation on readmission on a variety of human rights (including the right to life, the right to liberty and security, the right to respect for private and family life, etc.) or on the human rights of migrants in general, I focus precisely on its implications on the asylum-related human rights of (to be) readmitted migrants, i.e. migrants who are directly affected by cooperation on readmission. This allows me to highlight the direct effect of the use of informal cooperation instruments and initiatives on the ability of these migrants to access and benefit from international protection. Moreover, I limit my analysis to readmission policies *strictu sensu* and do not cover issues related to the protection of migrants' human rights after readmission is carried out, i.e. in the post-deportation phase (e.g. detention in the country of transit, reintegration measures in the country of origin, etc.). For an analysis of post-deportation risks, see: Alpes et al. 2015; Alpes 2016; Alpes and Nyberg Sorensen 2016.

Rights (ECtHR), the Court of Justice of the EU (CJEU), and some national courts. In my analysis, these human rights, i.e. the human rights of migrants and asylum-seekers, are not taken as absolute, but they are problematized and considered in their limits (also in light of certain critical views of human rights, such as Dembour 2006; 2010; 2015; Dembour and Kelly 2011; Perugini and Gordon 2015). Due consideration is given also to the corresponding asylum-related human rights obligations of the EU and its Member States (Spijkerboer 2007; 2013).

Parallel to the process of informalisation of cooperation, I identify a process of restriction of migrants' human rights and I investigate how these two processes relates to each other, leading to a situation where the use of informal cooperation on readmission leads to *de facto* limiting migrants' access to human rights. The effectiveness of cooperation policies is prioritised over the existence of laws legitimising or limiting them, and in particular over existing international and European human rights standards. This is also due to the lack of accountability and transparency which characterises informalisation of cooperation.

1.3. Scope of the research and case studies

In order to prove my hypotheses, I analyse cooperation on readmission in the Mediterranean area both at the supranational European level and at the national bilateral level. For both levels, I consider two different kinds of cooperation instruments: (1) formal legal instruments and (2) informal quasi-legal or policy instruments[8].

At the European level, I examine (1) EU readmission agreements (EURAs) and (2) Mobility Partnerships (MPs). For both instruments I focus on: their origins and evolution; their content and purpose; their negotiation process and incentives offered to third countries; and their limits and problems. In terms of their limits, I question in

[8] At the European level, EURAs can be defined as legal instruments and MPs as policy instruments. At the national level, formal bilateral readmission agreements can be considered as legal instruments; conversely, informal cooperation between States is grounded on a broad variety of instruments whose legal status is uncertain and whose boundaries are blurred (as analysed in sections 5.1 and 6.3). Therefore, throughout this work I generally refer to informal bilateral cooperation agreements on readmission as quasi-legal instruments. Recently, similar kinds of quasi-legal instruments of cooperation on readmission have emerged also at the European level, in the form of political dialogues, joint statements and informal agreements (as analysed in section 6.2).

particular their European scope, their relevance and effectiveness as tools for cooperation on readmission, the role non-state actors and international organisations may play in their negotiation and implementation, as well as their human rights content.

Given the geographical scope of my research, I analyse the relevant Mediterranean case studies. As concerns readmission agreements, I consider the pending EURA with Morocco (whose negotiations were opened in 2000 and are still ongoing), the pending EURA with Algeria (for which the Commission received mandate in 2002, but negotiations never started) and the EURA signed with Turkey in December 2013 and entered into force on 1st October 2014. The recent opening of negotiations for a new EURA with Tunisia is also considered, as a possible instance of re-formalisation. As regards Mobility Partnerships, I analyse the MPs signed with Morocco and Tunisia in June 2013 and March 2014, respectively.

The ongoing dialogue between the EU and Turkey on migration cooperation, which has been enhanced to face the so-called 'refugee crisis', is also considered as a further case of informalisation of cooperation. A Joint Action Plan 'stepping up EU-Turkey cooperation on support of refugees and migration management in view of the situation in Syria and Iraq' (European Commission 2015c) agreed by the EU and Turkey between October and November 2015 (European Commission 2015d; European Council 2015c) exemplifies how a policy instrument covering *inter alia* cooperation on readmission can be used with the aim to rapidly upgrade and operationalise the provisions of a legal instrument (the EURA with Turkey). The EU-Turkey Statement of 18 March 2016 (European Council 2016c) represents the peak of this recent phase of EU-Turkey cooperation: it is one of the most interesting borderline cases of an informal cooperation instrument with uncertain legal status (apparently, a political declaration playing the functions of a legally binding international agreement). Additional instruments of informal cooperation on readmission, such as high-level political dialogues or informal readmission arrangements, recently introduced by the EU in its relations with third countries also beyond the Mediterranean area (e.g. Sub-Saharan African and Asian countries, like Ghana and Afghanistan) are also considered, as examples of an increasing informalisation trend at the European level.

At the national level, I scrutinise (1) formal bilateral readmission agreements and

(2) informal written or unwritten quasi-legal agreements or arrangements between national executives linked to readmission. My analysis of these instruments covers three case studies of cooperation on readmission in the Mediterranean area: (i) cooperation between Italy and Libya; (ii) cooperation between Spain and Morocco; and (iii) cooperation between Greece and Turkey. The choice of these case studies is related to a number of reasons. First of all, they allow my research to ideally cover the whole Mediterranean, i.e. the three geographical macro-areas of the Central, Western and Eastern Mediterranean, which correspond to the main migration routes crossing it. Secondly, these three case studies are very different from one another and each of them presents specific peculiarities which make it an interesting case on its own[9]. However, while analysing different uses of formal and informal cooperation instruments, I will also assess the existence of common patterns and similar implications, in order to draw a broader picture of bilateral cooperation on readmission in the Mediterranean.

For each case study I investigate: the origins and evolution, the content and purpose, the incentives offered to third countries, and the problems and limits of formal and informal modalities of cooperation on readmission. With regards to the problems and limits of both formal readmission agreements and informal arrangements linked to readmission, I focus in particular on: their effectiveness as tools for cooperation on readmission; the transparency of their negotiation and adoption procedures (including issues of secrecy, democratic decision-making and accountability); and their impact on migrants' human rights.

Finally, as concerns the temporal scope of this study, in order to analyse in particular the recent phenomenon of the informalisation of cooperation on readmission at the European level, I had to consider also the latest developments in this policy area, including those taking place in the year 2016. Researching a 'moving target' proved to be an extremely interesting but challenging task; for reasons of convenience, I decided to cover developments until the 'cut-off date' of 1st December 2016.

[9] Features and peculiarities of each case study are discussed in the relevant sections of Chapter 5.

1.4. Methodology and sources

The following sources have been used for this research. In terms of secondary sources, I used: academic literature and journal articles; policy papers; reports by international governmental and non-governmental organisations (NGOs) and European agencies; grey literature; and media information, such as newspaper articles, blogs and other online sources.

In terms of primary sources, I used: primary and secondary EU legislation; official documents by the European Commission, the Council of the EU, the European Council and the European Parliament and other relevant policy documentation by other EU institutions and agencies; international conventions, in particular the European Convention on Human Rights (ECHR); various documents by UN bodies and by the Council of Europe bodies (Parliamentary Assembly, Committee for the Prevention of Torture, Commissioner for Human Rights); case law, primarily of the European Court of Human Rights (ECtHR) and to a lesser extent of the Court of Justice of the EU (CJEU) and some national courts; transcriptions of Italian parliamentary debates and works; EU readmission agreements (EURAs); Mobility Partnerships (MPs); European informal agreements, joint statements and political declarations linked to readmission; bilateral readmission agreements; bilateral migration cooperation agreements which include readmission clauses; and bilateral informal agreements linked to readmission[10].

In addition to these documentary sources, I used also information from interviews with: current or former EU officials working at the European Commission[11]; national experts and academics who have researched the topic of cooperation on readmission at the European or bilateral level; and lawyers and NGOs representatives who have investigated the issue at length.

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[10] Informal bilateral agreements may be rather difficult to detect and access because they often remain unpublished, unwritten or secret. However, in some cases information about their content is made available either officially through parliamentary debates, or unofficially through journalistic enquires, leaked documents or NGOs investigations. Sometimes the existence of an informal agreement linked to readmission may also be deducted from the fact that it is embedded into a more general framework of bilateral cooperation on migration.

[11] The Commission officials which I interviewed are (or were) mainly working at the Directorate General for Migration and Home Affairs (DG HOME), Dir. C: Migration and Protection Unit – Irregular Migration and Return Policy, and Dir. A: Strategy and General Affairs Unit – International Coordination.

Unfortunately, this study could not benefit from a systematic interview-based empirical research, because I would not be able to conduct interviews with national authorities and migrants in Italy, Libya, Spain, Morocco, Greece and Turkey, due to language, time, resources and factual constraints. Nonetheless, I deemed it worth to carry out interviews with some EU officials in order to gather a deeper understanding of the viewpoint of the Commission (and more generally of the EU institutions) on European readmission policies and migration cooperation with third countries in the Mediterranean[12].

In order to cover also the bilateral dimension of cooperation on readmission, I interviewed national experts, lawyers and NGOs representatives with a deep knowledge of the topic or a proved long-standing in-the-field experience in one of the three case studies analysed in this research. This allowed me to collect detailed first-hand information on bilateral cooperation on readmission in the Mediterranean. Interviews with national experts were also useful to supplement information gaps concerning in particular the Spain-Morocco and Greece-Turkey case studies, where I encountered some difficulties in accessing primary sources (e.g. informal agreements, policy documentation, parliamentary debates).

This research is based on a qualitative methodological approach, therefore I will not rely on statistical and numerical analysis and I will privilege a constructivist perspective (Della Porta, and Keating 2008; Moses and Knutsen 2012; Alvesson and Sköldberg 2010). My analysis draws upon different disciplines and combines different approaches. Cooperation on readmission at the European and bilateral level is analysed mainly from a legal-political perspective (also based on the theoretical frameworks and conceptual tools of EU migration and asylum law, European studies, international law, international relations theory and critical studies on migration control), while its human rights implications are analysed from a legal perspective, based on relevant case law.

Considering the literature of main importance for this research, the following can be noted. The study of cooperation on readmission at the European level draws upon the

[12] In preparing my interviews with EU officials I have drawn upon literature on interviewing elites (Aberbach and Rockman 2002; Berry 2002; Desmond 2004; Goldstein 2002; Harvey 2011; Mikecz 2012; Rice 2010).

literature on the process of Europeanisation of asylum and migration policies (Peers 1998; 2011; Peers et al. 2012; Hailbronner 2000; Guiraudon 2000; Lavenex 2001; De Bruycker 2003; Geddes 2003; Vink 2005; Faist and Ette 2007) and on the external dimension of the European migration policy (Boswell 2003; Lavenex and Uçarer 2002; Lavenex 2004; 2006; De Bruycker et al. 2011; Cremona et al. 2011). The analysis of EU readmission agreements owes much to the seminal work of Coleman (2009), while the analysis of Mobility Partnerships is inspired by the works of Kunz, Lavenex and Panizzon (Kunz et al. 2011; Kunz 2013; Kunz and Maisenbacher 2013) and Carrera and Hernández i Sagrera (2009; 2011).

The analysis of cooperation on readmission at the bilateral level largely draws upon the works of Cassarino (2007; 2010a; 2010c; 2014), which inspired this research since the very beginning, being the first scholar to study the use of informal agreements in the field of migration cooperation in the Mediterranean area. From an international law perspective, also the works of Pastore (1998), Hailbronner (1997) and Favilli (2005) proved very useful. Paoletti's (2011a) research on the relations between Italy and Libya in the field of migration has been of utmost relevance to my analysis of the Italian-Libyan case study.

My reflection on the process of informalisation and its features draws upon the early work of Lipson (1991) and the outcomes of a more recent research project on 'informal international law-making' (Pauwelyn, Wessel and Wouters 2012a; 2012b; Berman et al. 2012), to which I refer for a definition of 'informality'. My analysis of the relation between cooperation on readmission and human rights draws upon the contrasting opinions of Coleman (2009) on the one hand, and Giuffré (2013a; 2013b) and Noll (2005) on the other hand. My investigation into the human rights implications of informal cooperation on readmission has been hugely inspired also by the works of Gammeltoft-Hansen on the relation between the externalisation of European migration control policies and international refugee law (2011; 2012; 2014) and by Hathaway's and Gammeltoft-Hansen's conceptualisation of '*non-entrée* policies' and 'cooperative deterrence policies' (Hathaway 1992; Gammeltoft-Hansen and Hathaway 2015).

My analysis of the nature, content and limits of migrants' human rights in the European context owes much also to the reading of the works of certain critical

scholars, such as Douzinas (2000), Dembour (2006; 2011; 2015), Spijkerboer (2007; 2013) and Perugini and Gordon (2015), whose perspective on human rights helped me to problematize the issue. Finally, Gammeltoft-Hansen and Adler-Nissen's (2008) concept of 'sovereignty games' inspired my research into how national governments mould and strategically use informal quasi-legal instruments to reaffirm their sovereignty and autonomy, while limiting the scope of migrants' human rights.

This wide and diverse literature was fundamental to the shaping of my own ideas and, together with information gathered from primary sources and interviews, to my analysis of cooperation on readmission in the Mediterranean and its human rights implications.

1.5. Structure

The next chapter (Chapter 2) focuses on cooperation on readmission at the European level. The European readmission policy is contextualised within its broader policy framework: an introductory overview of the origins and evolution of the external dimension of the EU migration and asylum policy is followed by an analysis of common migration cooperation initiatives developed in the Euro-Mediterranean area. Chapter 3 is dedicated to European readmission agreements (EURAs). An account of the origins and evolution of EURAs within the framework of the EU return and readmission policy is followed by an analysis of their content and purpose, their negotiation process and incentives offered to third countries, and their limits. As mentioned above, EURAs are assessed in terms of: their European scope; their relevance and effectiveness as tools for cooperation on readmission; the role non-state actors and international organisations may play in their negotiation and implementation; and their human rights content. Two case studies are discussed in this chapter: the EURA with Turkey and the pending EURAs with Morocco and Algeria.

Chapter 4 focuses on Mobility Partnerships (MPs). It moves from a description of the policy context of MPs, including their origins and evolution within the framework of the Global Approach to Migration and Mobility (GAMM). Parallel to the previous section on EURAs, this introduction is followed by an analysis of the content and

purpose of MPs, their negotiation process and incentives offered to third countries, and their limits. MPs are also assessed in terms of: their European scope; their relevance and effectiveness as tools for cooperation on readmission; the role non-state actors and international organisations may play in their negotiation and implementation; and their human rights content. The case studies scrutinised in this chapter are the MP with Morocco and the MP with Tunisia.

Chapter 5 analyses cooperation on readmission at the bilateral level. The first section introduces bilateral cooperation on readmission as part of a broader framework of bilateral cooperation on migration management and describes its origins and evolution in the Mediterranean area. This introductory section is followed by an analysis of three case studies of bilateral cooperation on readmission, concerning Italy and Libya, Spain and Morocco, and Greece and Turkey. This study focuses on patterns of both formal and informal cooperation on readmission, investigating on: their origins and evolution; their content and purpose; the incentives offered to third countries; and their problems and limits, with particular regard to their effectiveness as tools for cooperation on readmission, the transparency of their negotiation and adoption procedures, and their impact on migrants' human rights.

Chapter 6 discusses the process of multi-level informalisation and describes its fundamental features. The first section elaborates on the concept of informalisation drawing upon studies on informality in international law-making and global governance. The second section discusses informalisation at the European level. On the one hand, it shows how MPs are an example of a broader trend, which privileges the use of policy instruments and concrete practices rather than legal instruments to establish cooperation on migration in general, and on readmission in particular. The EU-Turkey Action Plan for cooperation on migration management and the subsequent EU-Turkey Agreement are analysed (in their relation with the existing EURA with Turkey) as an example of this trend.

On the other hand, this section argues that: (i) the effectiveness of European instruments of informal cooperation depends on their implementation at the level of Member States, as proved by the case of the Greek implementation of the EU-Turkey Agreement of 18 March 2016; and (ii) informalisation of cooperation on readmission at

the European level is not a linear irreversible process, as proved by the opening of negotiations for new EURAs with Tunisia and Nigeria, which may be interpreted as instances of 're-formalisation'.

The third section of Chapter 6 focuses on informalisation at the bilateral level. It discusses the peculiar features of informal agreements linked to readmission and the reasons why States make an extensive use of them rather than (or in addition to already established) formal readmission agreements. Based on the empirical evidence provided by the three case studies analysed in Chapter 5, three common fundamental features are identified and discussed: (a) their flexibility, immediate operability, rapidity in the adoption; (b) the lack of visibility, transparency and accountability; (c) the role of non-state actors and international organisations. The last section of Chapter 6 describes how these features of informal cooperation apply also at the European level.

Chapter 7 addresses the implications of informal cooperation on readmission on the human rights of migrants. As anticipated in my sixth hypothesis mentioned above, I consider how the use of informal cooperation instruments or initiatives by the EU and its Member States limits the scope of the human rights of (to be) readmitted migrants. My analysis is focused in particular on asylum-related human rights, namely: the *non-refoulement* principle; the right to seek asylum; the prohibition of collective expulsion; and the right to an effective remedy, mainly (but not exclusively) as set in the ECHR and interpreted by the ECtHR.

The first section introduces the four asylum-related human rights that are the object of my analysis, and reflects on their nature, content and limits. Based on the three case studies of bilateral cooperation discussed under Chapter 5, the second section analyses how informal modalities of bilateral cooperation on readmission affect those rights. The third section is dedicated to the human rights implications of informal cooperation at the European level; it focuses in particular on the EU-Turkey Statement of 18 March 2016 to examine how this informal agreement infringes upon the four above-mentioned asylum-related human rights. Based on this investigation, in the conclusion of this work, I argue that, parallel to a process of informalisation of cooperation on readmission, one can identify a process of restriction of the fundamental rights of migrants and asylum seekers.

1.6. Acknowledgements

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CHAPTER 2
COOPERATION ON READMISSION AT EUROPEAN LEVEL. POLICY FRAMEWORK

2.1. Origins and evolution of the external dimension of the EU migration and asylum policy

The EU readmission policy is part of a broader policy framework which integrates migration and asylum into the EU's external policy. This broader policy framework is known as the 'external dimension' of the EU migration and asylum policy; this term identifies a whole set of policies aimed at addressing migration and asylum issues through the cooperation with third countries of origin and transit.

At the European level, migration cooperation with third countries has been explicitly endorsed as part of a more integrated approach to migration management at the meeting of the European Council in Tampere in October 1999. The Tampere Conclusions outlined a five-year programme for the creation of a so-called 'area of freedom, security and justice' in the European Union. This programme provided for the development of a common immigration and asylum policy; the management of migration in partnership with third countries was considered a key element of this policy.

The ground-breaking Tampere Conclusions called for 'a comprehensive approach to migration addressing political, human rights and development issues in countries and regions of origin and transit' and for 'a greater coherence of internal and external policies of the Union' (European Council 1999, para 11). This represented a clear and explicit acknowledgement of the need to integrate migration and asylum objectives into the EU's external relations in view of creating an external policy in the area of Justice and Home Affairs (JHA) based on cooperation with third countries[1].

[1] 'The European Council underlines that all competences and instruments at the disposal of the Union, and in particular, in external relations must be used in an integrated and consistent way to build the area of freedom, security and justice. Justice and Home Affairs concerns must be integrated in the definition

2.1.1. Origins of the EU external migration policy in the early 1990s: control-oriented approach vs prevention-oriented approach

However, already in the early 1990s discussions and proposals had emerged from both the Commission and the European Council about the need for a more comprehensive approach to asylum and migration policies and for their coordination with the EU's foreign relations.

As early as 1991, a Commission Communication on Immigration pointed to 'a more extensive incorporation of migration into the Community's external policy' in order to 'counter external migration pressure' (European Commission 1991, para 47). This communication included a first reflection on how to address the so-called 'root causes' of migration and suggested the inclusion of a number of provisions into future cooperation agreements with third countries[2]. It contained also a first proposal to develop 'common principles and procedures for the repatriation of immigrants in an irregular situation' from one of the (at that time twelve) Member States to a third country (European Commission 1991, para 54).

In December 1992 the Edinburgh European Council adopted a 'Declaration on principles governing external aspects of migration policy' (European Council 1992, Part A, Annex 5). The Declaration affirmed that 'coordination of action in the fields of foreign policy, economic cooperation and immigration and asylum policy by the Community and its Member States could […] contribute substantially to addressing the question of migratory movements' (European Council 1992, Part A, Annex 5, para ix). The statement recognised a detailed list of factors that would reduce migratory movements into Europe, including both forced migration and migration based on economic reasons[3]; the Community and its Member States committed to address such factors, with the purpose of improving the political and socio-economic conditions in

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and implementation of other Union policies and activities' (European Council 1999, para 59).

[2] Such provisions concerned: the fair treatment of migrants in the EU; measures to enable migrants' contribution to the development of their country of origin; but also measures to keep potential migrants in their area of origin (European Commission 1991, para 49).

[3] Factors listed were: 'preservation of peace and the termination of armed conflicts; full respect for human rights; the creation of democratic societies and adequate social conditions; a bilateral trade policy, which should improve economic conditions in the country of emigration' (European Council 1992, Part A, Annex 5, para ix).

countries of origin, contributing in the long term to reducing migration pressure (European Council 1992, Part A, Annex 5, paras 1, 3 and 4). As concerns readmission, the Community and its Member States committed to work for bilateral or multilateral agreements with third countries of origin and transit and they proposed to link their general foreign relations with third countries to the latter's degree of cooperation on readmission (European Council 1992, Part A, Annex 5, paras 6-7).

During its first meeting in November 1993, the Justice and Home Affairs Council further explored the idea of linking migration and asylum policy objectives to other policy fields. In particular, the JHA Council suggested the use of 'beneficial' cooperation agreements with third countries in the economic and development fields to obtain their cooperation in the areas of migration control and readmission (Coleman 2009, 20).

In these early documents of the EU external migration policy one can already recognise the co-existence of two distinct approaches to cooperation with third countries, which Boswell defined as the 'control-oriented approach' and the 'prevention-oriented approach' (2003, 619-620). The former is focused on externalising migration control, combating irregular migration, facilitating readmission and keeping asylum seekers in their region of origin, whereas the latter addresses the factors which influence migration in the countries of origin, taking into consideration how political, economic, development, trade and other foreign relations issues affect migration. As explored in this section, the whole development of the EU external migration and asylum policy is characterised by a tension between these two approaches. In different phases efforts were made to combine them in a balanced way (especially on the initiative of the Commission), but looking at the entire 25-year evolution of this policy field, it can be noted that the control-oriented approach has prevailed over the prevention-oriented one.

2.1.2. Reasons for developing an 'external dimension' of the EU migration policy

But what were the reasons that pushed the Member States and the EU to adopt an

external approach to migration and asylum issues? At the origins of the development of the external dimension of EU migration and asylum policy was, firstly, a (partly real and partly perceived) increase in migration and refugee flows in the late 1980s-early 1990s[4], combined with the perceived inadequacy of traditional domestic migration control instruments (Boswell 2003, 621; Billet 2010, 45-46).

Secondly, and in connection with the previous factor, starting from the 1980s, migration has been increasingly perceived as a problem, framed in terms of a 'security threat', linked to other internal security issues, and it has gradually reached the top of national political agendas. The increasing politicisation of migration and asylum led political parties in most European countries to seek electoral consensus through promises to restrict migration flows. This climate fuelled a fierce anti-migrant populist discourse, which legitimised increasingly restrictive policies, including the externalisation of migration control (Kruse 2007, 115-117; Boswell 2003, 623-624).

Thirdly, the Europeanisation process itself played a role in determining the expansion of the EU migration and asylum policy beyond the borders of the EU. In particular, the abolition of internal border controls (introduced by the 1990 Schengen Convention[5]) required not only a strengthened intra-EU cooperation between Member States but also an enhanced cooperation with countries of origin and transit in order to strengthen controls at the EU external borders and limit migration into the EU. The development of the external dimension was to some extent the 'natural continuation' of the process of Europeanisation of migration and asylum policies (Boswell 2003, 622). Similarly, Lavenex highlights the interrelation between internal communitarisation and external widening of migration policies: according to the author, this process 'reflects the continuity of a policy frame that emphasises the control, and, therewith, security

[4] In the late 1980s-early 1990s Western Europe experienced the fear of a mass influx of people coming from Central and Eastern Europe following the collapse of communism; these fears proved to be largely unfounded, as they did not materialise in the expected massive migration pressure. However, approximately the same period, i.e. the first half of the 1990s, was characterised also by a (this time real) significant increase in the number of refugees fleeing the civil war in the former Yugoslavia. (Boswell 2003, 621; Van Selm 2002, 146).

[5] 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, 19 June 1990.

aspect of migration' (Lavenex 2006, 330)[6].

Finally, a number of scholars have emphasised also the role played by national bureaucracies both in the process of Europeanisation and in the process of externalisation of migration and asylum policies (Guiraudon 2000, 2003; Lavenex 2006). Communitarisation and internationalisation may be interpreted as a strategy by interior ministers and immigration officials to increase their autonomy against political, normative and institutional constraints on their restrictive control-oriented migration policy-making. Originally these constraints were to be found at the national level, but communitarisation of migration and asylum policies (which involved, *inter alia*, the co-decision of the European Parliament and the extension of the CJEU jurisdiction in this area) moved them up to the European level. Therefore, the external action in the JHA field may have also represented 'an "escape" road for national executives resisting a communitarisation of their domain' (Lavenex 2006, 346).

2.1.3. Development of the EU external migration policy throughout the 1990s

The lack of follow-up to the above-mentioned statements and policy papers led the Commission to re-launch the initiative for a common migration policy in February 1994, through an elaborate Communication on Immigration and Asylum Policies. While explicitly drawing upon the Edinburgh Conclusions, it represented 'the first deep discussion of a comprehensive approach toward asylum and immigration policies in the EU' (Van Selm 2002, 146), combining prevention-oriented and control-oriented measures. This document emphasised the need for a holistic approach to migration, which would include: action on the causes of migration pressure; action on controlling migration flows; and action to strengthen integration of legal migrants (European Commission 1994a, Foreword). This Communication contained more detailed references to the root causes of migration (European Commission 1994a, 13-19) but it also identified the repatriation of irregular migrants as a key instrument in the fight against illegal immigration (European Commission 1994a, 30-31). Among the 'measures to facilitate the repatriation of illegal immigrants', the Commission

[6] On the same line, see also: Kruse 2007, 117.

mentioned the relevance of readmission agreements and reiterated the JHA Council suggestion to establish a link between RAs and other external agreements (European Commission 1994a, paras 114-115). In addition, the Commission admitted the 'important consequences' and 'considerable burdens' that RAs may cause to countries of origins and transits, and thus proposed an active policy of assistance and support towards those countries (European Commission 1994a, para 116).

Following the 1994 Commission Communication, the Council adopted a series of measures focused on readmission, aimed on the one hand at harmonising national readmission policies and on the other hand at incorporating readmission objectives into the EU external relations[7]. But the prevention-oriented approach focused on the situation in countries of origin was left aside[8]. For some time the idea of a comprehensive EU migration policy was 'only implemented in a piecemeal fashion' (Peers, 2011, 590). Towards the end of the century, between 1998 and 1999, the initiative for a more integrated and outward-looking approach to migration was resumed, culminating, as mentioned above, in the Tampere Conclusions[9]. But the way leading to Tampere included two significant steps.

The first one was the controversial Strategy Paper on Immigration and Asylum submitted by the Austrian Presidency to the Council in July 1998, which analysed what was considered as the failure to effectively implement the EU migration and asylum policy following the 1992 Edinburgh Conclusions and the 1994 Commission Communication. Although the paper was strongly criticised (mainly due to its proposal to radically review the 1951 Geneva Convention relating to the status of refugees) and actually never adopted by the Council, parts of this document influenced the following development of the external dimension of the EU migration policy (Van Selm 2002, 147; Boswell 2003, 628; Coleman 2009, 23).

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[7] These measures contributed significantly to the development of a common readmission policy; they will be described more in details under section 3.1 below.

[8] According to Van Selm, at that point 'the momentum to investigate the causes of migration [had] diminished' (2002, 146) because the refugee flow from former Yugoslavia had reduced and fears for an 'invasion' from former communist countries had not materialised.

[9] Among the factors which influenced this renewed interest in an external approach to migration and asylum there was a significant rise in the numbers of asylum seekers from Iraq in the period 1995-1997 (Boswell 2003, 629).

In particular, the Austrian paper suggested the EU migration policy includes actions aimed to the 'reduction of migratory pressure in the main countries of origin', such as: 'intervention in conflict regions; extension of development aid and economic cooperation; political cooperation between host States and States of origin; raising of human rights standards' (Council of the EU 1998, para 41). As concerns readmission, the paper evaluated 'the steps taken to establish the widest possible network of readmission agreements' as 'strikingly unsuccessful' (Council of the EU 1998, para 19) and it committed the EU to establish a 'complete system of deportation agreements' and to link bilateral agreements beneficial to a third country (e.g. concerning visa requirements, economic cooperation, etc.) to 'repatriation agreements and migration control obligations' (Council of the EU 1998, section 5.4)

The second step was the establishment in December 1998 of the High Level Working Group on Asylum and Immigration (HLWG), on a proposal from the Dutch government. This new body, created within the Council, had the task to 'establish a common, integrated, cross-pillar approach targeted at the situation in the most important countries of origin of asylum seekers and migrants' (Council of the EU 1999a, para 1). The Group was, thus, supposed to focus on the alleviation of root causes of migration in countries of origin, but it was soon criticised for concentrating more on the externalisation of migration control and on readmission obligations (Coleman 2009, 23-24). Not only its approach, but also its composition was meant to be 'cross-pillar', as the HLWG's members were officials and ministers from different policy areas, i.e. home affairs, trade, development and foreign affairs (despite the prevalence of home affairs officials)[10].

The HLWG had to identify a list of third countries to be the object of its analysis and prepare a cross-pillar Action Plan for each of them[11]. The countries identified were: Afghanistan/Pakistan, Albania/Kosovo, Iraq, Morocco, Somalia, and Sri Lanka

[10] This 'cross-pillar setting' was a new, and not unproblematic, institutional development, given in particular the reluctant attitude of development and external policy officials, who feared the risk of subordinating development and external relations goals (and budget) to migration control objectives (Van Selm 2002, 151; Boswell 2003, 631).

[11] For details on the tasks of the HLWG and the elements Action Plans should contain, see Council of the EU 1999a.

(Council of the EU 1999a, para 3). The first five Action Plans were submitted to the Tampere summit in October 1999 and they were welcomed by the European Council. However, when the implementation of the Action Plans had to start, their major shortcomings emerged clearly.

Their implementation required a dialogue with the countries concerned, but the same countries had not been involved at all in their drafting. Some countries did not appreciate being excluded, or even felt insulted, as in the case of Morocco, which asked a joint redrafting of its Action Plan. With other countries (Afghanistan/Pakistan and Iraq) it was impossible to enter into dialogue, due to the geopolitical situation or the breaking of diplomatic relations. If one considers the chances to implement in practice the projects indicated in the Action Plans, it seems that the countries selected by the HLWG were not the most appropriate; in addition, their lack of involvement in the drafting of the reports and plans had a negative impact on their willingness to cooperate in the implementation phase (Van Selm 2002, 152-158; Peers 2004, 207)[12]. These elements reduced the potential real impact of the first Action Plans as instruments of the EU external migration policy[13].

The Tampere Conclusions drew upon, and somehow overtook, the HLWG initiative; the European Council made it clear that the comprehensive outward-looking approach to migration developed until that moment would be upheld and further developed, through the integration of different (internal and external) policy areas and through an increased cooperation with third countries. Compared to previous years, this was the beginning of a more structured attempt to integrate migration and asylum issues into the EU's external relations.

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[12] Boswell considers a number of additional shortcomings of the HLWG and its work, namely: the lack of know-how and experience of HLWG officials; 'a superficial understanding of the root causes of migration and refugee flows, and of possible external relations tools appropriate for addressing them'; tensions between officials from different policy areas which hampered cooperation; primary focus on externalisation of migration control, readmission, containment of asylum seekers in the region of origin (Boswell 2003, 630-631).

[13] Nonetheless, the HLWG experience was not put aside; on the contrary, its functioning was improved in order to overcome the above-mentioned shortcomings and its mandate was expanded to encompass a broader set of tasks in the development of the EU external migration policy (Council of the EU 2002b).

2.1.4. Implementation of the EU external migration policy in the early 2000s

The years 2001-2002 were crucial for the operationalisation of the EU external migration and asylum policy (Peers 2011, 590). The European Council meetings in Santa Maria de Feira (June 2000) and in Laeken (December 2001) confirmed the intention to develop a common migration policy with a strong external dimension.

In June 2002 the European Council in Seville established new relevant rules concerning the external dimension of migration control. In Seville it was decided: to include in all future EU Association and Cooperation Agreements with third countries a standard clause on joint migration management and compulsory readmission; to offer financial and technical assistance to third countries in order to ensure their cooperation in migration management, border control and readmission; and to introduce a 'sanction policy' in case third countries do not provide adequate cooperation (European Council 2002, paras 33-36). The latter provision marked a significant change in strategy, as it introduced for the first time, along with a policy of assistance and support to third countries based on 'positive incentives', the possible use of punitive measures (so-called 'negative incentives') against third countries which are considered unjustifiably unwilling to cooperate on migration control and readmission.

In November 2002 the General Affairs and External Relations (GAER) Council agreed to implement the Seville Conclusions in practice. It established the criteria for deciding which third countries to address for intensifying cooperation in the field of migration[14], and based on these criteria, it identified nine countries to target: Albania, China, Yugoslavia, Libya, Morocco, Russia, Tunisia, Turkey and Ukraine[15] (Council of the EU 2002d, paras 4-5). The Council decided also on the content of the standard 'migration management clause' to be included in all future Association and Cooperation Agreements (Council of the EU 2002d, para 8).

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[14] The criteria are: nature and size of migratory flows towards the EU; geographical position in relation to the EU; need for capacity building concerning migration management; existing framework for cooperation; attitude towards cooperation on migration issues (Council of the EU 2002d, para 4).

[15] Except for China, the selected countries are Eastern or Southern neighbours of the EU. Comparing this list with the list of countries for which the HLWG had drafted its Action Plans in 1999, it emerges that the focus of the EU external migration policy has shifted from countries of origin to countries of transit in the neighbourhood of the EU, and from the root causes of migration to joint migration- and border control (Coleman 2009, 115).

If we consider, along with these developments, also the Commission Green Paper and the Commission Communication on a Community Return Policy on Illegal Residents, issued in April and October 2002 respectively, it clearly appears that in the post-Tampere era the EU institutions adopted a control-oriented approach to the EU external migration policy (as discussed also under section 3.1 below). Efforts to enhance cooperation with third countries were focused mainly on combating irregular migration and human trafficking and strengthening cooperation on readmission, joint migration management and border control.

However, towards the end of the year 2002, the Commission seemed to endorse a more balanced approach. The Communication on Integrating Migration Issues in the EU Relations with Third Countries issued in December 2002 represented the first detailed examination of the external relations aspects of migration policy, with a strong focus on third countries (Boswell 2003, 634-635; Peers 2011, 592). It analysed factors determining migration (including its root causes), as well as the impact of migration on developing countries (remittances, brain drain, etc.), and it suggested policies which would reduce migration demand in countries of origin (i.e. poverty reduction, liberalisation of trade, more liberal rules on short-term movements of people, conflict prevention, good governance, rural development).

The communication urged the EU to be more sensitive in its relations with countries of origin and transit, and to acknowledge the costs and problems related to migration in general, and to readmission in particular, that those countries experience. According to the Commission, these elements should be taken into due account when it comes to the negotiation of EURAs, because a better knowledge of the situation and perspective of the partner country would be useful in order to offer the most appropriate incentives (e.g. a more generous visa policy or increased quotas for migrant workers), as financial and technical assistance may not always be sufficiently attractive (European Commission 2002c, 25-26).

However, the Commission itself realistically admitted the difficulties in implementing such policies, especially due to the limited margin of manoeuvre at its disposal in policy areas falling under the competence of Member States or under the influence of international organisations like the World Trade Organisation (European

Commission 2002c, 26). Another obstacle to the proper implementation of the EU external migration policies was the lack of independent financial backing and consequent budgetary constraints, a problem which dates back to the 1998 HLWG initiative. But in the second part of the Communication, the Commission announced its intention to expand the EU funding dedicated to the external migration policy. Indeed, in 2004 the EU launched the AENEAS programme, a funding programme dedicated to technical and financial assistance to third countries in the areas of migration and asylum[16].

In her 2003 work, Boswell admitted that, at the time of writing, external migration policies were 'still in their infancy' and the EU was still in the process of defining which forms of cooperation would be more appropriate to achieve the multiple goals of EU external migration polices. Boswell considered that until that moment cooperation had comprised a (oscillating) combination of both approaches, but she wondered which one would predominate in the future. Conversely, Bouteillet-Paquet argued that until that moment (always the year 2003) the EU external migration policy had not incorporated the so-called 'integrated approach' and had predominantly been control-oriented, with very limited progress in terms of root causes, migration prevention and political, economic and development cooperation with third countries (Bouteillet-Paquet 2003, 373). According to the author, Member States' priorities had driven the overall EU migration policy towards the fight against illegal immigration, while the prevention-oriented approach developed by the Commission had been largely overlooked.

2.1.5. The EU external migration policy within the framework of the Global Approach to Migration and Mobility

In September 2005 the Commission issued a Communication on Migration and Development, which reaffirmed the approach of the December 2002 Communication. The document addressed the question of how to improve the impact of migration on

[16] Regulation (EC) No 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). For an analysis of the Aeneas Regulation, see: Coleman 2009, 125-128.

development focusing in detail on the issues of remittances, diasporas, circular migration and brain drain (European Commission 2005a). Apparently, starting from the end of 2002, the Commission had embraced and supported a more balanced and comprehensive approach to the EU external action in the area of migration, prioritising prevention-oriented policies. This orientation seems to be confirmed and expanded in the following years, with the launch of the Global Approach to Migration (GAM).

In November 2005 the Commission proposed a new action plan on the external aspects of migration, called 'Priority actions for responding to the challenges of migration', in response to a call by the informal European Council held at Hampton Court one month before (European Commission 2005b); in December that year the European Council endorsed the plan, in the form of a 'Global Approach to Migration' (European Council 2005, paras 8-10 and Annex I). Starting from that moment, the GAM became the overarching framework of the EU external migration policy. In the following years it was further developed, at first, to include the principle of 'circular migration' and the new policy tool of 'Mobility Partnerships' (European Commission 2007a). Later on, it was further expanded to incorporate more explicitly the concept of 'mobility' - thus becoming the 'Global Approach to Migration and Mobility' (GAMM) - and a fourth pillar dedicated to international protection and the external dimension of the EU asylum policy (European Commission 2011e)[17].

The analysis which follows will show that, even if on the paper the GAMM represents a balanced and comprehensive approach to cooperation with third countries, in practice its control- and security-oriented component is the prevailing one. Indeed, its second pillar, dedicated to irregular migration, human trafficking, border control and readmission, has long been an underpinning priority in the framework of the GAMM, but lately it has markedly come to the forefront, as it clearly emerges from the most recent documents issued both by the Commission and the Council on the EU return and readmission policy (such as the Commission's EU Action Plan on Return of September 2015 and the Council Conclusions on the future of the return policy of October 2015)[18].

[17] The GAMM and Mobility Partnerships will be analysed in details under Chapter 4.

[18] These and other recent documents concerning the EU return and readmission policy are analysed under section 3.1.

2.1.6. The EU external migration policy as a bargaining process

One final remark concerns the nature of the EU external migration policy from the point of view of international relations. This section has analysed the development of the EU external migration policy from a European perspective, but this should not mislead the reader. As argued by several international relations scholars, far from being solely a unilateral process whereby the EU and its Member States export migration control instruments outside their territory, the external dimension of migration consists of a network of complex and ever-changing bilateral and multilateral relations, whereby both the EU and its Member States, and third countries exercise power or pressure on the counterpart across different policy fields.

From this perspective, the external dimension of migration can be seen not only in terms of externalisation of migration control at the expenses of countries of origin and transit (as it has traditionally been) but rather as a bargaining process, where both parties involved are able to affect the behaviour of their counterpart using all instruments at their disposal, including in the areas of migration, foreign affairs, trade, development, energy, and security (Paoletti 2010; 2011a; 2011b; Cassarino 2005; 2007; 2010b). Examples of such bidirectional bargaining process may be found both at the European level (see section 3.5, which analyses the negotiation of EU readmission agreements with Morocco, Algeria and Turkey) and at the bilateral level (see the case studies analysed under Chapter 5 and section 6.3).

2.2. European migration cooperation initiatives in the Euro-Mediterranean area

Before analysing a specific component of the EU external migration policy, i.e. the EU readmission policy, it may be useful to briefly recall the main European migration cooperation initiatives in the geographical area of interest to this study, i.e. the Mediterranean area. This section aims to provide a broad picture of migration cooperation between the EU and Mediterranean third countries, as this represents the general framework where to situate cooperation on readmission.

The EU policy towards the Mediterranean countries encompasses two types of

cooperation initiatives: multilateral initiatives, involving the EU, its Member States and the partner countries gathered all together in one forum; and bilateral initiatives individually targeted to the third countries concerned.

2.2.1. The Euro-Mediterranean Partnership

Multilateral dialogue in the Mediterranean area has largely taken place within the framework of the Euro-Mediterranean Partnership (EMP), also known as the 'Barcelona Process', launched at the Euro-Mediterranean ministerial Conference held in Barcelona in November 1995, on the basis of the October 1994 Commission Communication on Strengthening the Mediterranean Policy of the EU: Establishing a Euro-Mediterranean Partnership. The EMP was created as a comprehensive multilateral forum for dialogue and cooperation at regional level, between the EU, its (at that time fifteen) Member States and (originally twelve) Mediterranean third countries. Nowadays the partnership, renamed 'Union for the Mediterranean' (UfM) counts, along with the European institutions, 43 members: 28 EU Member States and 15 third countries across the Southern and Eastern Mediterranean (i.e. Albania, Algeria, Bosnia and Herzegovina, Egypt, Israel, Jordan, Lebanon, Mauritania, Monaco, Montenegro, Morocco, Palestine, Syria [suspended], Tunisia and Turkey; plus Libya as an observer)[19].

The Barcelona Declaration set three broad objectives for the EMP: to establish 'a common area of peace and stability'; to create 'an area of shared prosperity' through the establishment of a free market zone; and to develop 'human resources' and promote 'understanding between cultures and exchanges between civil societies' (Barcelona Declaration 1995). These three goals correspond to three areas of dialogue and

[19] Another relevant multilateral sub-regional cooperation initiative focused on migration is the 5+5 Dialogue on Migration in the Western Mediterranean, established in 2002. Contrary to the EMP, it does not involve the EU institutions, but five European countries (France, Italy, Malta, Portugal and Spain) and five Mediterranean third countries (Algeria, Libya, Mauritania, Morocco and Tunisia), with the participation of the International Organisation for Migration (IOM), the International Labour Organisation (ILO) and the International Centre for Migration Policy Development (ICMPD) as observers. The 5+5 Dialogue focuses mainly on the fight against irregular migration and human trafficking, joint border management and information exchange, but (to a lesser extent) it also deals with labour migration, migrant integration, co-development and protection of migrant rights. It offers a comprehensive framework which aims also to foster the development of bilateral initiatives between individual Member States and North African countries. https://www.iom.int/55-dialogue-migration-western-mediterranean. Accessed on 10 August 2016.

cooperation: on political and security issues; on economic and financial issues; and on social and cultural issues. Although migration cut across the three areas, it was placed under the third one; according to Pastore this was for the EU and its Member States 'to avoid choosing between whether migration was a security or an economic issue' (2002, 111). Under its 'third pillar', the Barcelona Declaration contains two statements on migration:

> [the participants] acknowledge the importance of the role played by migration in their relationships. They agree to strengthen their cooperation to reduce migratory pressures, among other things through vocational training programmes and programmes of assistance for job creation. They undertake to guarantee protection of all the rights recognised under existing legislation of migrants legally resident in their respective territories;
>
> in the area of illegal immigration they decide to establish closer cooperation. In this context, the partners, aware of their responsibility for readmission, agree to adopt the relevant provisions and measures, by means of bilateral agreements or arrangements, in order to readmit their nationals who are in an illegal situation (Barcelona Declaration 1995).

The Declaration apparently combined a prevention-oriented approach in the first statement, with a control-oriented approach in the second statement. However, as noted by Pastore, the two propositions represent, respectively, the interests of the Mediterranean third countries, and the interests of the EU Member States. Significantly, the partners' interests were enunciated separately, and whilst cooperation to reduce migratory pressure was framed in rather generic terms, cooperation on readmission entailed a more precise commitment (Pastore 2002, 110).

Actually, this combination did not prove very fruitful, as in the following years cooperation in the area of migration under the EMP made no relevant progress. The Euro-Mediterranean ministerial meetings which followed simply reiterated the participants' commitment to enhance migration cooperation, but did not produce any concrete outcome. This was partly due to the high sensitivity and complexity of the issue, as well as to the difficulty in combining the interests and priorities of EU Member States and partner countries. However, the stalemate of the Barcelona Process in the

area of migration was also due to the fact that the partnership had focused mainly on its second objective, i.e. the strengthening of economic cooperation and creation of a free trade area in the Mediterranean, along with the issue of security. Conversely, the third pillar of socio-cultural dialogue, which included migration cooperation, was neglected (Pastore 2002, 111-112).

At the Paris Summit for the Mediterranean in July 2008 the Euro-Mediterranean Heads of State and Government decided the creation of the Union for the Mediterranean (UfM), as a continuation of the EMP. The evolution of the EMP into the UfM was aimed to re-launch multilateral Euro-Mediterranean cooperation and make it more operational, through the initiation of new regional and sub-regional projects. UfM projects address the areas of economy, environment, energy, transport, education, health, migration and social affairs, but cooperation initiatives in the field of migration continue to be the least developed ones, even in recent years[20].

Parallel to the development of a multilateral dialogue, the EU launched also bilateral cooperation initiatives in the Mediterranean area. We will first analyse a bilateral cooperation initiative based on legally binding international treaties, and secondly a policy initiative launched ten years later, based on bilateral action plans. The two initiatives are interlinked, as the latter builds upon the institutional framework of the former.

2.2.2. The Euro-Mediterranean Association Agreements

Starting from the early 1990s, the European Commission has negotiated and concluded a number of Association Agreements with Mediterranean countries, called the 'Euro-Med Agreements'. The first Euro-Med Agreements were signed with Tunisia in 1995 and Morocco in 1996, and entered into force in March 1998 and March 2000 respectively.

These agreements established conditions for cooperation between the EU, its Member States and each partner country on a variety of fields, including: political dialogue; economic cooperation, trade, competition and financial cooperation; and

[20] http://eeas.europa.eu/euromed/index_en.htm. Accessed on 10 August 2016.

social and cultural issues. Similarly to the EMP, the largest part of these agreements was devoted to economic cooperation and trade, while political dialogue and socio-cultural cooperation appear to be ancillary issues. In both treaties, migration cooperation was considered as a social issue and was only dealt with in a couple of sub-sections under the chapters on 'Dialogue in social matters' (Euro-Med Agreements with Tunisia and with Morocco, Art. 69.2 and 69.3) and 'Cooperation in the social field' (Art. 71.1).

Under Article 69, the parties committed to undertake 'regular dialogue' on different migration-related issues, once again combining a more comprehensive approach to migration (dialogue on equal treatment, social rights and integration of legally resident migrants) with a security- and control-oriented approach (dialogue on irregular migration and readmission). Article 71 set out a priority list of projects to consolidate cooperation on, and prioritised two migration-related initiatives: once again, whilst the first one is clearly prevention-oriented ('reducing migratory pressure, in particular by improving living conditions, creating jobs and developing training in areas from which emigrants come', Art. 71.1.a), the second one focuses on readmission of irregular migrants ('resettling those repatriated because of their illegal status under the legislation of the state in question', Art. 71.1.b).

However, according to Lavenex, this combination of approaches was not balanced; rather, the Euro-Med Agreements had a clear 'defensive focus' (Lavenex 2002, 168). This is proved by the fact that both priority measures listed under Article 71 were in fact aimed at reducing migration flows to Europe. Moreover, in both the Tunisian and Moroccan treaties Article 66 excluded illegally resident migrants from the enjoyment of social rights in their host country. As concerns cooperation on readmission, as mentioned above, both agreements contained a commitment to dialogue on 'illegal immigration and the conditions governing the return of individuals who are in breach of the legislation dealing with the right to stay and the right of establishment in their host countries' (Art. 69.3.c). In addition, the agreement with Morocco included also a 'Joint Declaration relating to readmission', in which the parties agreed to adopt bilaterally the appropriate provisions and measures to cover readmission of their nationals.

Through the inclusion in the Euro-Med Association Agreements of readmission

clauses committing the parties to adopt provisions on readmission at a bilateral level, the EU actually supported the negotiation and conclusion of bilateral readmission agreements between Member States and Mediterranean third countries, which proliferated throughout the 1990s. Indeed, the Euro-Med Agreements which followed (with Jordan in 1997; with Egypt in 2001; with Lebanon and Algeria in 2002) contained a specific readmission clause in their text (Peers 2004, 199-200). The clause was slightly different in each agreement, but it was generally based on the 'standard readmission clause' agreed by the Council in 1996 (Council of the EU 1996) and modified following the entry into force of the Amsterdam Treaty in 1999, when the EU became competent to conclude readmission agreements (Council of the EU 1999c)[21]. Readmission clauses in Euro-Med Agreements generally included: a confirmation of the international customary law obligation to readmit own nationals; a commitment to conclude future readmission agreements with the Member States which so request (or with the EU after 1999) in order to facilitate the implementation of this obligation; and a commitment to agree readmission obligations also with regard to third country nationals[22].

2.2.3. The European Neighbourhood Policy and its Action Plans

A further bilateral cooperation initiative is the European Neighbourhood Policy (ENP), launched by the European Commission in May 2004, with the 'ENP Strategy Plan', which followed the 2003 Communication 'Wider Europe - Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours' (European Commission 2004a; 2003). The ENP represents a new policy framework for the EU's relations with its neighbouring countries to the East and to the South, and it is implemented through bilateral Action Plans setting out the guidelines for cooperation to

[21] The texts of both the 1996 and the 1999 standard clauses can be found in Coleman 2009, 347-350 (Annex 3 and Annex 4 respectively). Standard readmission clauses are further discussed under section 3.1.

[22] In the context of readmission, the term 'third country national' refers to a person who does not possess the nationality of any of the contracting parties to a readmission agreement.

be pursued with each third country[23]. For this reason, even if it also provides an overall general framework, the ENP is chiefly considered a bilateral policy between the EU and each partner country[24]. Differently from the Euro-Med Association Agreements, the ENP and its Action Plans are not legal instruments: they do not include any legal obligations, but only political commitments (Lavenex et al 2009, 819-820; Coleman 2009, 129).

The ENP is based on the idea that 'the EU should aim to develop a zone of prosperity and a friendly neighbourhood – a "ring of friends" – with whom the EU enjoys close, peaceful and co-operative relations' (European Commission 2003, 4). It offers to neighbouring countries a privileged political relationship and the greatest possible economic integration with the EU, based on common values (e.g. democracy, rule of law, respect for human rights); in Lavenex's words, 'it opens the perspective for the furthest possible association below the threshold of membership' (Lavenex 2006, 344).

In the area of migration and with regard to the Southern neighbourhood, compared to the EMP (which, as discussed above, has proven rather ineffective), the ENP aims to promote a more partnership-oriented approach, built on a deeper understanding and consideration of the interests and priorities of partner countries, and on credible incentives in exchange for migration cooperation. The ENP embraces a more comprehensive strategy, embedding migration control into a much broader integration policy towards the EU neighbourhood (European Commission 2003; 2004a; 2004b).

However, the implementation of the ENP has shown a number of commonalities with previous strategies, being still based on conditionality and policy transfer (Lavenex 2006, 345). Indeed, in order to 'benefit from the prospect of a closer economic integration', the EU expects neighbouring countries to 'demonstrate shared values and effective implementation of political, economic and institutional reforms, including

[23] The ENP Action Plans are policy documents laying out the partner country's agenda for political and economic reforms and the strategic objectives of cooperation between the EU and the partner country, in different policy areas.

[24] http://eeas.europa.eu/enp/about-us/index_en.htm. Accessed on 12 August 2016.

aligning legislation with the *acquis*' (European Commission 2003, 10). Approximation to EU standards is actually one of the main objectives promoted by the ENP (Lavenex et al. 2009, 820).

In the area of migration the ENP reflects the EU cross-pillar approach, as it links financial assistance, economic integration and visa facilitation to joint migration management and border control (Cassarino 2005, 227). Since JHA issues continue to be central in this new policy framework, cooperation in the field of migration remains foremost security-oriented. This is unequivocally stated in the Commission's ENP Strategy Paper of May 2004:

> Border management is likely to be a priority in most Action Plans […]. The Action Plans should thus include measures to improve the efficiency of border management, such as support for the creation and training of corps of professional non-military border guards and measures to make travel documents more secure. The goal should be to facilitate movement of persons, whilst maintaining or improving a high level of security (European Commission 2004a, 16-17).

With regards to the Southern neighbourhood, the ENP seems to be especially focused on the fight against illegal immigration, border control and management of legal migration. This emerges clearly from the Action Plans with Morocco and Tunisia, adopted in July 2005: in both documents, a large part of the section dedicated to 'Cooperation on Justice and Home Affairs' is focused on strengthening cooperation on legal and illegal migration management (coupled with readmission of unauthorised migrants), border control and combating human trafficking and smuggling (EU-Morocco ENP Action Plan 2005, paras 46-53; EU-Tunisia ENP Action Plan 2005, paras 43-49)[25].

These provisions clearly mirror the EU's primary concerns (i.e. limiting migration flows into Europe) and the EU's understanding of changes to be undertaken by neighbouring countries in the field of migration and asylum, but they overlook the general policies and interests of those countries. Rather, as noted by Coleman, the ENP

[25] The texts of the Action Plans with Morocco and Tunisia are available at the following links: http://www.enpi-info.eu/library/content/eu-morocco-enp-action-plan; http://www.enpi-info.eu/library/content/eu-tunisia-enp-action-plan. Accessed on 12 August 2016.

reflects the EU's objective 'of creating a "buffer zone" of third countries surrounding the EU, which assume responsibility for transit migration' (2009, 130). In fact, as of today, nine out of twelve currently existing Action Plans contain a provision on the negotiation and conclusion of a readmission agreement with the EU, and two more Action Plans include a more general commitment to initiate a dialogue on readmission (Billet 2010, 57).

Differently from the HLWG Action Plans described in the previous section, ENP Action Plans are supposed to be jointly agreed by the EU and the partner countries concerned; they have a duration of three to five years, subject to renewal by mutual consent. Along with joint ownership, a crucial intended feature of ENP Action Plans is differentiation: even if based on common principles, each Action Plan should be tailor-made for each partner country (European Commission 2004a; 2004b). But in most cases, e.g. in the cases of Morocco and Tunisia, ENP Action Plans reveal a Euro-centric security-oriented approach, which does not take into due consideration the partner country's specificities, i.e. its national reform processes, relations with the EU, needs, capacities and interests.

ENP Action Plans have as a legal basis the existing bilateral agreements between the EU and its neighbouring countries, namely Partnership and Cooperation Agreements with Eastern neighbours and Association Agreements with Southern neighbours (presented above in this section). Indeed, the first Action Plans have been developed with countries with which the EU had already one of these agreements in force[26]. ENP Action Plans are built upon the institutional framework of Association or Cooperation Agreements, especially with regard to their respective Councils (European Commission 2004b, 3-4).

Differently from the HLWG Action Plans, it is the Commission (and not the Council) to be responsible for proposing the ENP Action Plans. This may lead us to think that a more comprehensive approach to migration management would prevail. However, JHA ministers retain significant control over the process, due to the very fact

[26] Nowadays, twelve third countries participate in the ENP, having agreed Action Plans with the EU. These are: Armenia, Azerbaijan, Egypt, Georgia, Israel, Jordan, Lebanon, Moldova, Morocco, Palestine, Tunisia and Ukraine. Algeria is currently negotiating an Action Plan, while Libya, Syria and Belarus are still outside the ENP. http://eeas.europa.eu/enp/about-us/index_en.htm. Accessed on 12 August 2016.

that the ENP draws upon the institutional framework of Association and Cooperation Agreements. Their respective Councils, whose members are officials and ministers of the Member States and the partner countries, are responsible for approving the Action Plans and for monitoring their implementation. According to Lavenex, 'the ENP can thus be seen as a laboratory in which the control agenda of JHA ministers competes with the more comprehensive approach of the Commission' (2006, 345).

Being a bilateral policy, the ENP is complemented by multilateral initiatives such as the EMP in the Southern neighbourhood; at the same time, the ENP aims to overcome the limits of the EMP, producing more visible and effective outcomes in the implementation of cooperation projects with Mediterranean countries in a variety of policy areas, including migration control and readmission of irregular migrants.

CHAPTER 3
EUROPEAN UNION READMISSION AGREEMENTS

3.1. Origins and evolution of EU readmission agreements within the framework of the EU return and readmission policy

The analysis of the development of the external dimension of the EU migration policy (section 2.1 above) showed that the issue of expulsion of irregular migrants and their readmission to a third country outside the EU has always been considered an element of crucial importance and it has been integrated into the common European migration policy since its origins in the early 1990s. The more the EU and its Member States emphasised the need to combat irregular migration, the more cooperation with third countries became essential and the conclusion of European readmission agreements rose to the top of the EU's external relations priorities. Readmission agreements came to represent the main instrument of a common return policy that needed the cooperation of third countries of origin and transit in order to be implemented effectively.

Under the Maastricht Treaty, and until the entry into force of the Amsterdam Treaty on 1st May 1999, the EU did not have competence in the area of return and readmission. Therefore, the early common readmission policy developed throughout the 1990s focused on: incentivising third countries to accept and implement readmission obligations prescribed by international law (also through the inclusion of readmission clauses into broader cooperation agreements); stimulating the conclusion of bilateral readmission agreements between Member States and third countries; and harmonising the content of these bilateral readmission agreements.

Firstly, the Council adopted two (non-binding) recommendations aimed to limit the disparities between bilateral RAs concluded by different Member States with a third country: in November 1994 it adopted a Recommendation on a specimen bilateral

readmission agreement between a Member State and a third country[1], covering both nationals and non-nationals of the State parties, and in July 1995 a Recommendation on guiding principles to be followed in drawing up protocols on the implementation of readmission agreements[2] (Bouteillet-Paquet 2003, 363-364; Cassarino 2010c, 15). Member States retained the exclusive competence to negotiate and conclude RAs individually with third countries, but they could use a common instrument and follow common guidelines[3].

Secondly, in 1996 the Council adopted a 'standard readmission clause' which the Commission had to try and include in the so-called 'global agreements' (i.e. Association Agreements or Partnership and Cooperation Agreements) with third countries[4]. The 1996 readmission clause committed the State parties in the agreement to the readmission of own nationals; in addition, the clause included a commitment for the third country concerned to conclude future bilateral readmission agreements with the Member States that so request, covering also the readmission of third country nationals and stateless persons (Council of the EU 1996).

Following the entry into force of the Amsterdam Treaty in 1999, in light of the new competences acquired by the EU in the area of readmission, the Council modified the text of the standard readmission clause, in order to include the possibility for the third country to conclude future readmission agreements with the European Community itself (Council of the EU 1999c). On that occasion the Council changed another relevant aspect of the readmission clause: whilst the 1996 clause *could* be included in association or cooperation agreements on a case-by-case basis, the 1999 clause had to be included

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[1] Council Recommendation of 30 November 1994 concerning a specimen bilateral readmission agreement between a Member State and a third country, OJ C 274, 19.9.1996.

[2] Council Recommendation of 24 July 1995 on the guiding principles to be followed in drawing up protocols on the implementation of readmission agreements, OJ C 274, 19.9.1996.

[3] As noted by Coleman (2009, 21-22), the impact of these instruments has been assessed differently by different scholars. Noll (2005, 497) highlighted a lack of harmonising effect, whereas Bouteillet-Paquet affirmed that they had a great influence over national policies: 'Largely followed in practice, the provisions of these two recommendations made it possible to approximate national practice' (Bouteillet-Paquet 2003, 363-364).

[4] The inclusion of readmission clauses in global agreements represented a way to incorporate migration policy objectives into the EU's general external relations, implementing the approach described under section 2.1 above. On the inclusion of readmission clauses in Euro-Med Association Agreements, see also section 2.2.2 above.

in *all* future agreements with third countries[5].

Finally, under the Austrian Presidency in 1998, the Council started negotiations on a draft standard readmission agreement between the whole group of the Member States and a third country (Coleman 2009, 24). This initiative was a clear signal of the Member States' willingness to pursue collectively their common interest in the readmission of irregular migrants. These negotiations were soon overtaken by the entry into force of the Amsterdam Treaty, which conferred to the European Community the competence to conclude readmission agreements with third countries. At that point the development of a proper common European return and readmission policy could stArt.

Article 63(3)(b) of the Amsterdam Treaty enabled the Council to adopt measures in the area of 'illegal immigration and illegal residence, including repatriation of illegal residents'. Does this include the power to conclude readmission agreements? According to the case law of the European Court of Justice (ECJ), on the basis of the principle of parallelism between internal and external competence[6], in cases where no explicit external competence is mentioned in the Treaty, competence on external matters (including power to conclude international agreements) can be implied from explicit internal competence in that field (Billet 2010, 59-60). Therefore, under this article, the EU acquired the power to conclude external agreements aimed to facilitate the return of irregular migrants to a country of origin or transit. The October 1999 Tampere European Council tried to make this external competence explicit, by expressly inviting the Council to conclude readmission agreements with third countries (European Council 1999, para 27).

The main reason for attributing these new powers to the European Community was that Member States were confronted with increasing difficulties in obtaining cooperation from third countries, which proved rather reluctant to collaborate in readmission procedures; without the necessary cooperation of third countries, the expulsion of irregular residents from a Member State's territory was not feasible (Schieffer 2003, 343-344). Hence, Member States agreed that if they were not able to

[5] The texts of both the 1996 and the 1999 standard readmission clauses can be found in Coleman 2009, 347-350 (Annex 3 and Annex 4 respectively).

[6] ECJ, *Commission v. Council (ERTA)*, Case 22/70, Judgement of the Court, 31 March 1971, para 16.

obtain sufficient cooperation on a bilateral level, they could probably be more successful by trying to act collectively: Member States expected that 'the political and economic weight of the Community would increase the readiness of third countries to enter into readmission agreements' (Coleman 2009, 56). According to Coleman, the perceived greater negotiating weight of the EU compared to individual Member States represented the added value of concluding readmission agreements at a European level, rather than at the national level.

The EU started to exercise immediately its new competence: in the years 2000-2002 the Commission received by the Council the mandate to initiate negotiations on readmission agreements with several countries: Morocco, Sri Lanka, Russia and Pakistan in September 2000; Hong Kong and Macao in April 2001; Ukraine in June 2002; Turkey, Albania, Algeria and China in November 2002. During the same period, the Member States progressively identified a set of criteria to select the target countries. In April 2002 the following list of selection criteria was agreed by the JHA Council: 1) the migration pressure exerted by the third country; 2) the fact that the country has signed an Association or Cooperation Agreement (but it must not be a candidate for accession to the EU); 3) the country's geographical position, in particular its proximity to a Member State; 4) the fact that a European RA with that third country represents an added value for Member States' bilateral negotiations; 5) geographical balance between various regions of origin and transit[7] (Council of the EU 2002a, para 2).

During the year 2002, the EU institutions produced a series of action plans and policy papers which contributed in a decisive way to the development of the general guidelines for a common return and readmission policy. In this regard, a first relevant document was the Comprehensive Plan to combat illegal immigration and trafficking of human beings in the European Union, adopted by the JHA Council in February 2002, on the basis of the Commission Communication on a Common Policy on Illegal Immigration of November 2001. These documents stressed the significant role EURAs play in the fight against illegal immigration and encouraged the conclusion of further

[7] In 2004 the GAER Council affirmed that, among these criteria, the most important ones were the migration pressure exercised by a third country, and its geographical position relative to the EU, including considerations of neighbourhood and regional coherence (Council of the EU 2004b).

EURAs with relevant third countries. At the same time the 2001 Communication noted that 'before the negotiation of any readmission agreement, the political and human rights situation in the country of origin or transit should also be taken into account' (European Commission 2001, 25).

As mentioned above under section 2.1.4, the Seville European Council held in June 2002 produced strongly control-oriented policy conclusions. *Inter alia*, it called for the speeding up of the conclusion of the EURAs which were already under negotiation and for the approval of new negotiating mandates (European Council 2002, para 30). In April 2002 the Commission produced a crucial Green Paper on a Community Return Policy on Illegal Residents, followed in October 2002 by a Communication on the same topic (European Commission 2002a; 2002b). With respect to European readmission agreements, while committing to push forward ongoing negotiations in order to complete them in due time as requested by the Seville European Council, the Commission explained in a very straightforward way the difficulties it was encountering with ongoing negotiations:

> As readmission agreements work mainly in the interest of the Community, third-countries are naturally very reluctant to accept such agreements. Their successful conclusion, therefore, depends very much on the positive incentives ("leverage") at the Commission's disposal. In that context it is important to note that, in the field of JHA, there is little that can be offered in return. […] It is, therefore, essential to give more thought to the crucial question of what other incentives, not only from the JHA area but from all Community areas (e.g. trade expansion, technical/financial assistance, additional development aid etc.) could be offered to the relevant countries in return (European Commission 2002b, 24).

The Seville Council also requested the development of a Return Action Programme based on the Commission Green Paper (European Council 2002, para 30), which was adopted by the JHA Council in November 2002. The Return Action Programme consisted of five elements: 1) improved operational cooperation among Member States, including exchange of information and best practices, common training, mutual assistance and joint return operations; 2) common minimum standards for return; 3) country specific programmes, the first one involving Afghanistan; 4) financial

assistance; and 5) intensified cooperation with third countries (Council of the EU 2002e). The first part concerning intra-EU cooperation was the most developed one; as regards the progress of EURAs, this document reiterated the importance for the EU 'to consider the use of all appropriate instruments available in the context of the Union's external relations to further negotiations with third countries' (Council of the EU 2002e, para 64). Annex II to the Return Action Programme specified also a list of measures and actions to be adopted and carried out in each of the five areas identified above[8].

In the following years, progress in the field of readmission has been rather discontinuous (Giuffré 2011, 10); most of the EU policy debate in this area has focused on the issue of incentives, and how to ensure the progress of negotiations with those countries which proved unwilling to conclude (or even to start negotiations for) EURAs. This was in particular the case of many of the first countries for which the Commission had received a mandate in 2000 and 2002: Morocco, Algeria and China, which as of today have not signed an agreement yet (Morocco) or have not even started negotiations (Algeria and China); and Pakistan and Turkey, which reached an agreement only after a long and complex negotiation (the EURA with Pakistan entered into force in December 2010, the one with Turkey in October 2014)[9].

In 2006, the EU decided to start negotiations for RAs with the Western Balkan countries (Serbia, Montenegro, Bosnia and Herzegovina, Macedonia) and Moldova, in conjunction with the negotiation of visa facilitation agreements[10] (VFAs). In 2008 and 2009 the Commission was granted two mandates to negotiate RAs with Georgia and Cape Verde respectively, and in 2011 three more mandates allowed the launch of negotiations with Belarus, Armenia and Azerbaijan. In December 2014 and September 2016 the Commission received the latest mandate for an EURA with Tunisia and Nigeria, respectively. While the RAs with the Western Balkan countries, Moldova,

[8] Annex I to the Return Action Programme presented definitions for the terminology used in the return and readmission policy field.

[9] The cases of Morocco, Algeria and Turkey will be analysed in details under section 3.5.

[10] Visa facilitation agreements (VFAs) are international agreements between the EU and a third country providing for measures to make procedures for the issuing of short-stay visas easier and faster. They generally offer faster decision processes, simplified documents and reduced visa fees for short-stay visas, and simplified criteria for multiple-entry visas for certain category of persons. The coupling of VFAs with EURAs is further discussed under section 3.3.

Georgia, Armenia and Azerbaijan were concluded quite rapidly, the negotiation with Cape Verde was slower but was finally concluded. Negotiations with Belarus started in January 2014 and are reported to be close to conclusion, while the beginning of negotiations with Tunisia was announced by the Commission only very recently, on 12 October 2016 (European Commission 2016j). In addition, on 26 October 2016, the Commission announced in its daily press release the beginning of negotiations for a readmission agreement with Nigeria, for which it had received the Council's negotiating mandate only one month before[11].

Overall, since the entry into force of the Amsterdam Treaty, the Commission has received 23 negotiating mandates; 17 EURAs have been signed and are currently in force, while six EURAs are under negotiation. Table 1 below lists the EURAs concluded and the EURAs whose negotiations are ongoing or have not formally started yet.

Table 1. European Readmission Agreements

Country	**Mandate received**	**Status of negotiations**	**Agreement signed**	**Entry into force**
Morocco	September 2000	Started April 2003	-	-
Sri Lanka	September 2000	Completed	4 June 2004	1 May 2005
Pakistan	September 2000	Completed	26 October 2009	1 December 2010
Russia	September 2000	Completed	25 May 2006	1 June 2007
Hong Kong	April 2001	Completed	27 November 2002	1 March 2004
Macao	April 2001	Completed	13 October 2003	1 June 2004
Ukraine	June 2002	Completed	18 June 2007	1 January 2008
Turkey	November 2002	Completed	16 December 2013	1 October 2014

[11] http://europa.eu/rapid/press-release_MEX-16-3547_en.htm. Accessed on 27 October 2016.

Albania	November 2002	Completed	14 April 2005	1 May 2006
China	November 2002	Not started yet	-	-
Algeria	November 2002	Not started yet	-	-
Macedonia	November 2006	Completed	18 September 2007	1 January 2008
Bosnia and Herzegovina	November 2006	Completed	18 September 2007	1 January 2008
Montenegro	November 2006	Completed	18 September 2007	1 January 2008
Serbia	November 2006	Completed	18 September 2007	1 January 2008
Moldova	November 2006	Completed	10 October 2007	1 January 2008
Georgia	November 2008	Completed	22 November 2010	1 March 2011
Cape Verde	June 2009	Completed	18 April 2013	1 December 2014
Belarus	February 2011	Started January 2014	-	-
Armenia	December 2011	Completed	19 April 2013	1 January 2014
Azerbaijan	December 2011	Completed	28 February 2014	1 September 2014
Tunisia	December 2014	Started 12 October 2016	-	-
Nigeria	September 2016	Started 28 October 2016	-	-

Source: Compiled by the author based on information from the European Commisssion

The Tampere Programme (1999-2004) was followed by another five-year programme establishing policy guidelines in the area of freedom, security and justice. The Hague Programme, adopted by the European Council in November 2004, for the period 2004-2009, combined the purpose of efficiently countering irregular immigration to the EU with the purpose of consolidating and harmonising EU legislation in the area of migration and asylum. In the field of return and readmission, the European Council

proposed a range of initiatives in line with the Tampere Programme, including: the adoption of common minimum standards for return procedures (what will become the so-called 'Return Directive'[12], adopted in December 2008); the creation of a European Return Fund by 2007; the development of common country and region specific return programmes; the timely conclusion of European readmission agreements; and the appointment of a Special Representative for a common readmission policy (Council of the EU 2004c, para 1.6.4).

A relevant change in the legal framework of the EU readmission policy occurred with the entry into force of the Lisbon Treaty on 1st December 2009, which modified the legal basis for the conclusion of European readmission agreements. Article 79(3) of the Treaty on the Functioning of the European Union (TFEU) states that:

> The 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.

Although the substance of this article is not new (in fact, when the Lisbon Treaty entered into force the EU had already concluded eleven readmission agreements with third countries worldwide), the relevance of this additional provision consists of the explicit recognition of the EU competence to conclude international agreements with third countries for the purpose of readmission. As mentioned above in this section, under Article 63(3)(b) of the Amsterdam Treaty such competence was not explicit, and could only be implied by interpreting the expression 'measures […] in the area of […] repatriation of illegal residents' as including the negotiation of readmission agreements, based on the principle of parallelism between internal and external competence[13].

The Lisbon Treaty introduced also a significant change in the procedure for the adoption of EURAs, which (as for other types of international agreements between the

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[12] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

[13] First established by the ECJ jurisprudence, the principle of parallelism was codified by the Treaty of Lisbon in art. 3(2) TFEU. See also: Panizzon 2012, 112-113.

EU and a third country) now foresees an increased role for the European Parliament (Art. 218 TFEU). Indeed, the European Parliament (EP) has to be 'immediately and fully informed at all stages of the procedure' (Art. 218(10) TFEU) and the Council can adopt a decision concluding the agreement only 'after obtaining the consent of the European Parliament' (Art. 218(6)(a) TFEU), whereas under the Amsterdam Treaty the EP was only consulted (Art. 300(3) TEC) and delivered a non-binding opinion[14].

Following the Hague Programme, the development of the EU return and readmission policy continued under the Stockholm Programme, adopted by the European Council in December 2009, for the period 2010-2014. This new programme was much more detailed than the previous ones, but in the substance its indications were in line with documents preceding it. Once again, 'the conclusion of effective and operational readmission agreements' was mentioned among the measures to be taken to combat illegal immigration (Council of the EU 2009, para 6.1.6).

3.2. Content and purpose of EU readmission agreements

As mentioned in section 1.1 above, EU readmission agreements are international treaties of a reciprocal nature between the EU and a third country, setting out detailed administrative and operational procedures to facilitate the return or transit of persons who do not, or no longer fulfil the conditions of entry to or residence in the requesting State (i.e. the State that request the readmission of a person). Despite minor differences, the structure and content of the EURAs concluded so far are almost identical. This is due to the fact that the Commission has pursued a 'standardised approach', basing negotiations on a specimen draft agreement and trying to achieve final texts that have as many common features as possible (Schieffer 2003, 353).

Section I and II set out readmission obligations for the contracting parties, i.e. the third country concerned and the EU, or rather its Member States[15]. They have reciprocal

[14] Roig and Huddleston noted that in practice under the old procedure the role of the European Parliament was minimal: 'in most cases the Parliament was neither consulted nor kept informed during negotiations and found itself delivering a post-facto opinion' (2007, 369). On the same line, see Billet 2010, 64-65.

[15] Although formally the contracting party of an EURA is the EU, readmission obligations in practice

obligations to take back their own nationals who have entered or stayed illegally in the territory of the other party; they also have an obligation to readmit third county nationals (i.e. nationals of non-contracting parties) or stateless persons who have illegally entered the territory of the other party after having transited through or stayed on their territory, sometimes subject to certain conditions[16].

Section III details the rules of the readmission procedure, including precise indication of: the content of the readmission application; the types of documents which constitute proof or *prima facie* evidence that a person is a national of the other party, or that a third country national has entered the territory of the requesting State after having transited through or stayed on the territory of the requested State; time limits for submitting a readmission application, for replying to it and for its implementation; and transfer modalities. EURAs usually provide also for a special accelerated procedure.

Section IV and Section V concern, respectively, transit operations and transport costs (which are borne by the requesting State). Section VI contains detailed provisions on data protection and a 'non-affection clause' regulating the relations between the readmission agreement and other international law instruments. More precisely, the clause states that EURAs apply 'without prejudice to the rights, obligations and responsibilities […] arising from international law', including from international human rights and refugee law conventions.

However, it must be noted that the first EURAs (with Hong Kong, Macao and Sri Lanka) contain a generic non-affection clause, which makes no explicit reference to human rights or refugee law instruments. The European Parliament criticised this fact in its report on the EURA with Hong Kong, and suggested the Commission reconsider the wording of the clause in order to make international human rights obligations more explicit (European Parliament 2002, 8). Since the EURA with Albania, almost all

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apply to its Member States, because it is Member State authorities who are responsible for requesting readmissions and replying to readmission requests. Readmission procedures are usually carried out at national level.

[16] In particular, certain treaties provide for delayed application of readmission obligations concerning third country nationals (e.g. a two-year delay for Albania and Ukraine; a three-year delay for Russia and Turkey). These transitional periods are usually justified as capacity-building phases.

agreements (with the exception of the EURAs with Ukraine[17] and Pakistan) mention explicitly several international human rights and refugee law conventions – in particular, the 1951 Geneva Convention relating to the status of refugees and its 1967 Protocol, the 1950 European Convention on Human Rights, and the 1984 Convention against torture and other cruel, unhuman or degrading treatment or punishment (Billet 2010, 72). The EURA with Turkey specifies also the relation of 'non-affection' between the readmission agreement and the rights and procedural guarantees provided for by the EU directives in the area of migration and asylum[18].

Furthermore, all EURAs regulate their relations to other formal and informal readmission agreements in two different provisions. Firstly, the non-affection clause always contains a paragraph stating that 'nothing in this Agreement shall prevent the return of a person under other formal or informal arrangements', allowing for the readmission of a person to be carried out in application of a different instrument. This provision ensures the possibility for Member States to continue applying bilateral readmission agreements as well as informal readmission practices (Coleman 2009, 106).

Secondly, all EURAs include an article concerning more specifically Member States' bilateral readmission agreements or arrangements; the so-called 'safeguard clause' establishes that the EURA takes precedence over any readmission agreement (or implementation protocol) concluded between an individual Member State and the third country concerned, in cases of incompatibilities or overlapping. Therefore, in case of conflict between the provisions of an EURA and the provisions of a bilateral agreement, the former prevail.

Section VII deals with the implementation and application of the agreement. All EURAs provide for the creation of a Joint Readmission Committee (JRC) comprising representatives of the Commission, representatives of the partner third country and experts from the Member States, with specific tasks related in particular to monitoring

[17] However the non-affection clause of the EURA with Ukraine contains a cross reference to the international human rights and refugee law conventions referred to in the Preamble of the agreement.

[18] Article 18, paragraphs 3 to 6 of the EURA with Turkey make explicit reference to the need for the readmission agreement to comply with the rights and procedural guarantees set out by the Return Directive, the Reception Conditions Directive, the Asylum Procedures Directive, the Long-term Residents Directive, and the Family Reunification Directive.

the application of the agreement. All EURAs also entail the possibility for individual Member States to draw up bilateral implementing protocols with the third country concerned, which may include more precise information on procedural and other practical issues. The last section lists final provisions, usually clarifying the territorial scope of the agreement[19] and rules on its entry into force, duration and termination.

Having analysed the content of European readmission agreements, it is useful to reflect on their direct and indirect purposes. The EU common readmission policy pursues, indeed, different objectives (Coleman 2009, 57-70; Giuffré 2011, 11). First of all, its most intuitive aim is to fight unauthorised immigration by facilitating the return of irregular migrants and residents to their country of origin or transit. As mentioned above, EURAs have been considered by European institutions and Member States as a crucial tool for the actual implementation of returns and as the main instrument of a common return policy. The relevance of an effective return policy is also linked to the deterrent effect it may have on potential migrants, as emphasised by the Commission in several policy papers.

The second purpose of EURAs is the establishment of a greater responsibility for migration control on the part of third countries of transit in the neighbourhood of the EU. The inclusion of a 'third country national clause' in EURAs is actually linked to the aim of creating a 'buffer zone' of countries responsible for readmitting migrants who entered the EU transiting through their territory, but also for intercepting migrants *en route* to the EU. The idea behind this argument is that a readmission agreement which includes an obligation to readmit third country nationals would lead a State to strengthen its border- and migration control polices in order to prevent transit migrants from entering into and crossing its territory towards the EU (Coleman 2009, 61-62).

A third objective of the EU readmission policy is the promotion of readmission agreements also among third countries themselves, in particular between countries of transit at the borders of the EU and countries of origin. The 2004 Council Conclusions on the Priorities for the Successful Development of a Common Readmission Policy,

[19] EURAs do not apply to Denmark, as it 'opted out' from the entire area of freedom, security and justice and hence is not bound by EU law and policy in the area of migration and asylum. Nonetheless, EURAs generally include a Joint Declaration suggesting that Denmark and the third country concerned conclude a bilateral RA in the same terms as in the EURA.

besides underlining the importance of concluding EURAs that include also the obligation to readmit third country nationals, explicitly encouraged 'third countries to conclude readmission agreements with each other and with other countries in their respective regions' (Council of the EU 2004a, para 1). This would lead to the creation of a large network of readmission agreements allowing for chains of consecutive expulsions - or 'readmission chains' (Noll 2006, 496) - from an EU Member State to a transit country, to another transit country or/and to the country of origin. From the point of view of European institutions, such an expansion of readmission agreements would be of benefit both to the Member States and to third countries of transit. Coleman notes that the negotiation of EURAs actually had a 'ripple-effect', triggering EU neighbouring countries to initiate or intensify their own readmission policies (Coleman 2009, 65-66; 187). The EU stimulated these developments through both direct and indirect assistance (European Commission 2002c, 25-26).

A further purpose for concluding EURAs with third countries is building reception capacity in transit countries, including policies and facilities for the reception of both readmitted irregular migrants and rejected asylum seekers. This objective, similarly to the second and third ones, is considered to be beneficial to both the EU and the third country concerned and its achievement is supported by the EU through financial and technical assistance (Coleman 2009, 68-70).

This analysis of the multiple purposes of EURAs shows that the relevance of these instruments for the EU goes well beyond their direct objective of facilitating the return of irregular migrants, as they are usually combined with the promotion of (and assistance in) improving border and migration control, negotiating further readmission agreements, and developing reception capacity in third countries.

3.3. Negotiation process and incentives offered to third countries

Despite their theoretically reciprocal nature, it is evident that in practice EURAs work in the interest of the EU and its Member States, as admitted by the Commission itself (European Commission 2002b, 24) and argued by numerous scholars. Rodier defined the EU readmission policy as *'eurocentrée'* (Rodier 2006, 21) and Roig and

Huddleston compared readmission negotiations to 'EU monologues where little interest exists on the other side' (Roig and Huddleston 2007, 373-374). In light of the unbalanced terms of EURAs, their successful conclusion depends very much on the 'leverage' at the Commission's disposal, i.e. on the possibility for the Commission to offer strong incentives to a third country in order to obtain its cooperation on readmission.

The need for strong incentives is often linked to one particular element of the EURAs: the third country national clause. Member States have so far insisted to include in all EURAs the obligation to readmit non-nationals; third countries, instead, have usually opposed the inclusion of such obligation. The Commission acknowledged that this provision generally represents the greatest blocking point in readmission negotiations[20]. Even in the relatively straightforward negotiations with Hong Kong, Macao and Sri Lanka, most of the time was spent discussing issues related to the readmission of non-nationals (Schieffer 2003, 355). But the main problems have been understandably experienced with third countries of transit in the neighbourhood of the EU which face a significant migratory pressure, like Morocco and Turkey; the inclusion of the obligation to readmit non-nationals is among the factors which hampered and lengthened most the negotiations with both countries (Roig and Huddleston 2007, 374; Coleman 2009, 187-189).

For this reason, and also in light of the limited practical use of the clause by Member States, in its 2011 Evaluation of EU Readmission Agreements, the Commission suggested to include the third country national clause only in cases where it really represents an added value, due to the geographical position of the third country compared to the EU and to the potential risk of irregular transit migration to the EU. In addition, according to the Commission, readmission of non-nationals should only be included when appropriate incentives can be offered to the third country concerned (European Commission 2011a, 9). However, the Council Conclusions which followed the Commission Evaluation, ruled out the Commission recommendation to exclude the

[20] Other technical aspects which have often required lengthy negotiations are: time limits, use of the EU standard travel document, means of proof or *prima facie* evidence, use of charter flights, and relation to existing bilateral RAs (Schieffer 2003, 355).

third country national clause from future negotiating directives, and decided to continue incorporating it as a general rule (Council of the EU 2011, para 9). This orientation was confirmed in the following years and maintained until the present day[21].

Over the years, the Commission has identified different kinds of positive incentives to bring to the negotiating table. Probably one of the most effective incentives is the coupling of EURAs with visa facilitation agreements (VFAs): in exchange for the readmission of non-nationals to a transit country, the EU offers facilitated procedures and simplified criteria for the nationals of that country to obtain short-stay visas and/or multiple-entry visas (for certain categories of persons). For instance, in the cases of Russia and Ukraine readmission negotiations (which were at a standstill) broke through when the EU decided to open parallel visa facilitation negotiations.

However, the Commission itself acknowledged that 'visa concessions or the lifting of visa requirements can be a realistic option in exceptional cases only (e.g. Hong Kong, Macao); in most cases it is not' (European Commission 2002b, 24); in particular, VFAs have never been (and probably will never be) offered to 'certain African countries', which are considered to 'pose a migratory risk' (Council of the EU 2015a, 6). This is because 'Member State hesitate to close a door on irregular immigration only to open a window on new potential irregular flows of visa overstayers, already the largest category of irregular migrants in the EU' (Roig and Huddleston 2007, 377). Therefore, visa facilitation appears to be a limited policy tool, that Member States have allowed the Commission to employ only with negligible countries of origin and transit, or with potential candidates to accession in the Eastern neighbourhood, but not with countries which exercise a large migratory pressure on the EU (and for whom the conclusion of an EURA would be most urgent and useful).

However, it must be noted that the 2009 Commission Evaluation of the Implementation of VFAs with third countries[22] demonstrated that 'the implementation

[21] In the JHA Council Conclusions on EU Return Policy of June 2014, the Council explicitly recognised the important role of countries of transit and encouraged the setting up of efficient readmission procedures with these countries (Council of the EU 2014, para 3).

[22] The 2009 evaluation of VFAs concerned the VFAs entered into force until that moment, i.e. the VFAs

of VFAs has not increased security risks or risks of irregular migration towards the EU, as the conditions for issuing visas and the conditions for crossing the external borders remain unaffected' (European Commission 2009b, 20). In light of this conclusion, in its 2011 Evaluation of EURAs, the Commission suggested that VFAs 'can provide the necessary incentive for readmission negotiations without increasing irregular migration' (European Commission 2011a, 7). But the 2011 Commission's suggestion remained largely unheard, and in its 2015 EU Action Plan on Return, the Commission itself admitted that 'the possibility to use this instrument [VFAs] is limited, as the EU is unlikely to offer visa facilitation to certain third countries which generate many irregular migrants and thus pose a migratory risk' (European Commission 2015b, 14).

A second incentive third countries are extremely interested in (and often request) is the opening of facilitated channels for the legal migration of their nationals to the EU. However, this incentive touches upon one of the most sensitive migration policy issues, i.e. the determination of the volume of admitted migrant workers, which lies within the exclusive competence of Member States, as affirmed by Art. 79(5) of the Lisbon Treaty[23]. On the one hand, Member States are generally extremely reluctant to offer legal and labour migration opportunities, as in their perspective this option carries even more controversial costs than VFAs (Roig and Huddleston 2007, 378); on the other hand, the Commission lacks the competence to take its own initiative in this field, and therefore cannot exert sufficient leverage (Coleman 2009, 198-199). Nonetheless, the Commission has repeatedly called on Member States to identify incentives in the areas that fall under their national competence (in particular access to their labour markets for migrant workers) and to coordinate national initiatives in this field at EU level in order for the Commission to exert a more significant leverage (European Commission 2015b, 14).

Financial and technical assistance represents another significant incentive for third countries to accept readmission obligations. In the Commission's perspective, such assistance should include support to measures for the reintegration of own nationals, as

with Russia, Ukraine, the Western Balkan countries (including Albania) and Moldova.

[23] 'This Article shall not affect the right of Member States 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'.

well as support to the creation of adequate reception facilities for non-nationals awaiting onward readmission to their country of origin (European Commission 2011a, 7). In the past, third countries demonstrated little interest in this kind of incentive, mainly due to the limited budget available under the Aeneas programme first, and the EU geographic and thematic programmes later on (Roig and Huddleston 2007, 378; European Commission 2011a, 7). The Commission noted that 'it could be quite efficient as leverage, provided the money offered is substantial and comes on top of what has been already programmed or promised' (European Commission 2011a, 7).

Finally, in light of the integrated and comprehensive approach to migration promoted by the Commission between the end of the 1990s and the early 2000s (analysed under section 2.1. above), the Commission suggested to offer in readmission negotiations not only financial and technical assistance or incentives from the JHA area (visa facilitation and legal migration), but also incentives from other policy areas, such as economic cooperation, WTO-compatible trade concession (e.g. better market access or tariff preferences) and development aid (Schieffer 2003, 356; Roig and Huddleston 2007, 375). This led the Commission to develop a so-called 'package approach', whereby the EU brings to the negotiating table (possibly right at the outset of negotiations) a coherent and tailor-made 'package' of incentives to be offered to the third country concerned in exchange for its cooperation on readmission (Coleman 2009, 192).

In its 2011 Evaluation of EURAs, the Commission recommended to pursue a 'package approach' and, where possible, to embed readmission obligations into framework agreements with third countries (European Commission 2011a, 7-8). In its 2014 Report on the implementation of the GAMM, the Commission reiterated that return and readmission should always be part of a balanced EU offer to a third country and should be linked not only to enhanced mobility, but also to other policy areas such as trade, enterprise and industry (European Commission 2014a, 19). Also in its EU Action Plan on Return, the Commission reaffirmed the need to develop 'tailor-made support packages […] to help certain partner countries to fulfil their readmission obligations in practice and support negotiations' (European Commission 2015b, 13).

The 'package approach' has been reconfirmed in the recent Commission

Communication on Establishing a New Partnership Framework with Third Countries, issued in June 2016. Packages here take the form of so-called 'compacts', which 'will be the key components of the overall relationships between the EU and third countries of origin or transit'. Each compact combines in a coherent and tailor-made way different policy elements leveraged towards the same objective, i.e. cooperation on migration management, including effective prevention of irregular migration and readmission. In order to maximise the leverage, 'all EU policies including education, research, climate change, energy, environment, agriculture, should in principle be part of a package' (European Commission 2016f, 5-9).

However, a package-based approach to readmission negotiations entails a number of difficulties. On 9 June 2015, Dimitris Avramopulous, Commissioner for Migration, Home Affairs and Citizenship sent a letter to the JHA Ministers on the subject of increasing the effectiveness of the EU return and readmission policy. The paper in annex reaffirmed that 'trade policy and development aid should be used to gain leverage in the area of readmission'; however it simultaneously admitted that 'leverage at EU level outside Justice and Home Affairs is very difficult to activate due to political reluctance and legal constraints' (Council of the EU 2015a, 6). In addition, if we consider that measures which would represent a real incentive to third countries, namely visa facilitation or exemption and legal migration opportunities, are generally ruled out by Member States in cases of third countries of significant migration salience, it appears that the Commission's task to successfully conclude EURAs with those countries remains particularly difficult. 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' (2007, 378-379).

Along with positive incentives, the Commission has considered also the possibility to resort to negative incentives, i.e. to adopt sanctions for non-cooperation. The idea of a 'sanction policy' was first introduced by the Seville European Council in 2002, as mentioned above under section 2.1.4. The Seville Conclusions established that 'insufficient cooperation by a country could hamper the establishment of closer relations between that country and the Union' (European Council 2002, para 35); moreover, if the Council 'unanimously find that a third country has shown an

unjustified lack of cooperation in the joint management of migration flows', the Council may 'adopt measures or positions under the Common Foreign and Security Policy and other European Union policies' (European Council 2002, para 36).

In practice, however, this policy was never pursued in this terms, being considered as potentially harmful not only to third countries, but also to the EU. Diminished assistance in the areas of development, trade, human rights and democracy-strengthening would only exacerbate the root causes of migration and reduce a third country's capacity to control it; moreover, such policy would risk to hamper the broader EU's external relations as well as its economic and strategic position (Coleman 2009, 135; Roig and Huddleston 2007, 379). Despite that, an approach including negative incentives has never been totally abandoned or excluded by the Commission. In its 2011 evaluation, indeed, the Commission reiterated that 'non respect of the readmission obligation should lead to adopting sanctions' and that negotiating directives should 'indicate possible retaliation measures by the EU in cases of persistent and unjustified denial of cooperation by the partner country' (European Commission 2011a, 8). The Council confirmed this approach in the following Conclusions Defining the EU Strategy on Readmission, where the possibility was mentioned for 'the withdrawal of incentives when a third country does not cooperate in the effective implementation of its readmission obligations' (Council of the EU 2011, para 8).

Most importantly, this approach introduced a 'conditionality concept' in the EU readmission policy; as a consequence, the relations between the EU and a third country in different policy areas (development aid, neighbourhood policy, trade, legal migration, mobility, security, energy, etc.) became conditional to that country's level of cooperation on migration management, border control and readmission. Conditionality has increasingly become a fundamental underlying principle in EU cooperation with third countries, also in the form of the 'more-for-more principle', which links improved cooperation on return and readmission on the part of third countries to benefits and support in all policy areas on the part of the EU (i.e. more readmission for more EU funding and incentives)[24]. The conditionality approach, or more-for-more principle, can

[24] Interestingly enough, the 'more-for-more principle' was first introduced in 2011, in the aftermath of

be found in all the most relevant and recent EU policy papers and statements concerning the EU return and readmission policy[25].

3.4. Problems and limits of EU readmission agreements

This section analyses the problems and limits of European readmission agreements, questioning four elements: their European scope; their relevance and effectiveness as instruments of cooperation on readmission; the role non-state actors and international organisations may play in their negotiation and implementation; and their human rights content.

3.4.1. How much are they 'European'?

European readmission agreements are 'European' in the sense that they are negotiated by the Commission on the mandate of the Council and on behalf of all EU Member States (Denmark excluded, having 'opted-out' from the entire area of freedom, security and justice; United Kingdom and Ireland are included only if they decide to 'opt-in' on a case-by-case basis to individual EURAs). Therefore, EURAs actually have a European scope, if we consider that they formally establish uniform obligations and harmonised procedures relating to readmission which apply to (almost) all EU Member

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the Arab Spring, with a completely different meaning and purpose. In short, it meant more democratic reforms for more EU support, and it was part and parcel of a new policy towards Southern Mediterranean countries based on a 'Partnership for Democracy and Shared Prosperity' (European Commission and High Representative 2011b; see also Chapter 4, section 4.1). The idea was that the EU would develop stronger partnerships and offer greater assistance and incentives to countries that would make more progress towards democratic reform (European Commission and High Representative 2011b, 5). The more-for-more principle in its original meaning was also incorporated in the last review of the ENP, in 2011. The Joint Communication of the European Commission and the High Representative of the Union for Foreign Affairs 'A New Response to a Changing Neighbourhood: A Review of the European Neighbourhood Policy' affirmed that: 'Increased 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. This enhanced support will come in various forms, including increased funding for social and economic development, larger programmes for comprehensive institution-building (CIB), greater market access, increased EIB financing in support of investments; and greater facilitation of mobility' (European Commission and High Representative 2011d, 3).

[25] E.g. the European Council Conclusions of 25-26 June 2015 (European Council 2015a, para 5(c)); the EU Action Plan on Return (European Commission 2015b, 14); the Council Conclusions on the Future of the Return Policy (Council of the EU 2015, para 12); and the Communication on Establishing a New Partnership Framework with Third Countries (European Commission 2016f, 6-9).

States. However, we should also consider that EURAs insert themselves into a broader and consolidated framework of bilateral cooperation on readmission between Member States and third countries.

Readmission policies at the European and at the national level coexist and are closely interconnected, but the relations between the two policy levels are complex and have not always developed smoothly. In particular, the division of competences relating to the negotiation and conclusion of readmission agreements with third countries has been (and to some extent still is) object of dispute between the Commission, the Council and the Member States. Tensions and ambiguity in the determination of the respective powers of the EU and its Member States, the sometimes unfair behaviour of Member States with regards to the limits of their own competence, the weight and impact of Member States' national priorities in the field of readmission on the EU's overall interest, and the prominent role Member States play in the implementation of EURAs, all these elements lead us to question the 'European' character of EURAs.

A primary controversial issue to be considered concerns the nature of the EU competence to conclude readmission agreements. As mentioned above under section 3.1, the Amsterdam Treaty (implicitly) conferred on the EU the competence to conclude RAs with third countries (Art. 63(3)(b) TEC), however it did not clarify the nature of such power: did the EU acquire an exclusive competence to conclude RAs at a supranational level, or were the Member States still competent to conclude bilateral RAs at the national level? At the time of the entry into force of the Amsterdam Treaty, the Commission claimed the exclusive power to negotiate and conclude EURAs on behalf of the Member States, whereas the Member States contested this interpretation and refused to renounce their power to enter into bilateral RAs with third countries (Schieffer 2003, 350-351; Coleman 2009, 75-80; Panizzon 2012, 111-113).

In order to settle the controversy, the JHA Council of 27-28 May 1999 defined the rules regulating the division of powers between the EU and the Member States. First of all, it affirmed that the EU competence is not exclusive but shared, and therefore Member States can continue to conclude RAs with third countries, '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 Council Conclusions also

foresaw an exception to this rule: Member States may conclude a bilateral RA after the conclusion or the opening of negotiations for an EURA with the same third country only in individual cases where the EURA contains only general statements on readmission, while the Member States require more detailed arrangements[26]. Finally, the Council maintained that Member States can no longer conclude bilateral RAs if they might be detrimental to existing EURAs (Council of the EU 1999b, 'Readmission Agreements - Consequences of the Entry into Force of the Amsterdam Treaty').

Coleman has usefully elaborated the content of the JHA Council Conclusions of May 1999 and of a confidential opinion issued by the Council Legal Service in March 1999, into a list of five rules that the Member States have to abide by, in order to continue pursuing their national readmission policies, while respecting the principle of sincere cooperation. The rules identified by Coleman are the following:

> 1) The Member States collectively may not conclude readmission agreements with third countries;
> 2) A Member State must notify the Council of its intention to negotiate a readmission agreement with a third country;
> 3) A Member State may negotiate or conclude a readmission agreement with a third country only insofar as the Council has not (yet) adopted a negotiating directive for a Community agreement concerning that country;
> 4) Regarding third countries for which the Council has adopted a negotiating directive for a Community readmission agreement, a Member State may exceptionally conclude an agreement containing more detailed arrangements, if required;
> 5) A Member State may not negotiate or conclude a readmission agreement in case this might be detrimental to the implementation of a Community agreement, or to readmission negotiations conducted at the EC level (Coleman 2009, 84).

Coleman, however, notes that neither the Commission nor the Member States appeared to be satisfied with such division: whilst the Commission had always aspired to exclusive competence in the area of readmission, the Member States considered the

[26] This provision has been actually incorporated in the text of all EURAs, which foresees the possibility for Member States to conclude bilateral implementing protocols with the third country concerned. However, it should also be noted that EURAs never contain only 'general statements on readmission'; instead, they are usually as detailed as bilateral RAs.

power they retained insufficient compared to their needs, and in fact individual Member States have challenged and even infringed the abovementioned rules on different occasions (Coleman 2009, 202-208; Panizzon 2012, 127-128).

The Lisbon Treaty represented a good opportunity to clarify the issue of division of competences and mitigate inter-institutional tensions. It actually offered not only the first explicit legal basis for the Commission to conclude EURAs (Art. 79(3) TFEU), but also the first unequivocal categorisation of policy areas falling under either exclusive or shared competence; and the area of freedom, security and justice was included into the fields of shared competence (Art. 4(2)(j) TFEU). Therefore, the Treaties confirmed that the EU and the Member States share the competence to conclude readmission agreements with third countries. Moreover, they should balance their respective competence as described by Article 2(2) TFUE:

> When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.

This provision incorporates the rules established by the JHA Council in May 1999 (see also Coleman's rules number 3 and 4). Furthermore, the relationship between the EU and the Member States in this policy area continues to be grounded on the principle of sincere cooperation, as established by Article 4(3) TUE, which requires both the EU and the Member States to 'assist each other in carrying out tasks which flow from the Treaties'. In particular, the last sentence of the article says: 'the Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives'. This provision recalls the last paragraph of the JHA Council Conclusions of May 1999 (and Coleman's rule number 5) establishing that Member States cannot undertake the negotiation of bilateral RAs that may be detrimental to the conclusion or implementation of an EURA.

A second relevant issue is the implementation of European readmission agreements. The whole debate on the nature of the EU competence concerns, in fact,

only the negotiation and conclusion of EURAs; the competence over their implementation has always been with the Member States. There is actually no 'European implementation mechanism': EURAs are implemented at a bilateral level between each Member State and the third country concerned. This means that the whole implementation phase, including the decision to return an irregular migrant, the issuance of a removal order, the corresponding readmission request and the actual enforcement of such order through the required procedure, all this falls entirely under the responsibility of each individual Member State (Cassarino 2010c, 17-18; Giuffré 2011, 13).

As noted by Cassarino, it is often mistakenly understood that once the Commission and the Council decide to open negotiations with a given third country, the Member States cannot exercise their competence on readmission as a whole; on the contrary, they will be responsible for the crucial phase of implementation. In 2006 Karel Kovanda, Special Representative for Readmission Policies at the Commission Directorate General for External Relations (DG Relex), clarified this point as follows:

> EC readmission policies and agreements fall under the external dimension. They set out reciprocal obligations binding the Community on the one hand and the partner country on the other hand. But once an agreement is negotiated, the Community responsibility is over. Its day-to-day implementation, the actual decision about sending a person back and the actual operation it involves – all this is entirely within the competence of our Member States (as cited by Cassarino 2010c, 18).

Therefore, in their practical implementation, EURAs appear to be much more a Member States' issue. As a matter of fact, when they need to send a third country national back to a given country, Member States generally tend to apply pre-existing consolidated bilateral level arrangements and practices, even when an EURA is in place. This is also one of the reasons for the limited use of implementing protocols: Member States that are potentially more interested in having a well-functioning cooperation on readmission with a certain third country usually do not need to draft an implementing protocol in the framework of the EURA, because most probably they have already regulated readmission procedures with that country through formal or informal bilateral

arrangements. The 2011 Evaluation of EURAs acknowledged the existence of this practice and criticised it, stating that 'the inconsistent application of EURAs undermines greatly the credibility of the EU Readmission Policy towards the third countries, which are expected to apply the EURA correctly'; the Commission, thus, urged Member States to apply EURAs for all their returns (European Commission 2011a, 4).

In sum, one may raise doubts on the truly 'European' nature and scope of EURAs in light of a number of factors:

1. the Member States' reluctance to transfer to the Commission their power to conclude RAs and their insistence for the competence in this field to remain shared;
2. the Member States' continued pursuit of their national readmission policies (and national interests in this field), even when this meant neglecting the principle of sincere cooperation and infringing the well-established rules on the sharing of competence, with the risk of jeopardising the Commission's negotiating strategy and/or compromise the conclusion of EURAs[27];
3. the fact that the implementation of EURAs rests with the Member States, which tend to resort to bilateral arrangements and practices rather than the procedures and instruments provided for by the EURA.

The second of these elements (i.e. the Member States' ambiguous behaviour when it comes to respecting the rules on the sharing of competences) is probably the most worrying one for the actual accomplishment of an EU readmission policy. As summarised by Coleman,

> parallel invitations by Member States to enter into a readmission agreement send ambiguous signals to third countries, and can interfere with negotiations at the Community level. It raises questions concerning the internal division of power regarding immigration in the EC, and raises doubts concerning the degree to which the Community truly has a common readmission policy (Coleman 2009, 204).

[27] Coleman reports different cases where this happened, in particular with regards to the EURA with Albania and the EURA with Russia (2009, 202-208); Panizzon discusses the examples of Morocco and Cape Verde (2012, 127-128); García Andrade et al. report about the cases of Russia and Algeria (2015, 89).

3.4.2. How much are they relevant and effective?

This section focuses on the effectiveness and relevance of European readmission agreements. From the standpoint of the EU institutions and Member States, EURAs are considered to be effective if they produce an increase in the number of returns of unauthorised migrants from a Member State to a third country. Similarly, EURAs are considered to be relevant when they actually contribute to successfully achieve their purpose, that is to fight irregular immigration by facilitating the removal of irregular migrants to a third country of origin or transit[28].

Measuring effectiveness

The main instrument used by the Commission and Member States to measure the effectiveness of EURAs is the comparison between the total number of removal orders issued and the total number of returns actually carried out, i.e. return rates[29]. Eurostat data (the only available data on return covering all EU Member States) show the existence of a significant gap between the two values in the period from 2008 to 2014: every year, less than half of the third country nationals who received a removal order in a Member State were actually returned to a third country. In the year 2014, over 470,000 migrants were issued an order to leave, but the order was actually enforced only for 36% of them (168,925)[30]. Eurostat data also prove that in the period 2008-2014 the absolute number of removal orders and enforced returns has remained substantially

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[28] Cassarino suggests an alternative interpretation of the concept of effectiveness. The effectiveness of readmission agreements depends on the extent to which the contracting parties respect their reciprocal obligations as enshrined in the agreement; such obligations are not limited to the enforcement of returns, but include also the respect of the fundamental rights of returnees. (Cassarino 2010c, 43-46; 2010b, 25). Therefore, quantitative data on returns under EURAs may only in part be indicators of the effectiveness of these instruments, but a comprehensive evaluation of EURAs should include an analysis of how they affect migrants' human rights.

[29] Carrera criticised the 'EU's current obsession with return rates' (2016, 52). He argues that return rates may not be very reliable as an indicator of effectiveness, because many removal orders are issued to people who turn out to be non-expellable; in addition, he points at national authorities' sometimes superficial expulsion decisions, which are taken without carefully looking at information available in individual cases (2016, 58-59).

[30] Source: http://ec.europa.eu/eurostat/statistics-explained/index.php/Statistics_on_enforcement_of_immigration_legislation#Number_of_non-EU_citizens_ordered_to_leave_has_decreased_between_2008_and_2014. Accessed on 6 September 2016. See also Table 5.1 in Carrera 2016, 38.

stable and in decreasing trend, while the average return rate has been 36,7% (ranging between 34% and 43%)[31].

Such a low rate of successful expulsions has been a main source of concern for the EU institutions throughout the last decade. The 'insufficient effectiveness' of the EU return system has been explicitly acknowledged in several policy papers, such as the European Agenda on Migration (European Commission 2015a, 9), the letter drafted by Commissioner Avramopulous in June 2015 (Council of the EU 2015a, 2-3) and the EU Action Plan on Return (European Commission 2015b, 2), and the need to improve the rate of effective returns has been repeatedly and consistently urged both by the JHA Council (Council of the EU 2011, para 3; 2015b, para 5) and by the Commission in its EU Action Plan on Return (European Commission 2015b, 10) and again in its recent Communication on establishing a new Partnership Framework with third countries (European Commission 2016f, 7).

But in reality, the quantitative picture provided by Eurostat does not help to precisely understand what the impact of EURAs on the EU return system really is. This is due to the fact that Eurostat data do not include any indication of the legal framework in which expulsion practices take place; therefore it is impossible to trace which returns are carried out within the scope of an EURA and which are carried out in application of other bilateral formal or informal cooperation arrangements[32] (European Commission 2011a, 3; PACE 2010b, para 5; 2010a, paras 8, 77-78; Cassarino 2010c, 43-45; Carrera 2016, 39-41). This lack of statistical information make it difficult to precisely assess the effectiveness of EURAs in quantitative terms.

The first study which tried to fill in this gap was carried out by the European

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[31] As noted by Carrera, this is true also for countries with which the EU has concluded a readmission agreement: therefore, no relevant increase in returns towards those counties has been recorded since the entry into force of their EURA (Carrera 2016, 38).

[32] In addition, Eurostat statistics do not specify whether a returnee is sent to the country of origin or transit, do not differentiate between voluntary and forced returns, and do not record whether those who received a removal order are irregular migrants or rejected asylum seekers. Data may also deviate from reality because not every third country national who is returned is always served an order to leave, in particular in the case of voluntary returns. Moreover, concerning the implementation of EURAs, Eurostat does not collect figures concerning the number of readmission requests issued by Member States and the number of those approved and refused by third countries; the number of travel documents issued by each third country; the number of readmission applications submitted under the normal and accelerated procedures; and other more specific information on the way in which EURAs are used.

Migration Network (EMN) in 2014. The synthesis report 'Good Practices in the Return and Reintegration of Irregular Migrants' was drafted on the basis of national contributions from 24 EMN National Contact Points[33], who completed a common template answering questions on the Member States' use of entry bans and readmission agreements, including both EURAs and bilateral RAs (EMN 2014b). As concerns EURAs, the study's aims were ambitious: its first purpose was to collect statistics from Member States' authorities on the total number of readmission applications made based on EURAs for the period 2010-2013 (distinguishing if they concerned own nationals or third country nationals, and if they involved voluntary returns). Secondly, the study aimed to gather figures on indicators measuring the effectiveness of EURAs[34]. And finally, it aimed to investigate also the practical obstacles experienced by Member States when implementing EURAs, either of a general nature or in relation to a given third country (EMN 2014a).

Unfortunately, only twelve Member States[35] provided statistics on the total number of readmission applications submitted on the basis of EURAs; some Member States (like France) do not collect separate data on readmission applications made under EURAs, while many others have offered only incomplete data (EMN 2014b, 40, Table A2.2). That said, the figures which emerge appear to be barely significant: in 2013 the total number of readmission applications submitted under EURAs in twelve Member States was 3,798 (EMN 2014b, 40, Table A2.2); in the same year, based on Eurostat data, third country nationals ordered to leave in the whole EU were 430,450 and those who were effectively returned were 184,765 (Carrera 2016, 38, Table 5.1).

In light of the limited data collected, the EMN study could not identify common trends for the use of EURAs, which in different Member States increased, decreased or

[33] The countries involved in the study were: 23 EU Member States (Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Slovak Republic, Slovenia, Spain, Sweden, United Kingdom) and Norway.

[34] Such indicators were: the number of readmission applications sent by Member States and the number of those which received a positive reply; the number of travel document requests sent by Member States and the number of travel documents issued by third countries; the number of persons actually returned under EURAs.

[35] Belgium, Bulgaria, Cyprus, Estonia, Finland, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Spain, Sweden.

remained stable (EMN 2014b, 40, Table A2.2). Collected data show that the vast majority of readmission applications concerned own nationals of the third countries with whom EURAs have been signed (almost 100%) and that even if some Member States use EURAs also to carry out voluntary returns, their share is generally limited (EMN 2014b, 21-22). However, these findings need to be carefully used: since they come from less than half of the EU Member States, no general conclusion should be drawn from them.

Data concerning the indicators of effectiveness mentioned above are scarce as well. Statistics provided by eleven Member States[36] show that the share of readmission applications receiving a positive reply ranges between 60% and 100% of the overall applications sent (EMN 2014b, 44, Table A2.6), but again these figures need to be put into perspective given the small number of States involved. For other indicators, data provided by Member States were too limited to be analysed.

Nonetheless, the information collected was presumably considered sufficient for the EMN study to conclude that 'EURAs are generally effective return tools' and that 'overall, no systematic problems in cooperating with third countries have been identified' (EMN 2014b, 7). These conclusions are largely debatable, as they are not based on sufficiently representative data. It is worth noting that the 2011 Commission Evaluation of EURAs confronted a similar problem (data collected from Member States were scarce and were not harmonised; return rates were too different, i.e. extremely high in some countries, very low in others) and came to the opposite conclusion, that 'data do not allow reliable conclusions about actual returns' (European Commission 2011a, 5)[37].

Finally, the EMN study reported a number of practical obstacles which, based on Member States' experience, have a negative impact on the effective implementation of EURAs. These include: third countries' failure to respect deadlines, insufficient

[36] Belgium, Bulgaria, Estonia, Finland, Hungary, Lithuania, Luxembourg, Latvia, Netherlands, Poland, Sweden.

[37] Even though the 2011 Commission Evaluation of EURAs did not succeed in evaluating the effectiveness of EURAs in quantitative terms due to the lack of data in Eurostat and from Member States, it nonetheless carried out a useful qualitative assessment, in particular with respect to the human rights safeguards under EURAs.

cooperation on readmission of non-nationals, failure to issue the required travel documents, etc. (EMN 2014b, 22-23)[38]. Despite the limited statistical relevance of figures collected, the EMN study correctly observed that, on the basis of Member States' experience, the extent to which EURAs can be considered effective largely depends on 'the agreement and the cooperation with a given third country' (EMN 2014b, 7)[39].

Factors limiting the effectiveness and relevance of EURAs

As a matter of fact, the degree of actual cooperation offered by a third country is one of the main factors which impact on the effectiveness of EURAs (PACE 2010a, para 86). The conclusion of an EURA, indeed, is not *per se* a guarantee of a third country's cooperation in the implementation of the agreement. Countries of origin may prove unwilling to readmit own nationals (EMN 2012, 62; Carrera 2016, 14) and countries of transit to readmit non-nationals (Council of the EU 2015a, 5); in addition, as reported by some Member States in the 2012 EMN study on 'Practical Measures to Reduce Irregular Migration', returns to some States are not enforceable because of the general situation in the country, e.g. the lack of a functioning central government to issue travel documents or verify the identity of the person (EMN 2012, 62-63).

The implementation of EURAs (which occurs at a bilateral level, as mentioned under section 3.4.1 above) is usually linked to the broader (bilateral) relations between a Member State and the third country concerned; the effective implementation of the readmission obligations established by an EURA may, thus, be the object of further bilateral negotiations and induce the development of informal procedural arrangements between national authorities (Coleman 2009, 58-60; Cassarino 2007). Carrera properly argued that 'EURAs present a high level of dependency on the state of diplomatic

[38] Member States identified further critical aspects of EURAs in another EMN study on 'Practical Measures to Reduce Irregular Migration' carried out in 2012. On that occasion, several Member States emphasised the limited relevance of EURAs: Finland and Germany noted that cooperation on readmission with third countries had not improved following the conclusion of EURAs, while Malta stated that the EURAs concluded until that moment did not involve any of the third countries form which irregular migrants to Malta originate (EMN 2012, 72-73).

[39] The same conclusion was actually drawn with respect to bilateral RAs, which the EMN study proved are in practice used by Member States in parallel to EURAs (EMN 2014b, 8).

relations between the states concerned' and emphasised the importance of the role of (and relations with) third countries' consular authorities in the concrete implementation of EURAs (Carrera 2016, 13).

A further element which limits the effectiveness of EURAs is represented by the technical and practical aspects of the readmission procedure, as highlighted also by Member States in the framework of the 2014 EMN study (see above in this section). There may be different practical obstacles to the effective implementation of EURAs, but the most relevant one concerns the determination of the identity and nationality of undocumented third country nationals who may refuse to cooperate to their own removal (Carrera 2016, 13-16). Along with the lack of cooperation of third countries, indeed, the lack of cooperation of returnees (who may conceal their true identity or abscond) is often highlighted as one of the main obstacles to the implementation of returns (EMN 2012, 62; Council of the EU 2015a, 3).

Since third country nationals cannot be returned anywhere, firstly, if their identity, nationality and/or migration route are not adequately established and proved, and secondly, if they are not issued new travel documents or *laissez-passer*[40], cooperation between Member States and third countries on the issues of identification and documentation is crucial (Council of the EU 2014, para 4.1) - and has often developed through informal bilateral practices (Cassarino 2007, 187; Carrera 2016, 14). Improved 'operational and political cooperation on readmission' has been urged also by Commissioner Avramopulous as a measure to increase the effectiveness of EURAs (Council of the EU 2015a, 5).

An additional element which impacts on the overall effectiveness of EURAs (and on the effectiveness of the EU readmission policy as a whole) is their geographical distribution. As clearly stated in the policy paper in annex to Commissioner Avramopulous' June 2015 letter:

> While the EU's eastern flank is now well covered – through readmission

[40] The *laissez-passer* is a standard travel document used to the purpose of expulsion, in cases when a third country national does not held any valid travel document; the *laissez-passer* need to be accepted by the third country of destination as a valid travel document.

> agreements with Russia, Ukraine, Moldova, Georgia, Armenia, Azerbaijan, Turkey, the Western Balkan countries – its southern flank, which is subject to strong migratory pressure, is not. The EU has no readmission agreements in force with the North African countries (Council of the EU 2015a, 5).

The lack of EURAs with countries of origin in Sub-Saharan Africa and countries of origin and transit in Northern Africa is another symptom of the limited effectiveness and relevance of EURAs as an instrument to fight irregular immigration. In light of the EU enlargement, in the recent past major EU's efforts and investments have gone to securing the EU's Eastern external border and establishing fruitful cooperation with Eastern neighbours. But EURAs have been signed also with several countries whose importance in terms of migratory pressure on the EU is minimal; conversely, with the main countries of origin and transit of migration flows into Europe, the EU has so far failed to conclude readmission agreements.

The Commission recognised this flaw and affirmed the need to take action: the EU Action Plan on Return clearly stated that 'African countries […] are a priority', also because 'the return rates to African countries are under 30% - well below the general rate of return from the EU, which […] is already insufficient' (European Commission 2015b, 10). In order to tackle this problem, the Commission suggested the opening of negotiations for EURAs with the main countries of origin in Sub-Saharan Africa; the recent announcement of the beginning of readmission negotiations with Nigeria apparently falls within this policy. In the Commission's view, the prospect of the readmission of own nationals by Sub-Saharan countries would reassure North African countries that their position as transit countries would not pose a massive burden on them with regards to non-nationals. This should in turn facilitate the conclusion of EURAs also with North African countries - especially where readmission negotiations or mandates are pending, i.e. with Morocco, Algeria and Tunisia (European Commission 2015b, 11; Council of the EU 2015a, 5). But this strategy may not lead to the expected results, because, as admitted by the Commission itself, 'these countries are sometimes reluctant to even cooperate in taking back their own nationals' (European Commission 2015b, 11). As confirmed by a DG HOME official in a confidential interview, this is for example the case of Morocco.

Finally, Panizzon highlighted the fact that EURAs are far less effective and relevant compared to bilateral RAs because the latter are generally much wider in scope, encompassing issues such as legal migration and police cooperation, which fall outside the EU competences. In particular, bilateral RAs are usually linked (and are in any case able to offer) labour migration quotas, while EURAs cannot, due to the EU's lack of competence in this policy area (Panizzon 2012, 131-132). The impossibility to resort to such a crucial incentive does not only hamper the negotiation of EURAs (as discussed above under section 3.3) but jeopardises also their effective implementation once they have been concluded, and limits their relevance as an instrument to combat irregular migration, especially if compared to more comprehensive bilateral RAs.

3.4.3. What role do non-state actors and international organisations play in their negotiation and implementation?

Since the early 2000s, private actors and international organisations have been increasingly involved in the implementation of European migration and asylum policies. In particular, in the fields of migration control, border surveillance, migration detention and forced return, the outsourcing of crucial tasks to private corporations in the security and surveillance sectors has become more and more widespread and is now the rule. As summarised by Gammeltoft-Hansen:

> The involvement of private actors in migration control is a growing phenomenon. […] Today, however, the privatisation of migration control is far from limited to airlines or other transport companies. From the use of private contractors to run immigration detention facilities and enforce returns to the use of private search officers both at the border and at offshore control zones, private involvement in migration management is both expanding and taking new forms (Gammeltoft-Hansen 2011, 204-205).

Moreover, international organisations specialised in migration and asylum, such as the International Organisation for Migration (IOM) and the United Nations High Commissioner for Refugees (UNHCR), have been increasingly involved in assisting EU Member States in the return and reintegration of irregular migrants and rejected asylum

seekers, through Assisted Voluntary Return and Reintegration programmes (Redpath 2004, 292-294). States have, thus, gradually delegated private actors and international organisations to carry out typical State duties, in order to maximise the effectiveness and minimise the costs and visibility of a wide range of measures and operations in the area of migration control, including return and readmission. In addition, the more non-state actors and international organisations are involved in the implementation of migration and asylum policies, the more they acquire the power to influence (and to some extent participate in) decision-making in this field.

Migration management has become a lucrative business for private actors – and has been analysed by various scholars as an 'industry' producing profits and 'products' (Andersson 2014; Gammeltoft-Hansen and Nyberg Sorensen 2013). In addition, migration management has become a way for international organisations like the IOM and the UNHCR to legitimise and expand their role and activities, to affirm their own logic, and to partly emancipate themselves from their own funders, i.e. the States (Triandafyllidou 2014, 5-6; Geiger and Pécoud 2014; Korneev 2014). At the same time, by taking part in the removal of unauthorised migrants and rejected asylum seekers, international organisations legitimise and support the overarching return objectives and security agenda of the EU and its Member States (Koch 2014; Scheel and Ratfisch 2014).

As concerns, more precisely, the role of non-state actors and international organisations in the negotiation and implementation of EURAs, information publicly available is scarce and in-depth research in this field is limited. Therefore, we acknowledge, together with Cassarino, that 'the actual magnitude of outsourcing in the field of readmission is still unknown' (2010c, 47). The interviews I conducted with current and former DG HOME officials and other experts in the field of readmission (like Jean-Pierre Cassarino, Institut de Recherche sur le Maghreb Contemporain (IRMC), Tunis) contributed to provide useful information on this issue, although leaving many questions unanswered. The general attitude of EU officials to my questions on the role of non-state actors was rather sceptical, but their answers were nonetheless interesting.

It emerged that private actors and international organisations have no official role

during the negotiations of EURAs; these are a confidential inter-state affair and they are quite strictly policed in this sense. International organisations may nonetheless be involved before negotiations formally begin: they are usually consulted when the Commission wants to recommend to the Council the adoption of a negotiating directive and needs to provide a detailed description of the migration scenario in the third country concerned. For instance, in the case of Jordan - a country with a large refugee population - the UNHCR was consulted and provided information on the potential impact of an EURA with Jordan[41].

As concerns the implementation of EURAs, international organisations like the IOM are often involved in projects in third countries, which are indirectly linked to the implementation of an EURA. Of course, the IOM does not deal with readmission procedures *per se* (which are under the responsibility of national authorities), but it is usually responsible for the implementation of Assisted Voluntary Return (AVR) projects, reintegration programmes and/or capacity building on return management and training of national authorities (e.g. in the areas of identification and re-documentation).

When the IOM is involved in the implementation of an EURA through these kinds of projects, it is quite common that the organisation is invited to participate in the Joint Readmission Committee (JRC) meetings as a third party. JRC meetings are inter-state gatherings which usually take place behind closed doors, and whose main purpose is to monitor the practical implementation of the EURA. JRC regulations generally foresee the possibility for both the EU and the third country to invite third parties to participate in meetings. However, given the 'high degree of secrecy' of JRC meetings (Carrera 2016, 41), the IOM is usually only invited to attend the part of the meeting where its projects are discussed. The IOM representative would give a presentation of the state of play of the readmission capacity-building initiative or the return and reintegration projects the organisation is implementing and would then leave the meeting. Therefore, it appears that international organisations like the IOM do not participate directly in decision-making processes, but can nonetheless potentially

[41] As mentioned in Chapter 4, the EU signed a Mobility Partnership with Jordan in October 2014; the MP entails a commitment to negotiate and conclude a readmission agreement between the EU and Jordan (MP with Jordan, para 9).

influence them, being among the actors responsible for the implementation of EURAs.

As concerns private actors, based on my interviewees' experience, it seems that their role in the negotiation and implementation of EURAs is even more limited. Nevertheless, EU officials affirmed that non-state actors may participate in the EURA implementation phase as service providers, sometimes along with the IOM. For instance, as part of a new strategy aimed at increasing the effectiveness of EURAs through the automatisation of readmission procedures, a pilot project was launched in the framework of the EURA with Georgia, introducing the 'Electronic Readmission Management System', i.e. a web-based portal for the uploading and processing of individual readmission requests that allows for the automatic online exchange of readmission applications between Member States authorities and national authorities in Georgia – thus, bypassing the third country's consulates in EU Member States and avoiding the exchange of hard paper copies (IOM 2014). In this case, the project implementation is coordinated by the IOM, but the development and management of the portal was outsourced to a private IT company.

Similarly to the practice followed with the IOM, a representative from the service provider may be invited to attend JRC meetings in order to explain and periodically report on the functioning of the system. Besides this, EU officials consistently stated that, in their experience, they have not witnessed any other form of private actors' involvement in the EURAs decision-making process; this is especially true for formal inter-governmental fora, such as the JRCs or the negotiation context. However, as mentioned by a former EU official, nothing excludes any lobbyists to contact either side during negotiations or in the implementation phase.

In sum, non-state actors and international organisation have so far played only a marginal and somehow indirect role in the implementation of EURAs. Nevertheless, this has already allowed them to have a voice in inter-state decision-making settings, although in an apparently limited way. However, this does not prevent them from exercising a certain influence on decision-makers; as highlighted by Cassarino, the mere consultation and provision of information to policy-makers may contribute to consolidate and strengthen a given hierarchy of priorities and a security-oriented paradigm (2010c, 47). Moreover, in the future the involvement of these actors in the

area of readmission may well develop, as part of a broader phenomenon where migration management is increasingly devolved to private actors and international organisations who have a specialised knowledge and expertise in the field. The increasing involvement of specialised technocratic private or international actors proves that privatisation and de-statualisation of migration and refugee management may open the way for its de-politicisation (Lahav 2014, 4; Scheel and Ratfisch 2014).

Even though 'further evidence is needed to understand the actual impact of these interconnections [between different actors] on policy options and priorities', Cassarino argues that:

a readmission system is emerging whereby the interests of the private remain intertwined with those of the public to respond and legitimise operable means of implementation. Incidentally, private security companies do not only deliver a service which, being private, often remains beyond public purview, they are also proactive in developing 'extremely close ties' (Flynn and Cannon 2009, 16) with decision-makers and government officials and in expanding strategic alliances with other key private actors or subcontractors (Cassarino 2010c, 47).

3.4.4. What is their human rights content?

The human rights content of European readmission agreements is rather limited. EURAs only provide for the inclusion of a 'non-affection clause' (see above section 3.2), establishing a duty for the contracting parties to apply the agreement in a way that is consistent with (i.e. does not affect) international obligations arising from international law, including human rights obligations. Starting from the EURA with Albania, most EURAs have included a list of human rights and refugee law conventions the agreement shall comply with. In addition, EURAs usually include references to international human rights and refugee law instruments in their Preamble. Besides this generic commitment to respect well-established international human rights law, EURAs do not contain more precise or stringent provision protecting the rights of migrants and asylum seekers.

Advocates of EURAs (including the Commission, Member States and some scholars, among which Nils Coleman) do not question whether these agreements are consistent with human rights: in their view EURAs are simply a tool facilitating the removal of irregular migrants and are neutral in terms of human rights. Human rights concerns may arise at a previous stage, when the return decision is taken, and not when that decision is enforced by means of an EURA. It is at that previous stage that national authorities should take into account human rights issues and should apply human rights and refugee protection obligations. Since its adoption in 2008, this occurs on the basis of the Return Directive, which established the rights and procedural guarantees that Member States have to ensure to third country nationals in a return procedure (PACE 2010a, para 29; 2010b, para 2)[42]. This interpretation of the relationship between EURAs and human rights has been consistently confirmed by the current and former DG HOME officials which I interviewed.

On the contrary, critics of EURAs (the Parliamentary Assembly of the Council of Europe, NGOs and some scholars, among which Gregor Noll and Maria Giulia Giuffré) affirm that there is a risk that readmission agreements pose a threat, directly or indirectly, to the human rights of irregular migrants and asylum seekers, in particular with regards to the principle of *non-refoulement*, as both the requesting and the requested country may fail to abide by their obligations under the 1951 Geneva Convention or the European Convention on Human Rights. EURAs may then be used to implement a flawed return decision.

According to critics, the existence of an EURA may actually encourage the taking of such faulty return decisions; as noted by the Parliamentary Assembly of the Council of Europe (PACE), in some cases EURAs may become the catalysts for the enforcement of questionable removal orders, which breach the human rights or neglect possible protection needs of the third country nationals concerned (PACE 2010a, paras

[42] According to this standpoint, not only EURAs do not raise human rights issues, but also they do have a number of advantages. For instance, they provide transparency because readmission procedures are clearly established prior to the enforcement of a removal decision, and if correctly implemented they may contribute to reduce the migrants' period of detention and uncertainty by accelerating their removal (PACE 2010a, para 29; 2010b, para 2). Panizzon highlighted in particular that EURAs have higher standards of transparency and democratic legitimacy in comparison with bilateral RAs, which often are not publicly accessible (2012, 115-116).

39-43). Therefore, there would be a certain causality link between the application of readmission agreements and the likelihood of human rights violations for returnees (Giuffré 2011, 14; 2013a).

This interpretation is based on the idea that the return process should be considered as a whole, in which readmission agreements are one important element; one phase of the process cannot be isolated from the others and respect for human rights must be guaranteed at every stage, from the issuance of the expulsion order to its enforcement (PACE 2010a, para 30; 2010b, para 3).

In its 2011 Evaluation of EURAs, the Commission clarified its position in this regard. It explained that the legal construction of these agreements is based on the fact that they apply only to persons who are considered to be 'illegally staying' in the territory of a Member State, as determined by a return decision issued by the competent national authorities in application of the relevant national and European legislation and in compliance with international standards. If a person claims international protection, the EU asylum legislation applies, and a return decision can only be issued after his or her application has been refused. Therefore, from the Commission perspective, on paper, readmission can only be carried out as a result of a return decision, which may only be issued if the procedural guarantees and human rights safeguards foreseen by international and European law are observed. Formally, EURAs do not apply neither to asylum seekers whose application is still pending, nor to persons who face a risk of persecution or torture in the country of origin or return (European Commission 2011a, 10-11). However, in the same document the Commission importantly acknowledged that 'the actual administrative and judicial practice applied in the field is important' and that 'practical deficiencies […] could lead to violations of fundamental rights in the implementation of a readmission procedure'. Therefore, the Commission suggested relevant measures 'to ensure that the human rights of returnees are fully respected at all times' (European Commission 2011a, 11).

Coleman shares a very similar position. In the conclusions to his 2009 book, he argued that EURAs are not detrimental to refugee protection and do not increase the risk of *refoulement*, because they do not affect in any way Member States' international legal obligations in the area of refugee protection. However, he acknowledged that 'this

is relevant to the formal application of a readmission agreement', while 'the compliance in practice with international obligations during the informal application of readmission agreements could be a cause of concern' (Coleman 2009, 325). He recognised the possibility of diverging practices, especially in relation to border procedures. Therefore, even the advocates of EURAs, and among them also the DG HOME officials which I interviewed in Brussels, acknowledge that a faulty implementation of EURAs in daily practice entails a risk that the rights and procedural safeguards of irregular migrants and asylum seekers are disregarded.

The Parliamentary Assembly of the Council of Europe, NGOs, scholars and the European Commission in its 2011 Evaluation of EURAs, identified a number of shortcomings in terms of human rights guarantees in EURAs, which typically emerge in the practice of readmission. Firstly, all EURAs foresee an accelerated procedure for migrants apprehended in border regions, allowing for readmission to be carried out within shorter deadlines. This procedure is recognised as a source of potential deficiencies in practice, with particular regard to the right to access an asylum procedure and to have one's application examined in substance, the respect of the *non-refoulement* principle and the right to an effective remedy with suspensive effect. The Commission recognised that this is also due to the fact that Member States may choose not to apply some of the safeguards of the Return Directive to persons apprehended in the border region (European Commission 2011a, 12; PACE 2010b, paras 6.3-6.5; AEDH 2013a, 3).

Secondly, criticism is often raised by the conclusion of EURAs with countries having a weak human rights and refugee protection record. This represents a serious risk for returnees both in the case of countries of origin (like Pakistan, which has not signed the 1951 Geneva Convention) and in the case of countries of transit (like Morocco, Algeria and Tunisia, with which the EU is trying to conclude EURAs and which allegedly do not offer adequate protection standards and living conditions to refugees and migrants) (AEDH 2013a, 3-4). The PACE and NGOs suggested EURAs should only be concluded with countries that comply with international human rights standards and the 1951 Geneva Convention, have a functioning asylum system and do not criminalise unauthorised immigration and emigration (PACE 2010a, para 6.1; AEDH

2013a, 3-4). In addition, in its 2011 evaluation, the Commission recommended the inclusion in EURAs of a 'suspension clause', providing for the temporary suspension of the agreement in case of a persistent and serious risk of human rights violations for returnees in the country concerned (European Commission 2011a, recommendation 12).

A third critical factor, which the PACE considers to be 'the most sensitive issue' (2010a, para 44), relates to the readmission of third country nationals to transit countries. The PACE, the Commission, NGOs and several scholars emphasised the fact that persons who are not returned to their country of origin but to a country of transit 'may find themselves in a particularly precarious situation' (European Commission 2011a, 13). They risk becoming subject to so-called 'chain *refoulement*', i.e. being denied the possibility to apply for asylum or to have their application examined on the merits, and being deported to their country of origin (or to another transit country) without an assessment of possible risks of persecution or torture. Moreover, they risk being subject to an indefinite detention period pending the removal to their country of origin. Or if they are not detained, they may face difficulties in integrating in the host society, in accessing the labour market, in providing for their basic needs; they may end up stranded in the transit country, deprived of any means of subsistence and unable to leave the country, not even to return to their country of origin (European Commission 2011a, 13; PACE 2010a, paras 44-58; 65-66).

Roig and Huddleston affirmed that this 'burden-shifting policy' which transfers responsibility for irregular migrants to transit countries with fragile capacities, weak asylum systems and controversial human rights records could result in the EU becoming an accomplice of serious human rights violations (Roig and Huddleston 2007, 379-383). Both the PACE 2010 resolution and the Commission 2011 evaluation actually recommended that readmission to a person's country of origin is prioritised over readmission to a transit country. The PACE suggested this become a legal obligation explicitly included in the text of EURAs (PACE 2010b, para 6.7); the Commission (as mentioned above under section 3.3) even recommended to exclude the readmission of non-nationals (i.e. the third country national clause) from future negotiating directives except in cases where this is deemed to be of crucial importance (European Commission 2011a, recommendation 8).

More in general, conditions upon return either to a country of origin or to a country of transit represent an extremely concerning issue. As reported by NGOs and the PACE, in some third countries readmitted migrants may be fined, arrested, detained, deported, subject to violence or deprived of any means of subsistence (PACE 2010a, paras 59-64). The PACE suggested Member States verify before readmission takes place that the readmitting country will grant the returnees access to minimum social rights (2010b, para 6.8). Both the PACE resolution and the Commission evaluation noted the lack of a mechanism to monitor what happens to returnees after their readmission is carried out; therefore, they both suggested the establishment of a post-return monitoring mechanism in third countries in order to gather information on the situation of persons who are readmitted under EURAs, and verify their human rights are respected upon and following their readmission[43] (European Commission 2011a, 13-14; PACE 2010a, para 73; 2010b, paras 6.13 and 7.5).

Scholars and NGOs have argued for the inclusion of explicit human rights clauses in EURAs (as well as in bilateral readmission agreements), which would provide for more specific and stringent obligations on the contracting parties towards returned migrants and asylum seekers compared to the already existing non-affection clause (Giuffré 2013a). A counter-argument to this proposal is that this would represent a superfluous reiteration, because States are already bound by human rights and refugee protection obligations deriving from international law (and from European law for EU Member States). However, as noted by Giuffré (2013a, 104), on the one hand EU and non-EU countries are not necessarily bound by the same legal instruments, and on the other hand the jurisdiction of European supranational courts would be limited in case of human rights violations committed by readmitting third countries. The inclusion of legally binding procedural human rights clauses in EURAs would thus create more onerous obligations than those deriving from general international law for both Member States and third countries (Giuffré 2011, 16-17; PACE 2010b, paras 6.11 and 7.2).

Finally, the analysis conducted in this section showed that the European

[43] In its 2011 Evaluation, the Commission suggested to launch a pilot project to monitor the situation of persons readmitted under an EURA (European Commission 2011a, recommendation 15). A post-return monitoring pilot project was launched in 2014 in Ukraine and Pakistan and is implemented by the IOM in partnership with the UNHCR (García Andrade et al. 2015, 38).

Commission, in its 2011 Evaluation of EURAs, significantly acknowledged the gaps and flaws in terms of human rights guarantees characterising the EURAs, and proposed a number of relevant measures to enhance such guarantees (e.g. the introduction of a suspension clause, the exclusion of the third country national clause from most EURAs, the launch of a post-monitoring mechanism). However, most of the 2011 Commission recommendations were largely disregarded by the Council Conclusions defining the EU Strategy on Readmission, adopted only a few months later (Council of the EU 2011).

Moreover, the EU Action Plan on Return, adopted by the Commission in September 2015, marks a substantial overturning in the Commission approach to the issue of human rights protection within EURAs. The recent Action Plan on Return, indeed, does not make any reference to the need to improve the implementation of EURAs from the perspective of its compliance with human rights obligations (European Commission 2015b, 10-14). It is remarkable that the whole Communication actually lacks any reference to human rights, except for a general commitment in the introduction, saying that the implementation of all actions under the Communication will have to comply with international human rights standards (European Commission 2015b, 2).

An EU source I interviewed confirmed this change of approach and explained it partly with the fact that in Europe 'the situation has changed, the mood has changed'[44] and partly with the political turn brought about by the Juncker Commission (in office since 1 November 2014) – and more precisely with the shift from a liberal left-wing to a conservative right-wing Migration and Home Affairs Commissioner[45]. A DG HOME official confirmed that in the last two years readmission has been clearly prioritised in EU cooperation with third countries, the current focus being on making readmission

[44] The reference was to increased mixed migration flows from the Southern and South-Eastern neighbourhood of the EU, which became increasingly tragic and increasingly mediatised, starting with the Lampedusa shipwrecks in October 2013 and then exploding with the so-called 'refugee crisis' in the fall-winter 2015-2016.

[45] The position of Migration and Home Affairs Commissioner, which was held by Cecilia Malmström (former Swedish Minister for EU Affairs and member of the liberal party) for the period 2010-2014, is currently held by Dimitris Avramopulous (former Greek Minister of Defense and member of the conservative New Democracy Party) for the period 2014-2019. According to this interviewee, the 2011 Communication was influenced by the then Commissioner Malmström, who 'was allergic to any kind of return and readmission'.

more effective and conducting as many returns as possible.

3.5. The case studies of Morocco, Algeria and Turkey

This section focuses on the case studies of three European readmission agreements geographically located in the Mediterranean area. While the EURA with Turkey was signed in December 2013 following long and complex negotiations and is now in force, the conclusion of EURAs with Morocco and Algeria is still far away. The Commission received the mandate to start negotiations with the two Maghreb countries in 2000 and 2002 respectively; negotiations with Morocco are formally still ongoing, but are currently stuck, whereas negotiations with Algeria never actually began. This section elaborates further on the critical aspects of the negotiation process analysed above under section 3.3; it also demonstrates the contradictions (also discussed above under section 3.4.2) of an EU return policy that has so far failed to conclude EURAs with any countries in the Southern Mediterranean and in Sub-Saharan Africa, which are among the main countries of origin and transit of migration flows into Europe.

3.5.1. The pending readmission agreements with Morocco and Algeria

Due to their relevance as countries of origin and transit, Morocco and Algeria were actually among the first countries to be targeted for the negotiation of a European readmission agreement.

Morocco

The Commission received the negotiating mandate for Morocco in September 2000 and sent the draft text of the agreement to Moroccan authorities in April 2001. However, a series of informal preparatory meetings and discussions within the EU-Morocco Association Council[46] were necessary to convince Morocco to formally start negotiations, finally, in April 2003 (Coleman 2009, 150-151). This first reluctant reaction to the EU's invitation to enter into an EURA was followed by a 15-year long

[46] The EU-Morocco Association Council was established under the EU-Morocco Euro-Med Association Agreement, signed in February 1996 (see above section 2.2.2).

(and still ongoing) negotiation process, counting 18 rounds so far. Besides being very long, the whole negotiation has also been particularly difficult (and according to an EU official I interviewed, less dynamic compared to the one with Turkey), as it got stuck every now and then on a number of sticking points; and once blocked, negotiations were hard to resume.

Throughout the entire negotiation process, there have been four main concerns on the part of Morocco. The first one relates to the inclusion in the EURA of a third country national clause imposing on Morocco a readmission obligation with regards to non-nationals who transited through (or resided in) its territory before entering the EU. Since Morocco is not only a main country of transit, but has also become a main country of destination for Sub-Saharan migrants, it fears becoming a 'gathering ground' for unwanted migrants (Coleman 2009, 151)[47]. Therefore, it has complained about the practical difficulties related to the actual implementation of this obligation (e.g. how to identify third country nationals, how to prove which countries they transited through, etc.) as well as the huge financial, organisational and technical efforts it would require.

Morocco's aversion to the readmission of non-nationals is linked to a second more general issue, concerning its foreign policy in the region. Morocco is an important player in the Maghreb and wants to maintain this image among regional partners (Wolff 2014, 84). It is thus keen to maintain good relationships with neighbouring countries in Northern Africa, as well as to revive its ties with Sub-Saharan countries, in particular in West Africa, both for political and economic reasons[48]. Therefore, 'Morocco cannot afford to cooperate on the deportation of citizens of African countries on Europe's behalf', as it would be 'a public relations nightmare for Morocco' and it would harm its economic and political interests in the region (Carrera et al. 2016, 6)[49].

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[47] This change in its status from country of origin to country of destination is a source of domestic concern, which led Morocco to develop restrictive migration polices during the first decade of the years 2000s (Coleman 2009, 151-152).

[48] Morocco has political and economic interests in West Africa, related in particular to the contentious issue of Western Sahara, a territory which Morocco has for a large part occupied since 1976 and over which it claims sovereignty. Algeria has always contrasted the Moroccan occupation and supported the Sahrawi people's right to self-determination and fight for independence.

[49] Charles (2007, 25-26) emphasised the possible destabilising impact of EURAs on relations between partner third countries and neighbouring countries in the region.

Thirdly, Morocco proved to be also extremely reluctant to readmit its own nationals, as confirmed by the EU officials I interviewed. Morocco considers the readmission of own nationals to be too costly and disadvantageous, also in light of the fact that socio-economic reintegration may be difficult for Moroccans who typically have been living abroad for a long time (Carrera et al. 2016, 6). Moreover, remittances are a major source of income for Morocco that it may not want to see reduced by limiting the presence of its citizens abroad (Coleman 2009, 152).

Morocco's aversion to the readmission of own nationals is also linked to a fourth concern relating to domestic public opinion. In the view of Moroccan authorities, a readmission agreement with the EU 'would be difficult to sell to the public' (Coleman 2009, 153) and might have relevant negative implications in terms of political consensus, being largely perceived as unbalanced by nature and largely unfavourable for Moroccan nationals. Therefore, Morocco has asked the EU for compensation 'that would not only be substantive but also clearly visible' (Coleman 2009, 153), so that the conclusion of the agreement could be presented to its domestic audience as overall beneficial to the Moroccan people.

First of all, Morocco has required technical and financial assistance for border control and the reception, processing and onward removal of readmitted persons; the Commission and Member States have responded positively to this request, by providing dedicated funding and technical support throughout the last decade (Coleman 2009, 154). However, according to Moroccan authorities, the readmission of unauthorised Moroccan nationals could only be sold to the public if counter-balanced by increased mobility and labour market access opportunities in the EU for Moroccan nationals. As mentioned above under section 3.3, the Commission lacks the competence to offer incentives in the area of legal migration and almost all Member States (with the exception of Italy) have proved extremely reluctant in offering preferential labour migration channels in exchange for cooperation on readmission (Coleman 2009, 154-155).

Moreover, Member States have always resisted the idea of offering visa facilitation to Morocco, because of the supposedly high migratory risk posed by the country (see section 3.3). They finally agreed on this, under the Commission's pressure,

only in the aftermath of the Arab Spring, when in the framework of the GAMM, the EU decided to offer Mobility Partnerships to Southern Mediterranean countries[50] (Wolff 2014, 78). As described in section 4.1 below, since 2011 Mobility Partnerships include a political commitment to negotiate in parallel VFAs and EURAs with the partner country (European Commission 2011e, 11). Therefore, the MP signed by the EU and Morocco in June 2013 provides for the opening of negotiations on a visa facilitation agreement, as well as the revitalisation of negotiations for the European readmission agreement.

The MP offered an actual opportunity for the re-launch of the EURA negotiations, which were stalled since May 2010. However, no agreement has been reached so far, despite additional offers of financial and technical assistance through EU- and Member State-funded projects and despite the visa facilitation incentive[51]. Core differences of opinion remain and new incentives do not seem to be particularly helpful, as many of the MP projects were actually in place already before, and the VFA in practice would offer only limited mobility opportunities due to its limited scope (it only applies to short-term Schengen visa). A new round of negotiations on the EURA (and the VFA) was held in January 2015 (EU Delegation to Morocco 2015); I learned from a DG HOME official interviewed in March 2016 that a further round of negotiations was scheduled in June 2015, but was cancelled by Morocco at short notice and no new date was proposed ever since.

Interestingly, if on the one hand Morocco has shown reluctance, when not aversion, towards cooperation on readmission at the European level, at the bilateral level it did quite the contrary. Since the early 2000s Morocco has cooperated closely with Spain to control irregular migration through the Gibraltar strait, to the Canary Islands and to the Spanish enclaves of Ceuta and Melilla, by applying the 1992 bilateral readmission agreement between the two countries, as well as informal readmission arrangements and practices (especially in the case of Ceuta and Melilla)[52]. Along with

[50] As maintained by one of the DG HOME officials interviewed by Wolff, before the Arab Spring 'visa facilitation was absolutely out of question for Member States' (2014, 78).

[51] The content of the MP with Morocco will be analysed in details under section 4.5.1 below.

[52] Bilateral cooperation on readmission between Spain and Morocco is analysed in detail in Chapter 5,

Spain, Morocco has signed bilateral readmission agreements with Italy, France, Portugal, Germany, Belgium and the Netherlands (García Andrade et al. 2015, 127; Wolff 2014, 79-80).

However, it is worth noting that cooperation on migration control and on readmission at the bilateral level proved to be effective and well-functioning with respect to third country nationals; conversely, readmission agreements (both of a formal and informal nature) are not necessarily implemented in a strict manner in the case of Moroccan nationals. At the consular level, in particular, Morocco has proved extremely hesitant in the practical application of bilateral RAs with respect to its own citizens, and established a practice of 'case-by-case cooperation' (Carrera et al. 2016, 6). The attitude of Moroccan consulates was described by an EU source that I interviewed as an issue of primary concern both for the Member States and the Commission. In their view, readmission should amount to an automatic procedure and it should not involve any decision on the merits of individual cases by the consulates of the readmitting country.

A further development which has not only blocked the EURA negotiations but has jeopardised EU-Morocco cooperation relations in general, is the December 2015 ruling of the CJEU annulling a 2012 Council Decision regarding a trade liberalisation agreement in agricultural and fishery products between Morocco and the EU[53]. Morocco reacted harshly to this ruling and suspended its diplomatic relations with the EU. The EU and Member States, on their part, showed sympathy towards Morocco and hoped for the rapid restoration of normal relations; the Council appealed the Court decision and a final judgement is expected for December 2016[54]. This episode proves how

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section 5.3.

[53] CJEU, *Front Polisario v. Council*, Case T-512/12, Judgment of the General Court, 10.12.2015. The case was brought to the CJEU by the 'Front Polisario' (a Western Saharan national liberation movement supporting the right of self-determination of the Sahrawi people) because the 2012 Council Decision, and the trade liberalisation agreement it established, would unfairly apply also to the contended territory of Western Sahara, which Morocco occupied in the 1970s but over which it does not have officially recognised jurisdiction.

[54] Even if it goes beyond the temporal scope of this study (which analyses developments until the 1st of December 2016), it is worth mentioning that the final CJEU judgement on the case was issued on 21 December 2016. The Court established that the agreement in question does not apply to the territory of Western Sahara because it does not mention it explicitly, and is therefore valid. Thus, the Court dismissed the action for annulment brought by the Front Polisario against the
Council's decision to conclude the trade liberalisation agreement, but it also explicitly reaffirmed that that

cooperation on readmission is intertwined with a broader cooperation framework, which includes other strategic (and perhaps more crucial) policy areas (Carrera et al. 2016, 6).

To conclude, all the EU officials I interviewed consider the chances for reaching an agreement with Morocco in the next future to be very low, one of them even stating that 'one thing is for sure: Morocco will never sign the European readmission agreement'. Similarly, Carrera et al. affirm that 'the continuous pressure to conclude an EURA has alienated rather than brought Morocco closer' (2016, 12). The authors argue that the EU's strong focus on readmission as a main goal, and the use of the whole EU cooperation with Morocco as a leverage to obtain the conclusion of the EURA, have been counter-productive and have put the EU's broader interests at risk. This was confirmed also by Jean-Pierre Cassarino in an interview I conducted in July 2016, during which he highlighted the Commission was wrong in focusing too much on readmission and making initiatives in all other areas conditional to it. According to Cassarino, this is doubly dangerous for the EU, because Morocco (like other Southern Mediterranean countries) have become strategic partners for the EU and its Member States in other, even more relevant, policy areas besides migration control (i.e. energy security, international terrorism, etc.).

Algeria

The case of Algeria is strongly linked with that of Morocco. Both countries were selected for the conclusion of EURAs for similar reasons and in light of the EU's regional approach to cooperation on readmission. As mentioned above, the Commission received the mandate to open negotiations with Algeria in November 2002, but negotiations have not started so far, because Algeria posed firm conditions for agreeing to negotiate the EURA (Coleman 2009, 175).

At first, Algeria refused to enter into negotiations because it wanted its Euro-Med Association Agreement to enter into force first. The Euro-Med Agreement with Algeria was initialled in December 2001, and it entered into force in December 2005. To some extent, Algeria forced the EU to accelerate the procedures necessary for its entry into

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for the EU the territory of Western Sahara is not part of the Kingdom of Morocco. CJEU, *Council v. Front Polisario*, Case C-104/16 P, Judgment of the Grand Chamber, 21.12.2016.

force, because it perceived the agreement as favourable; at the same time, thanks to this strategy, Algeria managed to postpone the negotiations of the readmission agreement, that it perceived as disadvantageous (Coleman 2009, 184).

Secondly, Algeria linked the start of readmission negotiations to the outcome of the EURA negotiations between the EU and Morocco. The reasons for this choice was that Algeria wanted to achieve a readmission agreement with the EU on the same terms as Morocco, and possibly obtain the same degree of compensation. Besides the traditional rivalry between the two countries, this request was mainly due to the fact that, as neighbours, they share the responsibility for transit migration in the region and in such situations a certain level of harmonisation in readmission procedures is highly desirable, if one wants EURAs to work properly (Coleman 2009, 176).

Evidently, Algeria's position is strategically very unfavourable to the Commission (Coleman 2009, 185-186) and it has so far resulted in the total impossibility for the EU to open readmission negotiations with Algeria, due to the difficulties in concluding the negotiations with Morocco first. Algeria has continued to refuse starting negotiations also in recent years, i.e. throughout 2012 and 2013 (European Commission 2014a, 6, footnote 11).

3.5.2. The readmission agreement with Turkey

The case of Turkey is interesting for several reasons. Turkey is among the key countries in the neighbourhood of the EU with which the Commission engaged early on in readmission negotiations. The latter revealed to be a long and difficult process, but differently from the cases of Morocco and Algeria, they ended with the actual conclusion of a European readmission agreement. The EURA with Turkey is particularly relevant to this study because it relates to readmission arrangements and practices established at bilateral level between Turkey and Greece (analysed in Chapter 5, section 5.4) as well as to recent migration cooperation and readmission arrangements adopted by the EU and Turkey starting from October 2015 with the purpose of stemming the increased migrant and refugee flow transiting through Turkey into the EU (see Chapter 6, section 6.2.1.1).

Already in the early 2000s, the establishment of readmission relations with Turkey was considered of utmost importance by the EU, in light of its objectives of securing the EU's external borders and creating a 'buffer zone' of third countries assuming responsibility for transit migration (both in terms of preventing the entry of and readmitting irregular migrants). Irregular transit migration through Turkey was already a critical issue, due to Turkey's geopolitical location at the crossroads of Asia, Africa and Europe, which made it a crucial hub of smuggling routes and networks (İçduygu and Aksel 2014, 338-339). In addition, in the early 2000s Turkey was still also a country of origin of unauthorised migrants and asylum seekers (Coleman 2009, 178).

A further peculiar element of the readmission negotiation with Turkey is that it is closely intertwined with the country's accession process. The case of Turkey, indeed, is peculiar also due to the country's long and troubled history of prospective EU membership (İçduygu and Aksel 2014, 338)[55]. Therefore, readmission negotiations were inevitably affected by membership negotiations, negatively or positively at different stages of the process. For instance, the Europeanisation triggered by the accession process brought about national reforms in the area of migration and asylum and the gradual adoption and implementation of the EU *acquis*; this *rapprochement* of Turkish legal and policy framework to the European one fostered cooperation in the management of migration, including readmission (İçduygu and Aksel 2014, 357-359; Wolff 2014, 91-92).

In November 2002 the Commission was given mandate to open negotiations for a readmission agreement with Turkey; after receiving a draft text of the agreement in March 2003, Turkey did not acknowledge the invitation to start negotiations until March 2004 (Coleman 2009, 178). Even before negotiations started, Turkey had manifested a reluctant attitude, when not open resistance, to the conclusion of an EURA. The most critical issue was, also in the case of Turkey, the readmission of non-nationals (Coleman 2009, 179; İçduygu and Aksel 2014, 352-353). Such obligation entails a responsibility for transit migration, which Turkey was not keen to take, fearing to become 'a buffer zone and a dumping ground for unwanted migration to the EU'

[55] Turkey had become a candidate Member State in 1999, after having applied ten years before (Coleman 2009, 178).

(Kirisçi 2014, 2). As a solution to this problem, Turkey adopted a 'delaying tactic' (Coleman 2009, 180): it postponed the conclusion of the EURA and meanwhile engaged in a 'regional readmission policy' (Wolff 2014, 90), by proactively seeking to conclude bilateral readmission agreements with an impressive number of countries[56]. Presumably, before agreeing to the readmission of non-nationals from the EU Member States, Turkey tried to secure more readmission obligations from the main countries of origin.

Turkey's second objection against the conclusion of an EURA is grounded on a manifest contradiction between the fact that since 1999 Turkey is a candidate Member State and the criteria for the selection of readmission target countries, as set by the April 2002 Council Conclusions on this topic. As mentioned above under section 3.1, in this document the JHA Council identified the criteria for the identification of third countries with which new EURAs should be negotiated; as a second criteria, the Council affirmed that: 'given the European Union's forthcoming enlargement, countries with which it is negotiating accession agreements should not be included' (Council of the EU 2004, para 2). As noted by Coleman, 'including this criterion was a strategic mistake, considering Turkey' (2009, 180); a mistake which left the Commission without much space for successful counter-arguments. Consequently, the Commission resorted to political pressure in order to convince Turkey to start readmission negotiations, e.g. by announcing Turkey's protracted lack of response on the EURA would impact negatively on the country's accession process (Coleman 2009, 181).

This strategy was finally successful, as in March 2004 Turkey accepted to start readmission negotiations. However, Turkey's reluctance was definitely not overcome, considering that in practice negotiations only began in May 2005 and were interrupted in December 2006, to remain stalled until 2010. This was partly due to the EU's decision to suspend negotiations on a number of chapters in the accession process

[56] In October 2004 Turkey already had agreements in place with Syria, Greece, Kyrgyzstan, and Romania; negotiations were underway with Belarus, Bulgaria, Egypt, Kazakhstan, Libya, Lebanon, Macedonia, Sri Lanka, Russia, Ukraine, and Uzbekistan; in addition, Turkey was awaiting responses to invitations to negotiate from Algeria, Bangladesh, China, Ethiopia, Georgia, India, Iran, Israel, Jordan, Mongolia, Morocco, Nigeria, Pakistan, Sudan, and Tunisia (Kirisçi 2004, Appendix, 14).

(Kirişçi 2014, 2)[57]. Turkey, on its part, reacted by advancing a new request: visa exemption for Turkish citizens travelling to the EU on equal terms as the Western Balkan countries, which were about to obtain visa liberalisation[58] (Wolff 2014, 86; Kirişçi 2014, 2). From that moment on, the opening of a parallel dialogue on visa liberalisation became the main *quid pro quo* required by Turkey in exchange for the conclusion of a readmission agreement with the EU[59].

The EURA negotiations were resumed in 2010, when the EU prepared a new draft text including the possibility of visa facilitation; but the Turkish government kept demanding visa exemption instead. Turkey's requests encountered the resistance of the JHA Council, and of some Member States in particular[60]. This worsened the climate of deep mistrust already characterising EU-Turkey relations. Nevertheless, three negotiation rounds took place in 2010, followed by a meeting of the Chief negotiators in January 2011 (Wolff 2014, 87). By February 2011 readmission negotiations were completed and the agreement on a draft text of the EURA was reached, but the issue of visa liberalisation was still pending. From February 2011 to June 2012 the debate focused entirely on this issue, with Turkish authorities making the conclusion of the EURA explicitly conditional to the attainment of a visa-free regime for Turkish citizens travelling to Europe (İçduygu and Aksel 2014, 335).

The EURA was finally initialled in June 2012, when the Member States finally accepted under the Commission's pressure, to initiate a dialogue on visa liberalisation

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[57] This decision was taken by the EU in response to Turkey's refusal to open its ports and airports to ships and planes from the Republic of Cyprus (İçduygu and Aksel 2014, 353).

[58] Western Balkan countries (i.e. Albania, Bosnia-Herzegovina, Macedonia, Montenegro and Serbia) signed EURAs in 2006 and 2008; in the meanwhile they were given a roadmap to follow in order to get visa liberalisation, which they obtained in 2009 and 2010.

[59] So-called visa exemption (or visa liberalisation, visa-free regime, etc.) allows citizens of a third country holding a biometric passport in line with EU standards, to travel for short stays (i.e. 90 days within any 180-day period) in the Schengen area without a visa. As part of its common visa policy, the EU has a common list of third countries whose nationals must be in possession of a visa in order to enter the EU, and a common list of countries whose nationals are exempt from that requirement. These lists are set out in EC Regulation 539/2001 of 15 March 2001 and its successive amendments.

[60] Member States had different opinions on the opening of a visa liberalisation dialogue with Turkey. Among the opponents, there were Germany, France, Austria and Greece, which highlighted the possibility of increased migration from Turkey and expressed hesitancy also with regards to Turkey's EU membership. Among the supporters, there were Italy, Britain, Sweden, Finland, Poland and Spain, which argued that a visa-free regime would not necessarily result in increased irregular migration (İçduygu and Aksel 2014, 354).

with Turkey. Nonetheless, this commitment was still rather vague and framed in a long-term perspective (European Commission 2012). The EU tried to make the actual launch of the visa liberalisation dialogue conditional to the formal signature of the EURA; conversely, Turkey refused to formally sign the EURA without a concrete and credible commitment on the part of the EU to move towards a visa-free regime for Turkey (Wolff 2014, 87).

But why had visa liberalisation become so crucial for Turkey? During the first decade of the years 2000s the country's economy grew considerably and economic relations with the EU expanded and intensified, in particular thanks to the EU-Turkey Customs Union established in 1995. Thus, 'it became increasingly awkward that Turkish goods enjoyed free movement while business people faced exacerbating if not humiliating visa applications while their European counterparts could enter Turkey freely often with just their identity cards' (Kirişçi 2014, 2). While business people argued that visa had become a form of 'non-tariff barrier', similar complaints were increasingly raised by university students and academics participating in EU programmes, as well as journalists and civil society in general. A recurrent argument on the part of Turkish authorities was that of 'equal treatment' for Turkey in comparison with other candidate Member States (Western Balkan countries in particular) which were granted visa liberalisation despite less favourable economic indicators and higher numbers of migrants and asylum seekers to the EU (Kirişçi 2014, 3).

The 'credible commitment' required by Turkey to the EU as a pre-condition for the formal signature of the EURA took the form of a 'Roadmap towards a visa free regime with Turkey', or Visa Liberalisation Roadmap (VLR) - a document setting out the requirements that Turkey needs to meet in order to be included in the EU list of visa-free countries. Although the Visa Liberalisation Roadmap is a Commission document, it was subject to an unusually long political negotiation within the Council. The Roadmap was finalised in November 2012 and transmitted to Turkey; but Turkish authorities were still hesitant in signing the EURA. The manifestly divergent Member States' positions, the fact that visa liberalisation was not directly incorporated in the readmission agreement, and the lack of clarity and deadlines to the visa liberalisation process fuelled Turkish distrust that EU Member States would ever grant Turkey a visa-

free regime, and thus weakened the power of the VLR as an incentive (Wolff 2014, 89). In addition, not all the VLR requirements were welcomed by the Turkish authorities; hence, Turkey refused to accept some of them and replied with an 'annotated version' of the Roadmap (Elitok 2015, 1; İçduygu and Aksel 2014, 356-357).

Finally, on 16 December 2013 the EU and Turkey signed the EURA and simultaneously launched the visa liberalisation dialogue, based on the Roadmap (European Commission 2013). The VLR contains 72 specific requirements that Turkey needs to meet in order to qualify for visa-free regime. Requirements are organised in five thematic 'blocks': readmission of irregular migrants (directly linked to the conclusion and effective implementation of the EURA); document security; migration management; public order and security; and fundamental rights[61]. On the one hand, Turkey is required to embark in substantial legislative and administrative reforms in all these areas with the aim to establish 'a secure environment for visa free travel'. But on the other hand, both the EURA and the VLR include provisions that are symptomatic of a troubled negotiation process where Turkey actually succeeded in pushing its main concerns forward.

The EURA contains a provision (Art. 24, para 3) that delays the application of the obligation to readmit third country nationals to three years after the entry into force of the agreement; during that three-year period the EURA applies to Turkish nationals, stateless persons and nationals of third countries with which Turkey has already concluded bilateral RAs[62]. This seems to be a compromise originating from Turkey's reluctance to take responsibility for the readmission of non-nationals.

Moreover, looking at the VLR, if on the one hand the EU requires that Turkey 'fully and effectively implement[s] the EU-Turkey readmission agreement in all its provisions' for visa liberalisation to occur, on the other hand Turkey has the right to suspend the application of the EURA if the terms of the Roadmap are not met by the EU

[61] The text of the Roadmap is available at the following link: http://ec.europa.eu/dgs/home-affairs/what-is-new/news/news/docs/20131216-roadmap_towards_the_visa-free_regime_with_turkey_en.pdf.

[62] The three-year deadline for the full application of the EURA with Turkey was modified following the EU-Turkey Joint Action Plan activated in November 2015; it was brought forward from 1st October 2017 to 1st June 2016. However, at the moment of writing, the EURA provisions relating to third country nationals are still not applicable, lacking the formal authorization from the Turkish Council of Ministers. For details, see section 6.2.1.1 below.

- i.e. if the EU does not offer visa liberalisation to Turkey by April 2018[63] (Kirisci 2014, 3). This represents a way to address Turkey's long-standing mistrust towards the EU's real intentions with regards to visa exemption. Ultimately, the EU-Turkey readmission agreement was ratified by the Turkish Parliament on 26 June 2014 and entered into force on 1st October 2014 (European Commission 2014e; 2014f).

Criticism has been raised by Turkish scholars and NGOs against the fact that the Turkish government presented the EU readmission agreement merely 'as a technical formality related to the visa exemption negotiations going on with the EU' (Refugee Rights Coordination 2014, 2) and 'a historical turning point that will remove the visa obligation for Turkish citizens to Europe' (Elitok 2015, 1). The whole public discussion in Turkey was in fact dominated by the issue of visa exemption, while the issue of readmission was downgraded to a procedural step required by the visa liberalisation process. According to Turkish scholars, the presentation at domestic level of the whole process as a success story that would bring as an outcome 'visa-free Europe' for Turkish people amounted to a 'public relations strategy' pursued by the Justice and Development Party (AKP) with electoral purposes (Elitok 2015, 3; İçduygu and Aksel 2014, 360). But according to several commentators, in reality the EURA represented a step back for Turkey, in particular with regards to its position as prospective candidate to EU membership.

Elitok highlights that, as a candidate Member State, Turkey had already acquired rights with regards to the free movement of its citizens in the EU, but the Turkish government decided to overlook this and accepted instead the supposedly shorter-term and more visible option of linking visa liberalisation to the conclusion of the readmission agreement. But Elitok criticises also the EU for applying double standards when awarding visa exemption to other candidate (or even non-candidate) countries in the Western Balkans before Turkey. Moreover, the author underlines that the visa liberalisation notion is ambiguous and the process leading to it open-ended, which might lead to extra duties and responsibilities on Turkey. Finally, Elitok emphasises that

[63] Also this deadline for the achievement of visa liberalisation was brought forward firstly by the November 2015 Joint Action Plan and then by the March 2016 EU-Turkey Agreement, to be later postponed again, at the moment of writing, to the end of 2016-beginning of 2017 (see section 6.2.1.1 below).

the EURA merely serves the EU's migration control objectives, as it shifts on Turkey the 'burden' of all irregular migration transiting through the country into Europe (Elitok 2015, 3-4).

Along with criticism related to the fact that the EU-Turkey readmission agreement would go to the detriment of Turkey and Turkish people, NGOs strongly criticised its human rights implications for migrants and refugees, especially in light of the significant presence of forced migrants, asylum seekers and refugees among those who transit through Turkey towards the EU (Refugee Rights Coordination 2014)[64].

As concerns the implementation of the EURA, from the interviews I conducted with DG HOME officials in March 2016[65] it emerged that it is ongoing: interviewees mentioned the fact that the Joint Readmission Committee has already met twice and that negotiations for an implementing protocol with Germany have been concluded[66]. However, none could provide figures concerning the practical implementation of the agreement, in particular the number of Turkish nationals and non-nationals who had been readmitted under the EURA since its entry into force. The reasons advanced by interviewees are related to the well-known lack of statistics distinguishing returns carried out under EURAs from other kinds of returns (see above section 3.4.2). Nevertheless, EU officials admitted that the implementation of the agreement is not progressing in the best way, mainly due to faulty practices on the part of Turkish authorities (e.g. with respect to time limits, identification of own nationals, issuance of travel documents, etc.) in particular at the consular level and in Member States like Germany or France (where the return of unauthorised Turkish nationals represents a relevant issue).

The relevance of the EURA with Turkey within the broader framework of the EU migration and asylum policy increased substantially starting from autumn 2015 when,

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[64] The human rights concerns raised with respect to the EURA with Turkey are not discussed in details here, because they are very similar to those characterising EURAs in general (which have already been analysed above under section 3.4.4).

[65] In March 2016 the EURA with Turkey was applicable only to Turkish nationals and nationals of third countries with which Turkey had already bilateral RAs in place

[66] In April 2016 the Commission reported Turkey had agreed a bilateral implementing protocol with Germany and was negotiating similar implementing protocols with Greece and Bulgaria (European Commission 2016d, 5).

due to a huge increase in arrivals of migrants and refugees coming from Turkey to Europe crossing the Aegean Sea and the Western Balkans (the so-called 'refugee crisis'), the EU established with Turkey enhanced cooperation in the area of migration management, with the twofold purpose of stemming this migration flow and supporting Syrian refugees in Turkey. This new EU-Turkey migration cooperation framework will be analysed in details under section 6.2.1.1. Here it is worth mentioning one of its most interesting outcomes: the anticipation of the deadline for the full application of the EU-Turkey RA to all third country nationals from the 1st of October 2017 to the 1st of June 2016. Therefore, since June 2016 Turkey has the obligation to readmit all irregular third country nationals who entered one of the EU Member States coming directly from Turkey.

CHAPTER 4
MOBILITY PARTNERSHIPS

4.1. Origins and evolution of Mobility Partnerships within the framework of the Global Approach to Migration and Mobility

As anticipated above under section 2.1.5, the Global Approach to Migration (GAM) was launched in 2005. Following the informal European Council held at Hampton Court in October that year, the Commission produced a plan of 'priority actions for responding to the challenges of migration' (European Commission 2005b). This Communication proposed a set of concrete measures that constituted a comprehensive approach to migration and formed the basis for further discussion by the European Council. In December 2005, the European Council upheld the Commission plan and adopted the 'Global Approach to Migration: Priority actions focusing on Africa and the Mediterranean' (European Council 2005, Annex I). Mobility Partnerships (MPs) were introduced soon after, in May 2007, as the main policy instrument to operationalise the GAM (European Commission 2007a).

However, both the GAM and the concept of MPs did not turn up out of the blue: their origins can be traced back to the early days of the Europeanisation of migration and asylum policy. As extensively discussed under section 2.1, the development of the external dimension of the EU migration and asylum policy underwent different phases, where policies (or the policy discourse) were informed by either a control-oriented approach or a more comprehensive prevention-oriented approach (or a mix of both). The Global Approach to Migration stems precisely from the ideas brought forward by the EU documents (especially Commission communications) that already in the 1990s had proposed a comprehensive approach to migration based on partnerships with third countries.

In particular, in its 1991 and 1994 communications on immigration and asylum policies, the Commission recommended the adoption of a 'global approach to the problem' (also referred to as 'comprehensive multi-disciplinary approach' or 'balanced

and integrated approach') combining 'three separate but interrelated elements: taking action on migration pressure; controlling migration flows; strengthening integration policies for the benefit of legal immigrants' (European Commission 1991, 2-3; 1994, 11). The first element (i.e. taking action on migration pressure) was meant to be implemented in close cooperation with the main countries of origin, as it should specifically address the root causes of migration. Lavenex and Stucky (2011, 118) noticed two main differences between the 2005 Global Approach to Migration and this early notion of 'global approach': the latter did not include initiatives in the field of legal and labour migration, and did not make EU cooperation with third countries conditional to the third countries' commitment in the areas of migration control and readmission.

As mentioned under section 2.1 above, the 1999 Tampere European Council represented a turning point for the breakthrough of 'a comprehensive approach to migration addressing political, human rights and development issues in countries and regions of origin and transit' and for the strengthening of an idea of 'partnership with third countries' as 'a key element for the success of such a policy' (European Council 1999, para 11). The issue of 'possibilities for legal immigration' was included in Tampere's idea of a comprehensive approach to migration as an issue to be dealt with in cooperation with third countries (European Council 1999, para 22). But it was a Commission Communication issued one year later, in November 2000, that focused specifically on legal migration and on the admission of labour migrants in the EU.

In this forward-looking document, the Commission explicitly stated that 'channels for legal immigration to the Union should now be made available for labour migrants', because 'it is clear from an analysis of the economic and demographic context of the Union and of the countries of origin, […] that the «zero» immigration policies of the past 30 years are no longer appropriate' (European Commission 2000, 3). The 2000 Communication promoted a 'partnership approach' whereby the EU should 'take a responsible attitude towards the effects of emigration on the countries of origin', in particular as concerns brain drain, remittances and the link between migration and development (European Commission 2000, 7). In light of these considerations, the Commission further suggested that:

> The partnership approach should provide a framework for dealing flexibly with new trends in migration which are now developing in the world, with the concept of migration as a *pattern of mobility* which encourages migrants to maintain and develop their links with their countries of origin. This includes ensuring that the legal framework does not cut migrants off from their country of origin e.g. that they have possibilities to visit without losing their status in their host country, and of moving on or going back as the situation develops in the country of origin and elsewhere in the world (European Commission 2000, 8).

In this paragraph, the Commission clearly anticipated the concepts of mobility and circular migration (although without naming the latter), which will be formally introduced as part of the GAM in May 2007, by the Commission Communication on Circular Migration and Mobility Partnerships between the EU and Third Countries.

However, as analysed under section 2.1.4, in the following years (the early 2000s) the focus of the EU migration policy shifted to irregular migration and to a security-oriented approach to migration control, both at the level of the European Council, the JHA Council and the Commission. As highlighted by Lavenex and Stucky (2011, 119-120), in this context, the 'rhetoric of partnership' was to some extent maintained but the purpose of 'partnering' was no more to tackle the root causes of migration and support socio-economic development in partner countries, or to offer legal migration opportunities to migrant workers; rather, the aim of 'partnering' became to integrate countries of origin and transit into the EU migration control system. Cooperation on the part of third countries was required primarily in the areas of return and readmission, as well as on migration- and border control. Cooperation in these areas was incentivised through the promise of rewards, such as visa facilitation, financial and technical assistance, and benefits in other policy areas. Therefore, in the early 2000s, the notion of partnership was embedded in a conditionality, or *quid pro quo*, framework.

In light of this analysis, the Global Approach to Migration appears to be closely connected with the overall evolution of the EU migration policy. Indeed, as further discussed below in this section, the GAM has incorporated and merged elements from both the comprehensive prevention-oriented partnership approach and the control-oriented approach. But notwithstanding this close relation with its broader policy

context, the breakthrough of the GAM in 2005 has to be attributed to a number of contingent factors, both external and internal to the European framework, as follows.

The first (and most crucial) factor leading to the launch of the GAM is represented by the tragic events which occurred in Ceuta and Melilla in September 2005, when Spanish and Moroccan authorities brutally deterred hundreds of migrants from climbing over the fences of the Spanish enclaves, causing the death of at least eleven people, and deported many of them in unhuman conditions to the Moroccan-Algerian desert border. These events and their mediatisation acted as 'external shocks' causing what has been considered as a 'crisis' in the then prevailing EU repressive approach to migration cooperation with third countries. The EU institutions and Member States were thus pushed towards a major rethinking of their external migration policy (Lavenex and Stucky 2011, 122; Cassarino and Lavenex 2012, 284).

A second factor, identified by Cassarino (2009), is a change in power relations between the EU and Southern Mediterranean and African countries, following the proactive involvement of the latter in the reinforced control of the EU external borders. The flourishing of bilateral and multilateral joint operations led to a significant interdependence between sending, receiving and transit countries and to the 'empowerment' of Mediterranean and African countries *vis-à-vis* the EU and its Member States. Having become strategic partners in the implementation of migration control, neighbouring countries could 'act as key and equal players in migration talks', advancing their own requests and conditions. Consequently, the EU had to adapt its policy approach and make it more comprehensive and 'partnership-oriented'.

A third element that, according to Cassarino, was conducive to this change in the EU approach consists of the Member States' growing concerns about the EU institutions' capacity to effectively fight unauthorised immigration and negotiate EURAs (2010c, 33; 2009). These concerns pushed the Commission to explore new avenues to improve third countries' cooperation in the area of migration control and readmission, by means of a new approach, which needed to be less restrictive, less Eurocentric and more sensitive to the partner countries' perspectives and interests[1].

[1] Lavenex and Stucky highlighted two further elements which may have contributed to and supported a

The Global Approach to Migration was, thus, presented as 'a balanced, global and coherent approach, covering policies to combat illegal immigration and, in cooperation with third countries, harnessing the benefits of legal migration' (European Council 2005, para 8). When it was first launched by the European Council in December 2005 it consisted of a broad array of actions aimed at strengthening operational cooperation between Member States, as well as increasing dialogue and cooperation with African countries and with neighbouring Mediterranean countries – with a special focus on Morocco, Algeria and Libya (European Commission 2005, Annex I).

In November 2006 the Commission reported back on the progress made during the first year of implementation of the GAM and discussed ways to make it more comprehensive. In its Communication on the Global Approach to Migration One Year On, the Commission suggested in particular to promote the 'migration and development agenda' and to include measures in two policy areas, i.e. legal migration and integration, that had been given only marginal consideration in the 2005 list of priority actions (European Commission 2006, 5-8)[2].

The European Council Conclusions of December 2006 confirmed this orientation and required the Commission to take steps, in particular with regards to the expansion of the geographical scope of the GAM and to the issue of legal migration (European Council 2006, para 24(a)). The European Council established that the Global Approach should be applied not only to the EU Southern neighbourhood, but also to its Eastern and South-eastern neighbouring regions. Moreover, it invited the Commission to elaborate proposals on how to effectively incorporate legal migration opportunities into the EU external migration policy 'in order to develop a balanced partnership with third countries adapted to specific EU Member States' labour market needs' and to explore 'ways and means to facilitate circular and temporary migration'. In response to this request, in May 2007 the Commission issued a Communication on Circular Migration

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change in the EU external migration policy: 'the intensifying international discourse on the issue of migration and development within the UN system' and 'a general move towards "partnership" in EU external relations' (2011, 122).

[2] Interestingly, this 2006 Communication explicitly mentioned that, along with reinforcing the fight against illegal immigration and human trafficking, the GAM should also ensure access to asylum procedures, in particular in the context of mixed migration flows (European Commission 2006, 9-10).

and Mobility Partnerships Between the EU and Third Countries, where it elaborated the new policy instrument of MPs and the concept of circular migration (European Commission 2007a).

Actually, the idea of 'mobility partnerships' was first introduced in the above-mentioned 2006 Communication on the Global Approach to Migration One Year On, where the Commission stated:

> Once certain conditions have been met, such as cooperation on illegal migration and effective mechanisms for readmission, the objective could be to agree *Mobility Packages* with a number of interested third countries which would enable their citizens to have better access to the EU. There is a clear need to better organise the various forms of legal movement between the EU and third countries. Mobility packages would provide the overall framework for managing such movements and would bring together the possibilities offered by the Member States and the European Community, while fully respecting the division of competences as provided by the Treaty (European Commission 2006, 7).

Therefore, the first notion set forth by the Commission was that of 'Mobility Package', a term that 'highlight[s] more explicitly the bargaining character of this policy initiative' (Lavenex and Stucky 2011, 126). It was the Commission itself to suggest in its 2007 Communication the renaming of the instrument as 'Mobility Partnership' (European Commission 2007a, 3), 'probably to stress the joint management and ownership of the initiative and the sharing of mutual commitments between the European Union and selected third countries' (Cassarino 2009).

This quote from the 2006 Communication is particularly relevant because it contains explicit indication of one of the fundamental features of the MPs, and of the GAM as a whole, i.e. their conditionality. As affirmed in the first lines, the adoption of MPs is conditional to the degree of cooperation on irregular migration and readmission demonstrated by the third countries concerned. The conditional approach adopted in the framework of the MPs is clear: cooperation in the fight against irregular immigration and effective implementation of readmission obligations represent mandatory preconditions for partner countries to possibly (but not certainly) benefit from legal migration opportunities and increased mobility towards the EU. As highlighted by

Lavenex and Stucky (2011, 125-126), the more the GAM policy discourse moves towards practical cooperation, the more the 'partnership approach' leaves space to a 'conditionality approach'. This statement from the 2006 Communication reveals also the selective nature of MPs: indeed, MPs are addressed only to third countries that cooperate in the fight against irregular migration and have effective mechanisms for readmission in place (Cassarino 2010c, 33-34).

This analysis of the evolution of the GAM in the two-year period 2005-2007 shows that the Global Approach to Migration has been gradually developed to comprise three thematic areas, or 'pillars', as reflected also in the structure of MPs. These areas are: 1) the management of legal migration and mobility, including visa issues; 2) the prevention of and fight against irregular immigration, including combating human trafficking and smuggling, border control and readmission; and 3) the relationship between migration and development, i.e. the development impact of migration. However, as further discussed in the following sections, in practice the second component (i.e. migration control and readmission) continued to prevail and to be prioritised over the other dimensions of the GAM.

A Commission Communication issued in October 2008 affirmed that the GAM reflected a major change in the external dimension of the European migration policy, 'namely the shift from a primarily security-centred approach focused on reducing migratory pressures, to a more transparent and balanced approach guided by a better understanding of all aspects relevant to migration' (European Commission 2008, 3). However, it emerges from the analysis above that, although heralded as a comprehensive partnership-oriented approach, the GAM did not mark a radical shift from previous restrictive security-oriented policies; instead, the GAM discourse combines comprehensive and restrictive elements by making legal migration perspectives conditional on readmission and joint migration management.

In 2011, a second 'external shock' or 'crisis' (after the 2005 deadly events in Ceuta and Melilla) seemed to be potentially able to bring about a real change in the EU's approach to migration cooperation with third countries. This second 'crisis' was represented by the Arab Spring, i.e. the uprisings involving large parts of civil society in several Southern Mediterranean countries aimed to the deposition of former

dictatorships and democratisation of the countries. Shortly after the revolutions in Tunisia and Egypt, the EU was quick to promise major innovations in its relations with Northern African countries, including in the area of migration cooperation; such innovations were meant to mark a (this time) real shift from a repressive to a comprehensive partnership-oriented approach (European Commission and High Representative 2011b).

In fact, even though the GAM was born with a focus on the Mediterranean and African countries (European Council 2005, Annex I), when in 2007 the moment arrived for its concrete implementation through the MPs, the attention of the EU seemed to shift towards its Eastern neighbourhood, as proved by the Commission Communication on Applying the GAM to the Eastern and South-eastern Regions Neighbouring the EU (European Commission 2007b). This trend is clear if we look at the MPs signed or under negotiations in 2011: at the time of the Arab Spring, the EU had concluded the first pilot MPs with Moldova and Cape Verde in June 2008 and with Georgia in November 2009, and it was negotiating a MP with Armenia. Three out of four MPs involved countries in the Eastern and South-eastern neighbourhood, while the only MP in the Southern neighbourhood targeted an island whose migratory impact on the EU was rather limited, compared to other countries in West Africa (Lavenex and Stucky 2011, 129-130).

But the Arab Spring did not only bring the attention of the EU back to the Mediterranean; it also questioned the willingness of the EU to support the process of democratisation in the Southern Mediterranean and to re-found its relations towards Northern African countries on new, more equal and fair bases. In this respect, the Joint Communication issued by the European Commission and the High Representative of the Union for Foreign Affairs already in March 2011 'A Partnership for Democracy and Shared Prosperity with the Southern Mediterranean' was a very inspired and forward-looking document[3] (European Commission and High Representative 2011b).

[3] The historic message contained in the first paragraph of this Communication is worth quoting: 'The events unfolding in our southern neighbourhood are of historic proportions. They reflect a profound transformation process and will have lasting consequences not only for the people and countries of the region but also for the rest of the world and the EU in particular. The changes now underway carry the hope of a better life for the people of the region and for greater respect of human rights, pluralism, rule of

Moving from the awareness that 'a radically changing political landscape in the Southern Mediterranean requires a change in the EU's approach to the region' (European Commission and High Representative 2011b, 3), the EU offered its support in the form of a 'Partnership for Democracy and Shared Prosperity' to Southern Mediterranean countries willing and able to embark in a process of democratisation and reforms. This Communication introduced for the first time the 'more-for-more' principle, which in its original meaning entailed a commitment on the part of the EU to offer greater support and a stronger partnership to the countries that 'go further and faster with reforms' (European Commission and High Representative 2011b, 5)[4]. In the area of migration, the Commission emphasised the need to enhance 'well-managed mobility' from Mediterranean countries to the EU; to this purpose, it suggested the launch of Mobility Partnerships with these countries and committed to work together with Member States on legal migration legislation and visa facilitation options (European Commission and High Representative 2011b, 6-7).

The following Communication on 'A Dialogue for Migration, Mobility and Security with the Southern Mediterranean Countries' issued by the Commission in May 2011 partly followed the orientation of the previous joint communication (in particular the proposal to offer MPs to Northern African countries), but the very open and proactive partnership-oriented approach characterising the first European reaction to the Arab Spring was distinctly downsized. The May 2011 Communication moved from the verification that the historic events that occurred in the Southern neighbourhood of the EU 'have also induced significant movements of people'; it thus proposed to address the existing challenges in the area of migration through the establishment of a 'Dialogue for Migration, Mobility and Security' with Southern Mediterranean countries (European Commission 2011c, 2).

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law and social justice – universal values that we all share. Movement towards full democracy is never an easy path - there are risks and uncertainties associated with these transitions. While acknowledging the difficulties the EU has to take the clear and strategic option of supporting the quest for the principles and values that it cherishes. For these reasons the EU must not be a passive spectator. It needs to support wholeheartedly the wish of the people in our neighbourhood to enjoy the same freedoms that we take as our right' (European Commission 2011b, 2).

[4] For an analysis of how the meaning of the more-for-more principle has been changed to become a synonym of conditionality, see the last paragraph (and footnotes) of section 3.3 above.

Although this initiative was intended to reflect the three pillars of the GAM, the terms used to define the Dialogue reveal a renewed focus on security aspects and a conditionality-based approach. The declared aim of the Dialogue is to support and encourage reforms in the partner countries 'aimed at improving security', as a precondition to offer their citizens 'a possibility of enhanced mobility towards the EU Member States, whilst addressing the root causes of migratory flows' (European Commission 2011c, 7-8). MPs are considered to be the most suitable tool to achieve this goal; but if on the one hand their declared primary function is 'to ensure that the movement of persons between the EU and the partner country concerned is well-managed', on the other hand this movement must 'take place in a secure environment' (European Commission 2011c, 8).

As a matter of fact, the Communication lists (in a non-exhaustive way) a number of specific measures that each prospective partner country has to implement as a precondition for increased mobility. These measures are 'aimed at contributing to the creation of a secure environment' for the circulation of persons, and include: setting up voluntary return arrangements; concluding readmission agreements with the EU and working arrangements with Frontex; cooperating in joint surveillance operations in the Mediterranean Sea; and strengthening capacities in integrated border management (European Commission 2011c, 10-11)[5].

This overhaul in the order of priorities from the 'Partnership Communication' to the 'Dialogue Communication' may be explained by the institutional shift in the responsibility for drafting the documents, from the High Representative and the External Action Service to DG HOME. Moreover, the elaboration of the Dialogue was carried out in spring 2011, against the background of growing European concerns for an alleged 'invasion' of migrants from Northern Africa and amidst the Franco-Italian dispute over the influx of Tunisian migrants (Carrera et al. 2012, 9). The approach to be

[5] Interestingly, the May 2011 Communication mentions a specific feature of future MPs with Northern African countries that seems to indicate a less restrictive approach on the part of the EU: at least on paper, indeed, the legal migration and mobility opportunities included in MPs should apply not only to the citizens of the partner countries but also to the nationals of other countries, 'in particular those of Sub-Saharan Africa and of the Middle East, who increasingly reside on or transit through the territory of the Southern Mediterranean countries' (European Commission 2011c, 7).

pursued through the Dialogue was clearly pointed out already in the JHA Council Conclusions of 11-12 April 2011, stating that:

> The Dialogue should in first instance focus on the identification and promotion of measures which can contribute in a concrete and effective way to the prevention of illegal migration, to the effective management and control of their external borders, to the facilitation of the return and readmission of irregular migrants, and to the development of protection in the region for those in need, including through regional protection programmes. Subsequently, this dialogue could explore the possibilities for facilitating people-to-people contacts using instruments such as mobility partnerships (Council of the EU 2011a, para 10).

Therefore, the renewed promise originating from the Arab Spring for a more comprehensive and balanced GAM was largely betrayed. The second pillar (i.e. irregular migration and readmission) continued to be prioritised, while the possibility of increased mobility was made conditional to the prior fulfilment of an array of security- and control-oriented conditions[6].

Following the May 2011 Communication, the Commission proposed to start Dialogues for Migration, Mobility and Security with Morocco, Tunisia and Egypt. The launch of these Dialogues represented a preliminary step towards the negotiation and adoption of MPs[7]. Dialogues with Morocco and Tunisia started in October 2011 and led to the adoption of MPs in June 2013 and March 2014, respectively; conversely, Egypt declined the EU's proposal and has thus far refused to enter into negotiations for a MP. In December 2012 the EU started a Dialogue also with Jordan, which led to the signature of a MP with the country in October 2014.

However, towards the end of 2011 a further relevant development marked the evolution of the GAM. Building upon the approach and proposals set out by the previous 2011 communications, in November 2011 the Commission issued a new

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[6] 'During the preparatory phase, the Southern Mediterranean countries would be requested to make progress towards building capacity for the efficient management of migration and to contribute towards establishing a secure environment for mobility, as conditions for the fair and sustainable implementation of the Mobility Partnership' (European Commission 2011c, 11).

[7] 'The dialogues allow the EU and the partner countries to discuss in a comprehensive manner all aspects of their possible cooperation in managing migration flows and circulation of persons with a view to establishing Mobility Partnerships' (European Commission 2011e, 2).

Communication on 'The Global Approach to Migration and Mobility', which represents the most relevant 'reform' of the GAM after its launch in 2005[8] (European Commission 2011e). This Communication, like the previous ones, originates from the Arab Spring and from the impact those events had on the EU, as stated in the press release which accompanied its publication[9]. In this document the Commission presents a renewed Global Approach to Migration and Mobility (GAMM, with double 'M'), which at least on paper should place mobility of third country nationals at its centre and make partnerships with third countries more sustainable and forward-looking. The main innovations introduced by the November 2011 GAMM reform are the following.

A stronger focus is placed on 'mobility', which is considered 'a much broader concept than migration', 'of strategic importance' for the EU. Due to the close interconnections existing between the EU visa policy for short stays, Member States' national policies on long stays and the GAM, the Commission proposed 'to expand the scope of this policy framework to include mobility, making it the Global Approach to Migration and Mobility (GAMM)' (European Commission 2011e, 3).

However, the concept of mobility, portrayed in a positive way in all EU documents, is in fact rather controversial, because it implies a short-term temporary movement. According to scholars, the renewed GAMM entails an explicit shift of emphasis away from more permanent or semi-permanent forms of legal migration to encourage short-term temporary movements, which may even become 'recurrent' under circular migration schemes (Carrera and Hernández i Sagrera 2011, 100 and 109; Carrera et al. 2012, 13). Such forms of mobility are promoted by the EU as especially beneficial to third countries, since they contribute to avoid brain drain and support development. However, critics emphasise that the actual purpose of this new (but in fact old) approach is to regulate labour migration as a seasonal temporary phenomenon targeting certain categories of workers, while avoiding their permanent residence,

[8] The above-mentioned MPs with Mediterranean countries signed after 2011 reflect in their content and structure the developments introduced by the new GAMM.

[9] 'The Arab Spring and events in the Southern Mediterranean in 2011 further highlighted the need for a coherent and comprehensive migration policy for the EU. That is why today the European Commission proposes to strengthen dialogue and operational cooperation with non-EU partner countries in the area of migration and mobility' (European Commission 2011f).

family reunification and social integration in the EU (Carrera and Hernández i Sagrera 2011, 109).

As concerns the thematic areas, the new GAMM complements the traditional three pillars of the old GAM (legal migration, irregular migration and migration and development) with a fourth pillar on international protection and the external dimension of asylum policy. In addition, in the renewed GAMM the human rights of migrants should be considered a cross-cutting issue relevant to all four pillars and more in general 'the GAMM should […] be migrant-centred' (European Commission 2011e, 5-7).

Therefore, the revised GAMM appears to be much more focused on the interests of third country nationals and partner countries, given the emphasis that is given for the first time to mobility, international protection and migrants' human rights. But this is on paper; the implementation of the Global Approach through MPs demonstrates that even after 2011 the focus of the EU external migration policy has continued to be on combating irregular migration and making readmission more effective.

Also the instrument of MPs is partly modified and strengthened under the new GAMM. The Commission stresses that, since it is no more in its pilot phase, the MP 'should be upgraded and promoted as the principal framework for cooperation in the area of migration and mobility between the EU and its partners'; as concerns its geographical focus, MPs should be primarily offered to countries in the EU's immediate neighbourhood (European Commission 2011e, 10-11). However, the most relevant change in the renewed MP is that it includes a commitment for the parties to negotiate a visa facilitation agreement in parallel with a European readmission agreement; it thus reinforces the connection between VFAs and EURAs and confirms the conditionality link between cooperation on readmission and increased mobility (European Commission 2011e, 11).

Table 2 below lists the Mobility Partnerships signed and indicates which Member States participate in each of them; Table 2 lists also the third countries that refused the EU's offer to negotiate a MP (Egypt), whose negotiations are ongoing (Ghana) or whose negotiations have been suspended due to lack of progress (Senegal).

Table 2. Mobility Partnerships

Country	Status of negotiations	Mobility Partnership signed	Participating Member States
Moldova	Completed	5 June 2008	BG, CY, CZ, FR, EL, DE, HU, IT, LT, PL, PT, RO, SI, SK, SE (15)
Cape Verde	Completed	5 June 2008	ES, FR, LU, PT, + NL (5)
Georgia	Completed	30 November 2009	BE, BG, CZ, DK, DE, EE, EL, FR, IT, LT, LV, NL, PL, RO, SE, UK (16)
Senegal	Suspended	-	-
Armenia	Completed	27 October 2011	BE, BG, CZ, DE, FR, IT, NL, PL, RO, SE (10)
Ghana	Ongoing[10]	-	-
Azerbaijan	Completed	27 October 2013	BE, FR, DE, IT, NL, PT, ES, SE, UK (9)
Egypt	Refused	-	-
Morocco	Completed	7 June 2013	BE, FR, DE, IT, NL, PT, ES, SE, UK (9)
Tunisia	Completed	3 March 2014	BE, DK, DE, FR, IT, PL, PT, ES, SE, UK (10)
Jordan	Completed	9 October 2014	CY, DE, DK, EL, ES, FR, IT, HU, PL, PT, RO, SE (12)
Belarus	Completed	13 October 2016	BG, LT, LV, HU, PL, RO, FI (7)

Source: Compiled by the author based on information from the European Commisssion

[10] Negotiations for a MP with Ghana have been ongoing since 2010 (Maroukis and Triandafyllidou 2013, 2) but until very recently they have not progressed in any significant way. Following the La Valletta Summit of November 2015, negotiations have been revitalised in the form of a High Level Dialogue on migration. So far, this has led to the signature of a 'Joint Declaration on Ghana-EU Cooperation on Migration' on 16 April 2016. Compared to MPs, this is a more informal and less structured kind of political declaration, covering the four thematic areas of the GAMM but in a rather general way (EEAS 2016a). The text of the Declaration is available at the following link: https://eeas.europa.eu/headquarters/headquarters-homepage/5249_en. The ongoing EU-Ghana Dialogue is meant to lead to the adoption of a Common Agenda on Migration and Mobility (CAMM), which may prelude to the subsequent adoption of a MP.

4.2. Content and purpose of Mobility Partnerships

Mobility Partnerships are conceived as the main comprehensive and long-term framework for facilitating policy dialogue and operational cooperation in the field of migration between the EU, a given third country and interested Member States (European Commission 2011e, 10). More precisely, as affirmed by the Council in June 2007, MPs should include on the one hand an 'offer of legal migration opportunities, adapted to the specific Member States' labour market needs' and on the other hand 'a genuine cooperation on preventing and combating illegal immigration, trafficking in and smuggling of human beings as well as effective readmission and return policy' (Council of the EU 2007, para 10). These two elements represent precisely the dual purpose of MPs.

As described in the previous section 4.1, MPs were launched by the Commission in May 2007 as a response to a request raised by the European Council in December 2006 to explore ways for incorporating legal migration and mobility into the EU cooperation with third countries (European Council 2006, para 24(a)). Therefore, the first explicit objective of MPs is to create a framework for the EU and Member States to offer in a coordinated way legal migration opportunities (with a special focus on labour migration), increased mobility, a less restrictive visa policy and circular migration projects to the citizens of selected third countries.

However, as analysed above, legal migration and mobility are offered only in return for the partner countries' cooperation on combating irregular migration and implementing effectively their readmission obligations. This conditionality link reveals what the more implicit objectives of MPs are, i.e. to reinforce migration control and to improve readmission. Going beyond the official purpose of MPs as declared in most of the EU documents, their introduction seems in fact to be closely related to the EU readmission policy (Carrera and Hernández i Sagrera 2011, 100). Given the difficulties encountered by the Commission in the negotiation of EURAs and obstacles in their effective implementation (attributed *in primis* to lacking cooperation on the part of third countries), MPs appeared to be a new potentially powerful vehicle to promote readmission. This view is confirmed by the 2008 Commission Communication on

Strengthening the Global Approach to Migration, which called for an intensification of readmission efforts by 'placing the readmission policy more firmly within the Global Approach and its priorities and using the potential of mobility partnerships' (European Commission 2008, 6).

From a European perspective, MPs could represent a tool for offering third countries a broad package of incentives in different JHA areas (legal migration, visa policy, development, integration, etc.); they could thus help speeding up readmission negotiations and reaching a *quid pro quo* which could satisfy both parties. Moreover, being a long-term and ever-changing cooperation framework, MPs could be useful to ensure from partner countries the effective implementation of their readmission obligations (because, as explained below in this section, the content of MPs is open and it is always possible to add or withdraw incentives).

The interviews I conducted both with experts and DG HOME officials confirmed that the introduction of MPs was directly linked to the need to improve readmission, i.e. to make negotiations easier and faster and to create a framework that would encourage actual cooperation and effective returns. A top official declared that this was not 'one of the reasons', but 'the main reason' why MPs were introduced. However, we will analyse under section 4.4.2 below whether this attempt to foster readmission through MPs has produced the desired outcomes.

As concerns the content of MPs, they all share an almost identical structure, as in the case of EURAs. Their Preamble makes reference to the existing relationships between the EU and the third country concerned, i.e. the GAMM, the regional and bilateral dialogues and the agreements that represent the broader framework for migration cooperation with the partner country. Following a presentation of its general objectives, which correspond to the four thematic areas of the GAMM, each MP lists the specific objectives of the partnership and commitments of the parties. These are usually divided under the following four sections (i.e. the GAMM pillars), with slight variations in some cases: 1) mobility, legal migration and integration; 2) fight against irregular immigration and trafficking in human beings, readmission, border management; 3) migration and development; 4) asylum and international protection. The first MPs with Moldova, Cape Verde and Georgia (signed before the 2011 renewal

of the GAMM) do not include a dedicated section on international protection, but a few provisions on this topic are nonetheless incorporated under other sections (usually the first one). The MPs with Southern Mediterranean countries (Morocco, Tunisia and Jordan) as well as the latest MP with Belarus entail a further section on horizontal initiatives, dealing with broader cross-cutting issues concerning the governance of migration. All MPs are closed by a set of provisions on their implementation.

Most MPs are accompanied in Annex by a list of concrete projects and initiatives which the EU, its agencies and participating Member States commit to implement in order to achieve the objectives set out in the text of the MP. Each proposed project is listed under one of the four thematic areas mentioned above. The Annex details also which party (or parties) is (or are) responsible for the implementation of each initiative, i.e. the EU (sometimes with indication of which EU institution or agency) or one or more Member States[11]. Annexes may be more or less rich and detailed in terms of the quantity and quality of initiatives listed; the Annex to the MP with Morocco is the most detailed one, due to a specific request from Moroccan authorities, as reported by an EU official I interviewed.

However, 'policies proposed in the Annex usually do not break new ground' (Lavenex and Stucky 2011, 132) and are often very much in line with the national migration policies of participating Member States; in some cases Member States have included also initiatives that were already planned or that were already in their implementation phase under different bilateral cooperation frameworks (Weinar 2012). As concerns the thematic area of reference of the projects listed, there is a predominance of initiatives relating to migration control and readmission, while measures promoting mobility are scarce, weak and of poor value; most of the projects under the first pillar deal with information sharing and capacity building, while real offers of legal migration opportunities, especially for working purposes, are almost absent from all MPs. Also projects intended to foster synergies between migration and development are very limited in number and hardly significant in value (Lavenex and Stucky 2011, 132-133).

[11] Only in the case of the MP with Azerbaijan, the Annex does not contain any indication of the party responsible for the implementation of the proposed projects.

Annexes are included in all MPs, except for the most recent ones with Tunisia, Jordan and Belarus. A DG HOME official interviewed in Brussels confirmed that with regards to MP Annexes, after the MP with Morocco there has been a change in the EU negotiation strategy: they are no more discussed together with the text of the MP (the Joint Declaration), but at a later stage, after the MP has been agreed upon and signed. According to the interviewee, this change was linked to the experience with Morocco: the MP negotiation process was slowed down by the Moroccan request for a very detailed Annex, the elaboration of which required more time. Therefore, with the following MPs the Commission decided it was not worth to delay the signature of the entire MP due to a detailed negotiation on its Annex[12]. The list of practical projects and initiatives to be implemented is now produced by an appropriate body (called 'Mixed Committee' in the MP with Tunisia and 'Joint Working Group on Migration and Mobility' in the MP with Belarus) created in the framework of the MP itself and composed of representatives from the signatory parties, which meets once or twice per year, in the first place to agree on a list of projects and then to update it and monitor its implementation (MP with Tunisia, para 37; MP with Belarus, para 39)[13].

With regards to their legal nature, MPs are established by a Joint Declaration signed by the EU, interested Member States (at the ministerial level) and the partner country. Being based on a political declaration, they do entail mutual commitments for the parties, which however are not legally binding[14] (European Commission 2009a, 4). Indeed, all MPs include a final clause indicating explicitly that their provisions 'are not designed to create legal rights or obligations under international law'; the inclusion of

[12] In the 2015 study on EU migration cooperation with third countries conducted by García Andrade et al. for the European Parliament, the authors affirm that 'the Annex of the EU-Tunisia MP was not published [together with the Joint Declaration] at the request of the Tunisian authorities' (García Andrade et al. 2015, 132). Maybe both statements are to some extent true: on the one hand the EU was interested in signing the MP as soon as possible, on the other hand Tunisia was keen on taking more time to discuss the specific content of the Annex before adopting it formally.

[13] Under previous MPs the monitoring of projects' implementation was carried out by Local Cooperation Platforms, as discussed under section 4.4.2 below. Most probably the composition, function and tasks of Mixed Committee, Joint Working Group on Migration and Mobility and Coordination Platforms are the same.

[14] The fact that MPs lack legally-binding force does not mean they lack legal value; their signatories may be bound by the good faith principle not to act against their commitments and expectations they have created in their partners (García Andrade et al. 2015, 32).

such clause helps to clarify their legal nature, because 'in the absence of the will of the parties, other signs such as formal elements, the structure or the drafting could have led to an interpretation in favour of an international agreement' (García Andrade et al. 2015, 32). On the contrary, MPs are not international law sources but rather fall within the category of 'soft law', or even 'soft policy' (Carrera and Hernández i Sagrera 2011, 105-106). According to García Andrade et al., MPs may be qualified as 'non-conventional concerted acts' or 'non-normative agreements' (2015, 32). In this study MPs are considered policy instruments, in contrast to EURAs, which are legal instruments.

MPs are characterised by a number of relevant features relating to their content. Firstly, they are meant to be country-specific, meaning that their content should be tailor-made to the shared interests of the EU participants and the partner country; it should also take into account 'the current state of the EU's relations with the third country' and 'the level of commitments which the third country is ready to take on' (European Commission 2007a, 3). This element reveals the importance of the Annexes, given the scarce differentiation of the texts of Joint Declarations.

Secondly, as mentioned above, MPs are conceived as long-term open and flexible instruments. Flexibility means that their content may change over time, as new projects and initiatives may be added to the Annex, while others may be abandoned; hence, flexibility allows the participating actors to adjust the partnership according to evolving circumstances, interests and priorities (Brocza and Paulhart 2015, 2). Openness and flexibility also mean that Member States take part in MPs on a voluntary basis; Member States may even decide to join MPs after their signature, because MPs remain always open to the participation of additional EU countries[15] (European Commission 2009a, 4).

Thirdly, the MPs' content has been critically defined as 'a package of fragmented cooperation measures' and 'a *shopping list* of different proposals' (Carrera and Hernández i Sagrera 2011, 106) informed by 'distinct and hugely divergent domestic priorities' (Carrera and Hernández i Sagrera 2011, 108). This fragmentation and lack of internal coherence has been identified as a weakness of the instrument by the

[15] In practice this happened only in the case of the Netherlands, which joined the MP with Cape Verde after its adoption.

Commission itself, which observed that 'the partnerships risk being a collation of new and already planned activities' and suggested that 'additional effort should be made so that the package offered to a partner is an effective and coordinated offer' (European Commission 2009a, 5).

Fourthly, the content of MPs has been largely criticised for being 'unbalanced', i.e. disproportionately focused on the second thematic area of the GAMM (i.e. on measures in the area of irregular migration, border control and readmission) compared to the others. In particular, MPs appear to lack concrete and significant initiatives aimed to facilitate legal migration and increase mobility to the EU (Lavenex and Stucky 2011; Carrera and Hernández i Sagrera 2011; Carrera, den Hertog and Parkin 2012, 11-14; Cassarino and Lavenex 2012; Maroukis and Triandafyllidou 2013; Brocza and Paulhart 2015). As further discussed under section 4.4.1, this flaw is generally attributed to the division of competences between the EU and its Member States in the area of legal migration. However, the insufficient offer of projects in this policy field is highly paradoxical if we consider that facilitating legal migration to the EU was precisely the major explicit purpose of MPs (see also section 4.4.2).

4.3. Negotiation process and incentives offered to third countries

Mobility Partnerships are not international agreements, therefore the procedure for their adoption is not subject to the rules established by Article 218 TFEU (which instead apply to EURAs). MPs are negotiated mainly by the Commission, under political guidelines of the Council (similar to mandates for international agreements) together with the Presidency of the Council, Member States' representatives and the third country. EU agencies like Frontex, the European Training Foundation (ETF), the European Asylum Support Office (EASO) or Europol may participate in negotiations, especially when involved in the implementation of some initiatives under the MP (European Commission 2009a, 4; García Andrade et al. 2015, 32).

The Commission plays a leading role in the negotiation process. In fact, there is no direct meeting between Member States and third countries: it is the Commission that holds discussions with both parties and is responsible for bringing together their

respective interests. As described by Lavenex and Stucky (2011, 131-132), during a first phase of preliminary talks the Commission shares with the third country concerned an EU 'list of priorities' and explores the third country's interest and willingness to engage in the partnership. The third country is then expected to submit its proposals to the Commission; moving from these proposals, the Commission elaborates together with Member States an 'EU offer'. At this stage Member States may decide to join the MP and add projects to the offer. Based on the output of these discussions the Commission drafts the text of the Joint Declaration and the Annex, to which third countries may add final amendments. In this process the Commission's task is to encourage Member States' collaboration and verify whether the concerns expressed by third countries match with the Member States' offer.

The Commission considers that 'this division of roles, while respecting competences, ensured smooth negotiations and increased trust between all actors, thus having a positive impact on the integrity of the process' (European Commission 2009a, 4). However, Lavenex and Stucky (2011, 132) argue that the negotiation of MPs is more a 'consultation process', where the leverage lies on the side of Member States. Third countries, instead, can only express their wishes and proposals, but have no leverage to push Member States to change their offers; they can merely accept what the EU and Member States are available to give (or rather promise), or alternatively refuse it. With regards to Southern Mediterranean countries, Carrera, den Hertog and Parkin agree and affirm that:

> there is little indication that the Dialogue was developed in close consultation with the third countries it intends to target. Rather it appears to have been presented as a *fait accompli* to the authorities of Egypt, Tunisia and Morocco with the expectation that those states would be ready to undertake the strict security requirements demanded in return for limited mobility possibilities (Carrera et al. 2012, 14).

According to García Andrade et al. (2015, 31), a further symptom of the limited role of third countries in the elaboration of MPs consists of the high similarities in the structure and content of their text; this element suggests that MPs are drafted by the EU following a standard model and proposed to the partner country for adherence without leaving much space for discussions.

As a matter of fact, the whole period of negotiation (or consultation) is usually rather short (in particular if compared with the length of EURA negotiations) and includes few talking rounds at the expert level before the MPs are signed at political level (Lavenex and Stucky 2011, 132). For instance, the first MPs with Moldova and Cape Verde were concluded in five months only; the MP with Georgia in seven months[16]. Negotiations with Southern Mediterranean countries took longer - one year and a half to two years from the launch of Dialogues on Migration, Mobility and Security to the signature of the MPs, which is still a short time considering the traditional reluctance on the part of those countries to establish migration cooperation with the EU, especially with regards to return and readmission (Carrera et al. 2012).

A final relevant feature of the MPs' negotiation process, which also represents a crucial difference with EURAs, is the complete absence of involvement of the European Parliament, which is neither consulted nor informed before the signature of MPs. Moreover, since MPs are political instruments and are not international agreement, once adopted they do not need to be ratified neither by the European Parliament, nor by national parliaments of the participating Member States. As noted by Carrera and Hernández i Sagrera, this democratic deficit raises concern over the MPs' compatibility with the rule of law: 'it is striking that the negotiations and implementation of MPs have marginalised any sort of democratic accountability at the EU and the national levels' (2011, 106)[17].

But what are the incentives offered to third countries to encourage them to conclude a Mobility Partnership with the EU? On paper, MPs are supposed to offer the same incentives mentioned under section 3.3 above with regards to EURAs, namely: visa facilitation (combined with readmission), legal migration opportunities, cooperation in the management of migration, financial and technical assistance (including capacity-building) in particular in the area of migration control, and projects

[16] Exploratory talks with Moldova and Cape Verde started in January 2008 and MPs were signed in June the same year. Negotiations with Georgia started in Spring 2009 and were conducted in parallel with negotiations for the EURA and the VFA; the MP was signed in November 2009.

[17] In addition, the authors observe that: 'the extent to which MPs can be subject to any judicial control exercised by the Court of Justice or Member States' jurisdictions remains equally doubtful' (Carrera and Hernández i Sagrera 2011, 106).

aimed at supporting the positive impact of migration on the development of the partner country. These incentives are all put together within the framework of the MP and are offered as a whole 'package'; in MPs, incentives take the form of concrete projects that the EU and participating Member States commit to implement. The 'package approach' and the alleged pragmatism of MPs are meant to represent an added value, especially compared to EURAs taken alone. This should make MPs more appealing to third countries and should make third countries more keen to cooperate on readmission and more ready to negotiate an EURA (in parallel with a VFA).

However, the problem with the MP incentives is that the most relevant ones from the point of view of third countries are neglected by Member States (similarly to what occurred with EURAs) - *in primis* the opening of legal migration opportunities for citizens of the partner country. As mentioned in the previous section 4.2, MPs are only in theory balanced in their offer of measures under the four pillars of the GAMM. Indeed, almost all Annexes reveal a large prevalence of projects relating to migration control and readmission, while the offer of significant initiatives in the areas of legal migration and mobility, and migration and development is quantitatively scarce and qualitatively poor; in particular, concrete labour migration opportunities are almost completely lacking.

In addition, sometimes Member States include in their offer to the partner country also initiatives which were already planned or which were already in the process of being implemented. The inclusion of pre-existing projects, which would be carried out anyway, certainly cannot represent an incentive for third countries. A further element limiting the power as incentives of the actions listed in the Annex is the gap between what is put down on paper and what is implemented in practice. Indeed, given the non-legally binding nature of MPs, third countries have no guarantees that Member States will abide by their commitments; even once the EU incentives are set out in the Annex, uncertainty remains as to their concrete implementation (Carrera et al. 2012, 14).

On the other hand, the long-term open and flexible nature of MPs suggests that more incentives could be added over time by the EU participating parties and possibly by additional Member States that may join the MP later on. This could represent an added value; however, in light of the strong conditionality basis of MPs, additional

incentives in the form of new projects (possibly in the areas of legal migration and development) would most probably be offered to third countries only in exchange for increased efforts on their part, always in the area of irregular migration and readmission.

4.4. Problems and limits of Mobility Partnerships

This section analyses the problems and limits of Mobility Partnerships, questioning four elements: their European scope; their relevance and effectiveness; the role non-state actors and international organisations may play in their negotiation and/or implementation; and their human rights content.

4.4.1. How much are they 'European'?

Mobility Partnerships are 'European' in the sense that, similarly to EURAs, they are negotiated by the Commission under political guidelines of the Council and on behalf of all EU Member States. However, differently from EURAs, MPs are explicitly also very much 'national', because Member States' national policies are clearly integrated within this EU policy instrument and do play a relevant role in it. Indeed, as described above, the Annexes to MPs consist of a list of concrete actions, proposed both by the EU and by participating Member States, implementing the objectives set out in the main text of the MP.

Therefore, MPs present themselves as a way to merge under a single umbrella a broad array of migration cooperation initiatives to be developed at different levels: the supranational level (projects proposed and implemented by the Commission and/or other EU agencies); the national level (actions proposed and carried out by individual Member States); and the multinational level (initiatives involving groups of Member States). It seems thus interesting to consider whether this coexistence of different policy levels is balanced and works well or, on the contrary, whether tensions may arise, in particular between the European and national scope of MPs.

As analysed in the previous sections, Mobility Partnerships were launched with a dual purpose: to facilitate legal migration from selected third countries to the EU and to enhance third countries' cooperation on migration control and readmission. The

Commission heralded MPs as the tool of a radical shift from a security-oriented approach to a more balanced and equal framework for cooperation, based on the idea of contracting partnerships with third countries to reduce irregular migration, while simultaneously offering possibilities for their nationals to enter legally in the EU for working purposes.

However, the Treaties establish that whilst the EU has the competence to elaborate common policies relating to the management of migration flows and the fight against irregular migration and human trafficking (Art. 79(1) TFEU), it is up to the Member States 'to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work' (Art. 79(5) TFEU)[18]. Since Member States retain the exclusive competence to decide on migrant workers' admission quotas, in the framework of MPs it is necessarily their responsibility to propose concrete measures in this policy area.

When MPs were introduced, Member States were thus supposed to contribute with national initiatives aimed at opening labour migration channels (e.g. for certain categories of workers), introducing circular migration schemes, etc.. Therefore, their role was crucial to ensure a significant content to the first MPs' pillar, and consequently to guarantee a balance between the four pillars. However, this happened only in a very limited way. In fact, MPs initiatives aimed at concretely offering opportunities for migrant workers to enter the EU are mere exceptions; when they are present, they are usually formulated in vague terms or they re-propose already existing bilateral schemes. Therefore their relevance and potential impact are extremely reduced[19].

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[18] However, it is worth recalling that the Commission has some competences in the area of legal migration and mobility. As mentioned when discussing visa facilitation, it has competence over short-term visas, but also over the temporary admission of students, researchers, highly-qualified people, intra-corporate transferees and seasonal workers. The Commission has adopted legislation harmonising the conditions for admission and rights of these categories of migrants; however, Member States retain the right to decide on the numbers of migrant workers to be admitted in their territory.

[19] For instance, the MP with Cape Verde includes, along with the continuation of a pre-existing temporary migration scheme with Portugal for the admission of certain categories of workers, three new national initiatives proposed by Spain, France and Luxembourg aimed at creating labour migration or circular migration opportunities; however, these commitments are formulated in rather abstract and vague terms (MP with Cape Verde, Annex, paras 2(iv), 2(v), 2(viii)). The MP with Moldova is another case in point; the Annex includes the continuation of a pre-existing project promoted by Italy to support the entry of certain categories of Moldovan workers, but also a new (potentially valuable) initiative proposed by

Scholars consider the division of competences between the EU and its Member States mentioned above as one of the main reasons for the unbalanced content of MPs (Cassarino and Lavenex 2012, 285; Pastore 2015; Maroukis and Triandafyllidou 2013, 2-3). Measures in the area of legal migration and mobility are still largely insufficient because in most cases Member States have proved reluctant to offer labour migration opportunities to citizens of the partner countries, and have rather focused on actions addressing irregular migration (Carrera et al. 2012, 12-13; Carrera and Hernández i Sagrera 2011; Weinar 2012). The Commission, on its part, lacks the competence to take its own initiative in this field and has no power to force Member States in this direction, due to the legally non-binding nature of MPs.

This division of competences represents a problem not only for third countries that might not get from Member States the counterpart of what they are asked to give to the EU, but also for the Commission that, as in the case of EURAs, except for visa facilitation, cannot offer to third countries the necessary elements to achieve a balanced partnership and to ensure their effective cooperation. This may actually represent an element of tension between the European and national policy levels.

All the Commission can do (and all it actually does, although with limited results) is encourage national governments to take action in the area of labour migration. In doing so, the Commission often emphasises that opening legal migration channels for certain categories of migrant workers, also through circular migration schemes, could be beneficial *in primis* for Member States, which may use this opportunity to fulfil their own labour markets' needs and address specific labour and skill shortages (European Commission 2006, 2, 6-7; 2011c, 10; 2011e, 12-13; 2014a, 15 and 19). Still, in most cases Member States have resisted this possibility.

The analysis conducted so far shows that there is a risk that within the framework of MPs Member States' national policies and interests prevail over more general EU-wide objectives, and MPs end up being a mere sum of national initiatives. As a matter of fact, it is the very structure and functioning of MPs that offer the possibility for this

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Poland to offer admission for temporary work without the need to obtain a work permit (MP with Moldova, Annex, para 4(iv)). Also the Czech Republic and Cyprus offered circular migration projects, which however concerned support for migrants' return and reintegration in Moldova, rather than employment opportunities in the EU Member States (MP with Moldova, Annex, para 4(ii)).

to happen, due to a number of reasons. Firstly, Member States decide voluntarily to participate in MPs precisely on the basis of their national interests; secondly, Member States are free to contribute to MPs with projects that they choose, again on the basis of their own preferences and needs, and are not obliged to cover all four thematic areas; thirdly, also the implementation of proposed projects is left to the discretion of Member States, as there is no enforcement mechanism and no independent monitoring agency. The Commission has been criticised, indeed, for its reduced role in MPs as mere coordinator of national initiatives (García Andrade et al. 2015, 33).

The actual European scope of MPs may be questioned also on the basis of two more considerations. First, all 28 Member States have never signed up for one Mobility Partnership; the most 'participated' ones are the MPs with Moldova and Georgia (with 15 and 16 signatory States respectively), while the least 'participated' ones are the MP with Cape Verde (five signatory States) and the MP with Belarus (seven signatory States, all concentrated in Eastern Europe). Member States' choice ranges from participating in almost all MPs (only France, except for the MP with Belarus) and participating in none (Austria, Ireland, Malta and Croatia); all other Member States participate only in some partnerships.

This is usually highlighted as a symptom of the limited European value of MPs; however, Weinar (2012) is of a different opinion. The author argues that this does not represent a weakness of the instrument, because third countries *in primis* are not interested in developing migration cooperation initiatives with all Member States, but typically only with those Member States with which they have already established (or have an interest in establishing) cooperation in this (and other) area(s)[20]. The same is of course true also for Member States, which usually decide to participate in MPs on the basis of their needs and interests, without considering the potential European added value of MPs; this kind of attitude, however, risks to reduce the innovative and potentially valuable elements of the instrument.

Secondly, only a small number of initiatives listed in Annex to MPs are multilateral; these projects are proposed and implemented jointly by several Member

[20] For instance, Tunisia would presumably be more interested in legal migration opportunities offered by Italy or France rather than by Bulgaria or Latvia (Weinar 2012).

States, in some cases also with the involvement (or on the initiative) of EU agencies. Even though they are usually focused on migration management, border control, readmission, return and reintegration, and are often described in rather vague terms, multilateral projects have a larger scope than national ones[21]. It is often argued that this kind of projects brings 'a real EU dividend' (Weinar 2012) and could represent an added value for MPs. The Commission, in fact, encourages the adoption of such multilateral initiatives; for instance, the funding allocated to MPs under the Thematic Programme for Cooperation with non-EU countries in the areas of migration and asylum was partly conditional on a partnership between Member States (Reslow 2015, 124). But probably this incentive has not been sufficient, as so far the majority of projects has been offered and implemented by individual Member States, as a continuation of their own national policies (Reslow 2015, 118).

To conclude, the prevalence of national policies and the prioritisation of national interests, together with a division of competences that allows only Member States to offer real labour migration opportunities, risk to jeopardise not only the European scope of MPs, but the very idea of MPs as a balanced and comprehensive instrument of migration cooperation with third countries.

[21] Examples of multilateral initiatives come from the MPs with Moldova, Georgia and Armenia, as well as from the MPs with Morocco and Tunisia. MPs with Moldova and Georgia include the same initiative, proposed and implemented by eleven and ten Member States respectively, whose purpose is 'to cooperate in providing information on routes for legal migration to the EU, legal employment in the EU Member States, dangers and negative effects of illegal migration as well as return and reintegration' (MP with Moldova, Annex, para 3(i); MP with Georgia, Annex, para 1(a)). This description is rather generic, but according to the Commission the initiative includes in particular 'an important component for return migration and reintegration' (European Commission 2009a, 5). The MP with Georgia contains also two more specific multilateral projects: one in the area of border management proposed by Frontex and involving eight Member States; the other one in the area of readmission with the participation of four Member States (MP with Georgia, Annex, paras 3(a) and 4(a)). The MP with Armenia includes: a capacity-building initiative in the area of migration management proposed by five Member States; a reintegration project involving seven Member States and the EU with the support of ETF; an information- and good practice-sharing initiative on return and readmission proposed by six Member States and the EU; and a project to improve border control implemented by three Member States and the EU (MP with Armenia, Annex, paras I(b), II(b), III(a) and III(c)). Also the 'Sharaka Project' and the 'Lemma Project' implemented in the framework of the MPs with Morocco and Tunisia (analysed under sections 4.5.1 and 4.5.2 respectively) are examples of multilateral initiatives.

4.4.2. How much are they relevant and effective?

This section focuses on the effectiveness and relevance of Mobility Partnerships. From the standpoint of the EU institutions and Member States, MPs may be considered effective and relevant if they actually contribute to successfully achieve their implicit and explicit purposes (analysed under section 4.2 above). From this perspective, MPs may thus be considered a relevant and effective policy tool when: 1) they succeed in offering legal migration opportunities and increased mobility; 2) they contribute to reinforce cooperation on combating and preventing irregular migration, human trafficking and smuggling; 3) they help improving cooperation on readmission and lead to the conclusion of EURAs and to more effective returns. Let us now consider if and how the achievement of these purposes can be assessed.

Assessing the relevance and effectiveness of MPs

According to Reslow, the MPs' implementation process is still at an early stage, therefore 'a definitive assessment of policy success/failure, in terms of goal realisation, is premature' (2015, 118). The author argues that an ideal assessment of the implementation of MPs would be based on 'scoreboards'. These are documents tracking the progress of projects listed in the Annex to MPs, including details on the initiatives' funding, implementing period, state of play, responsible partners, etc. (European Commission 2009a, 5-6). Each MP has its own scoreboard, which is regularly updated by the Commission, based on information provided by participating Member States, EU agencies and other actors involved in its implementation. Unfortunately, except in the case of Moldova[22], scoreboards are not made publicly available, therefore it is not possible to assess the progress in the implementation of MPs for the purpose of evaluating their effectiveness in a comprehensive way[23].

Alternatively, the effectiveness of MPs may be determined based on their actual

[22] Moldova's scoreboard is available online at the following link: http://scoreboard.mfa.gov.md/.

[23] Although scoreboards are usually not published online and not made available to the broad public, one of the EU officials I interviewed in Brussels told me that the Commission has produced two versions of scoreboards: whilst one is for internal use only, the other one can be shared with the public. Therefore, I asked him for the updated scoreboards of MPs with Morocco and Tunisia and I was kindly given access to the non-restricted version of both documents. I am very grateful to this EU official for his courtesy.

contribution to legal migration and mobility, since this was heralded as their primary purpose and the reason for their creation (European Commission 2007a). This may be assessed on the basis of two indicators: the number of first residence permits and the number of short-stay visas issued to citizens of MP countries. Both Reslow (2015, 119) and García Andrade et al. (2015, 74-75) considered these two indicators, coming to the same conclusions.

As concerns the first indicator, it clearly emerged that MPs had no impact on the number of residence permits issued. In most cases MPs actually seemed to have a negative impact; but other completely separate factors (e.g. the economic crisis) have certainly played a relevant role in causing a decrease in the number of residence permits issued to citizens of MP countries. As concerns the second indicator, there seemed to be an increase in the number of short-stay visas issued (e.g. in the case of Georgian and Armenian nationals) but most VFAs have entered into force too recently and are still at an early stage of implementation to allow for a truthful assessment of their actual impact.

Therefore, from a quantitative perspective, it seems that so far MPs have not created new dynamics of legal migration and mobility from partner countries to the EU; but since migration and mobility are affected by a variety of factors, more time is needed for a more reliable evaluation. What is evident simply looking at the text of MPs (their Annexes in particular) is that legal migration and mobility are not given the same attention as irregular migration and readmission (as already discussed in previous sections). This shortcoming jeopardises the achievement of the first above-mentioned purpose of MPs (to increase mobility and legal migration) as well as the very functioning of MPs, which is based on the offer of legal migration opportunities in exchange for enhanced cooperation on migration control and readmission.

The 2007 Communication which launched the MPs as the main instrument of the GAMM clarified, indeed, that MPs were based on a set of reciprocal commitments on the part of the third country concerned on the one hand, and the EU and participating Member States on the other hand. The list of commitments expected from third countries put in first place the effective implementation of readmission obligations and the signature of EURAs, followed by a list of actions exclusively pertaining to the fight

against irregular immigration and human trafficking, border control and security of travel and identity documents. The commitments to be taken on by the EU and Member States were instead entirely focused on legal migration: offering labour migration opportunities and assistance in the management of legal migration flows; addressing the risk of brain drain and promoting circular migration; and facilitating procedures for issuing short-stay visas (European Commission 2007a, 4-8).

However, the reciprocity of these commitments did not imply that the parties would benefit equally from MPs, due to at least two reasons: 1) the fulfilment of the first set of commitments by third countries is a precondition for the EU and its Member States to implement their set of commitments; 2) Member States participate in MPs on a purely voluntary basis, they are free to decide the level of their engagement, and once they take on a set of commitments, the implementation of the latter is relegated to their discretion, determining a potential gap between initiatives proposed on paper and initiatives materialised in practice.

The combination of these two elements – conditionality and voluntary non-binding nature of MPs – produced an unbalanced instrument of cooperation, largely focused on irregular migration and readmission, which does not correspond to the comprehensive tool that it was meant to be. This is the main criticism raised by scholars with regards to MPs (Lavenex and Stucky 2011; Carrera and Hernández i Sagrera 2011; Carrera et al. 2012, 11-14; Cassarino and Lavenex 2012; Maroukis and Triandafyllidou 2013; Brocza and Paulhart 2015). But the problem has been highlighted also by the Commission itself. In its 2009 evaluation of MPs, the Commission stated that 'the focus of mobility partnerships should go beyond issues regarding illegal migration' (European Commission 2009a, 3). Also in its 2014 report on the implementation of the GAMM, it stressed that 'more work needs to be done to make sure that the MPs are being implemented in a balanced manner, i.e. better reflecting all four thematic priorities of the GAMM, including more actions with regard to legal migration, human rights and refugee protection' (European Commission 2014a, 9). Weinar (2012) emphasised that MPs have raised very high expectations for increased mobility, which have not been fulfilled yet; she claims that in order to be effective, MPs should 'fulfil their main promise: more mobility to the ordinary people', including more visa facilitation, visa

liberalisation and concrete labour migration opportunities.

A further element which proves the ineffectiveness of MPs in increasing legal migration and mobility, is the lack of concrete follow-up measures relating to the concept of circular migration, launched by the 2007 Commission Communication together with mobility partnerships (Papagianni 2013, 294, García Andrade et al. 2015, 76). According to Maroukis and Triandafyllidou (2013, 4), the type of circular migration envisaged by the 2007 Communication 'is largely non-existent': very few highly-skilled migrants engage in circular mobility and take back to their country of origin the skills acquired in the EU. According to the authors, the only kind of circular migration taking place in some Member States concerns seasonal workers in the agricultural sector and usually occurs through informal channels, rather than through national or European schemes.

As concerns the other objectives of MPs, i.e. increasing the partner countries' involvement in migration control, enhancing their cooperation on readmission and concluding readmission agreements with them, MPs could potentially be more effective in achieving these purposes, as most of the MPs' initiatives are in these policy areas. For instance, with regards to EURAs, in most cases the adoption of MPs has so far actually led to the signature of EURAs with partner countries: this happened in the cases of Georgia, Armenia, Azerbaijan and Cape Verde, and will probably soon happen also for Belarus since negotiations are finalised[24]. However, it remains to be seen whether such a 'successful' outcome will be replicated for the Southern Mediterranean countries (Morocco, Tunisia and Jordan), given the traditional resistance demonstrated by these countries towards EURAs.

As in the case of initiatives proposed in the area of legal migration, also commitments undertaken in the area of readmission may suffer from the consequences of the voluntary and non-binding nature of MPs. Political commitments to revitalise or initiate readmission negotiations may not lead to the actual conclusion of EURAs, as affirmed also by one of the DG HOME officials I interviewed. The same interviewee admitted that, with regards to readmission, until that moment (the interview took place

[24] In the case of Moldova, the country had already signed an EURA when it started to negotiate a MP.

in March 2016) the MPs with Morocco and Tunisia had not produced the results the Commission has hoped for[25].

Factors limiting the effectiveness and relevance of MPs

There are a number of factors that may impact on the effectiveness and relevance of MPs, i.e. on the possibility that they achieve their purposes as described above.

The first of these factors is the lack of a transparent monitoring mechanism to ensure the actual implementation of proposed projects listed in the Annex to MPs (which is made uncertain by the non-legally binding nature of the instrument). The projects' implementation should be monitored at the EU level through a Mobility Partnership Taskforce and in the partner country through a Local Cooperation Platform[26]. In addition, partner countries may have their own internal structure for monitoring and coordinating the MP's implementation (European Commission 2009a, 5-6; Reslow 2015, 118; Lavenex and Stucky 2011, 134-136). This multilevel monitoring mechanism seems to be in place, with slight variations, for all MPs.

However, this is not a public and open monitoring process, as it usually takes place behind closed doors. As mentioned above, generally scoreboards (the MPs fundamental monitoring tool) are not publicly available, making it extremely difficult for any external independent subject to get information about the implementation of MPs, monitor the progress of projects in different areas and evaluate the overall effectiveness of the instrument.

In addition, the Commission has not produced any specific evaluation of existing MPs after the early Communication on Mobility Partnerships as a tool of the GAM of

[25] The interviewee specified that in the case of Morocco the MP for sure had not facilitated the progress of the EURA negotiations, while in the case of Tunisia it remained to be seen, as the MP could indeed encourage the formal starting of readmission negotiations (which actually happened very recently, on 12 October 2016). But in the opinion of the official, this can hardly be considered as a success in itself, because beginning negotiations does not necessarily mean being able to conclude the readmission agreement, as proved by the experience with Morocco.

[26] The MP Taskforce gathers representatives of the Commission and participating Member States with the aim to ensure internal EU coordination; the Commission plays a key role in organising the Taskforce meetings and updating the MPs' scoreboards. MP Local Cooperation Platforms involve Member States' embassies, EU Delegations and the partner countries' authorities with the aim to ensure coordination between third countries and participating actors and agencies on the ground; Cooperation Platforms are responsible for checking that the implementation of projects follows the scoreboard.

September 2009, whose scope was rather limited, given that the only MPs in force at that moment were with Moldova and Cape Verde. The Commission Report on the Implementation of the GAMM 2012-2013 issued in February 2014 presents a general evaluation of the whole GAMM and its various instruments, including but not limited to MPs (European Commission 2014a). Even though this report includes interesting considerations on the progress and state of implementation of existing MPs, the information provided is not sufficiently specific and detailed, in particular if compared to the 2009 Commission Staff Working Document on MPs or to the 2011 Evaluation of EURAs[27]. A follow-up in-depth quantitative and qualitative evaluation of MPs, almost ten years after the launch of this instrument, would be most useful.

That said, it seems that the actual implementation of MPs depends in the first place on the willingness of Member States to follow up on projects once they have been agreed upon[28]. Indeed, a second factor limiting the MPs effectiveness is the Member States' reluctance to participate in MPs and actively contribute to them. Member States' engagement in developing and implementing significant initiatives appears scarce, as proved by the fact that they often re-propose projects which were already planned or were already in the process of being implemented under other bilateral cooperation frameworks (García Andrade et al. 2015, 33 and 90). Moreover, Member States are also reticent in contributing financially to the implementation of MPs' initiatives; as reported by the Commission in 2014, the majority of Member States participating in MPs has not made any financial contribution to their implementation, while most of the funding comes from the EU budget (European Commission 2014a, 20).

The reduced involvement of Member States is partly a consequence of the non-binding and flexible nature of MPs, which allows Member States to participate on a voluntary basis. However, from an EU perspective, voluntary participation could, on the

[27] The only exception is the MP with Moldova, the sole MP to be subject to a detailed evaluation by an expert contracted by the IOM (European Commission 2014a, 4). The result of this evaluation is the report 'The European Union - Republic of Moldova Mobility Partnership 2008-2011: Evaluation Report' issued on 1st October 2012 and available online at: http://www.mfa.gov.md/img/docs/eu-moldova-mobility-partnership-evaluation.pdf.

[28] However, some scholars emphasise that the effective implementation of MPs depends also on the partner countries' degree of 'ownership' of the instrument, on their active participation in the monitoring process and on their ability to actively use Local Cooperation Platforms to advance their own priorities (Lavenex and Stucky 2011, 136).

contrary, have represented a potential advantage, because it allows Member States to cooperate to various degrees in countries where they have particular expertise and interests, while Member States whose national policies and priorities did not match well with the MP approach could simply choose not to participate (European Commission 2014a, 20; García Andrade et al. 2015, 85; Reslow 2015, 122 and 126). This could have a positive impact on the effectiveness of MPs, because in theory Member States that decide to participate in a given MP are more committed to implement it properly. The 'normative softness' of the MP structure was thus expected to decrease national reluctance to offer concrete initiatives, especially in the area of legal migration; but Member States have so far failed to demonstrate their full commitment and to secure a balanced offer of projects spread across the four thematic areas (García Andrade et al. 2015, 33).

A third factor affecting the effectiveness of MPs is represented by the limited financial, human and organisational resources available on all sides: at the Commission level, in EU Delegations on the ground, with regards to Member States' national authorities and diplomatic missions, and on the part of third countries. Given the complexity of coordination tasks required for the implementation and monitoring of a multilevel policy instrument like MPs, insufficient staff and inadequate institutional structures are a serious problem for both the Commission and Member States (Lavenex and Stucky 2011, 136; Reslow 2015, 123-124).

As pointed out by the Commission, 'EU representatives on the ground are not necessarily initially well-informed and equipped to follow-up on intensified and increased activities on migration in the partner country or to ensure their articulation with already existing activities in that field' (European Commission 2009a, 6). Moreover, not all Member States participating in MPs are represented locally in the partner countries, while others cannot provide adequate human resources at home. This is considered to be also one of the causes for the Member States' incapacity to ensure a continuous active involvement in the implementation of MPs (García Andrade et al. 2015, 90). In addition, third countries may face specific difficulties concerning institution building, organisational capacity and staff expertise (Lavenex and Stucky 2011, 136; Reslow 2015, 124). These practical deficiencies cannot but impact

negatively on the effective implementation of MPs.

A fourth problematic aspect is the overlapping of projects offered by more individual Member States and/or the EU and its agencies in the same policy area and with the same (or very similar) purpose (García Andrade et al. 2015, 89-90). Although each project may bring added value to migration cooperation between the partner country and individual Member States, it has been argued that, in order to ensure greater effectiveness and relevance to MPs, there should be more coordination efforts, more information sharing, more joint planning between the Commission, Member States and the EU agencies involved (European Commission 2009a, 7-8). According to Lavenex and Stucky (2011, 137), this possibility for enhanced coordination and dialogue between participating actors at different levels represents a potential strength of MPs. However, in order to be effective and relevant, MPs should be considered as a European instrument and not simply as a collection of bilateral initiatives, as emphasised by the Commission itself in its 2009 evaluation of MPs (European Commission 2009a, 5).

An additional element which impacts on the effectiveness and relevance of MPs within the broader framework of the GAMM is their geographical distribution. Until the Arab Spring, the GAM has been more successful towards the East than towards the South of the EU. The only MP signed with a country in the Southern neighbourhood was the MP with Cape Verde, a small country whose migratory salience was rather limited compared to other countries in West Africa. The following attempts to open negotiations with Senegal (in 2008) and Ghana (in 2010) in view of the signature of MPs have either failed or produced negligible progress[29] (see Table 2 at the end of section 4.1 above).

As in the case of European readmission agreements, the main reason explaining why it has been easier for the EU to establish migration cooperation with Eastern neighbouring countries seems to be linked to the EU prospective enlargement. However, it is hard to consider the progress of the GAM to the East as a significant result for the EU external migration policy, because in many cases MPs have been signed with countries whose migratory impact on the EU is minimal (e.g. Georgia,

[29] For an analysis of the negotiations for a MP with Senegal and the reasons that led to their suspension and failure, see: Chou and Gibert 2012.

Armenia and Azerbaijan). The fact that no MPs had been signed with key countries of origin or transit, in particular in the African continent, represented a clear deficit of the instrument, which undermined its effectiveness and relevance as the main tool for the operationalisation of the GAMM.

For this reason the launch of negotiations for MPs with a number of North African countries following the Arab Spring, and the actual conclusion of MPs with Morocco, Tunisia and Jordan in the years 2013-2014, represented a crucial development. From an EU perspective, this was a significant evolution not only because finally MPs were signed with key countries for the EU migration policy, but also for a revival of the GAMM, and most importantly, because the signature of MPs could offer the possibility to reach an agreement also on the conclusion of EURAs with countries which have always proved reluctant (especially Morocco, as discussed in section 3.5.1 above).

However, so far the adoption of MPs with Southern Mediterranean countries has not brought radical changes or substantial improvements in the cooperation between these countries and the EU or its Member States, and no real progress has been done with regards to the negotiation of EURAs, except for the recently announced opening of negotiations with Tunisia. Therefore, even after the formal expansion of their geographical scope to relevant countries of origin and transit, Mobility Partnerships have not yet proved to be a relevant and effective instrument of the EU external migration policy.

4.4.3. What role do non-state actors and international organisations play in their negotiation and implementation?

As discussed in the corresponding section of the previous chapter dedicated to EURAs, since the early 2000s private actors and international organisations have been playing an increasingly relevant role in the elaboration and implementation of the EU external migration and asylum policy (see section 3.4.3 above). With particular regard to Mobility Partnerships, information publicly available on the role of non-state actors in their negotiation and implementation is scarce; as in the case of EURAs, also in-

depth research and critical analysis of this phenomenon are still limited[30]. The interviews I conducted with DG HOME officials contributed to provide useful information on this topic, although the attitude of EU interviewees to my questions on the role of non-state actors in MPs was generally prone to understating the issue.

Nonetheless, what emerges quite clearly from official documents is the crucial role played by international organisations - e.g. the International Organisation for Migration (IOM), the International Centre for Migration Policy Development (ICMPD), etc. - in the implementation of MPs' projects and initiatives, often in cooperation with Member States, EU Delegations, EU agencies and other non-state actors and NGOs. Among intergovernmental organisations, a special consideration should be given to the IOM, which has been largely involved not only in the implementation of all MPs, but also at different stages of their preparation, negotiation and monitoring. First of all, since 2005 the IOM has contributed substantially to developing the concept of circular migration (IOM 2005) and it has actively promoted the link between circular migration and MPs by the EU, framing the partnerships as a tool for the implementation of circular migration schemes and proposing a direct role for the organisation itself in putting this idea in practice - e.g. during preliminary dialogues on the MP with Moldova (Carrera and Hernández i Sagrera 2009, 24-25; Carrera and Hernández i Sagrera 2011, 100).

Moreover, given its large expertise in the field of migration, its highly decentralised structure and its worldwide capillary presence on the ground[31], the IOM emerged as an essential partner for the EU to gather and analyse information, identify counterparts in third countries and initiate an informal dialogue with them (Potaux 2011, 184). The IOM has thus come to play a crucial role in supporting the preparation of each MP: by providing information on the third countries' migration trends (and drafting country- or region-specific migration profiles); through consultations with third

[30] However, as we will see, the role and activities of the IOM within the framework of MPs have been the subject of some specific academic interest (Potaux 2011; Carrera and Hernández i Sagrera 2009; Carrera and Hernández i Sagrera 2011).

[31] In 2016 the IOM consists of 165 member states and has offices in 150 countries; in 2014 it had more than 2,400 ongoing projects in more than 400 field locations. Data as of October 2016, available online at: http://www.iom.int/organizational-structure. Accessed on 10 October 2016.

countries' governments to explore their interests and expectations; and by recommending possible activities to be included in MPs (Potaux 2011, 186).

Furthermore, the IOM is involved in the development and implementation of many concrete projects under all MPs, especially in the areas of legal migration and migration and development, but also concerning return and reintegration, visas, security of identity and travel documents, etc. Notably, Assisted Voluntary Return and Reintegration (AVRR) programmes are among the main services offered by the IOM to EU Member States (Redpath 2004, 292-294). Potaux (2011, 186-198) describes extensively the role of the IOM in preparing, drafting and implementing the MPs with Cape Verde, Moldova, Georgia and in preparing the MP with Senegal (in the end not concluded); her account provides a detailed picture of the IOM's involvement and, more in general, clarifies the extent of the IOM's penetration in the EU policy-making in the area of migration and asylum.

The Commission, on its part, has affirmed on various occasions that it is keen to see IOM taking a role in the development and implementation of MPs (Potaux 2011, 185). In Annex II to the 2007 Communication on circular migration and mobility partnerships, the Commission included four IOM initiatives as examples of EU-funded projects facilitating the orderly management of legal migration flows to Europe (European Commission 2007a, 18-25). This proves that the Commission acknowledges the IOM's expertise and operational capacities in this field and its potential usefulness in the practical implementation of circular migration and MPs. In the 2009 Working Document on MPs, the Commission suggested an increased involvement of international organisations (like the IOM) and NGOs that are 'active on migration in the third country concerned' through their participation in Local Coordination Platforms (see above section 4.4.2) along with representatives of the EU, Member States and partner countries (European Commission 2009a, 8).

However, as mentioned by Lavenex and Stucky, at the present moment 'international organisations, non-governmental organisations, diaspora or migrant organisations are not formally involved' in Coordination Platforms (2011, 135). But a DG HOME official I interviewed affirmed that even though international organisations do not participate in an official and systematic way in meetings with partner countries

(Cooperation Platforms), they may be invited to join on a case-by-case basis, usually to report on the progress of the projects they are implementing and to share views with the partners. More often, they take part in EU internal meetings between the Commission, EU Delegations and Member States, but always upon invitation.

This analysis shows that Mobility Partnerships cannot be comprehensively understood from a purely state-centric approach. As argued by Carrera and Hernández i Sagrera,

> The picture is far more complex. The external dimensions of the EU's immigration policy go beyond pure state-to-state and EC institutional interests. The early and continuing role played by other intergovernmental and non-governmental actors (such as the IOM, ICMPD and the Fundación Internacional y para Iberoamérica de Administración y Políticas Públicas) has been very important (Carrera and Hernández i Sagrera 2009, 31).

It should also be noted that most of the projects implemented by international organisations within the framework of MPs receive funding mainly from the EU. This makes the IOM (and to a lesser degree other international organisations) 'the main beneficiaries of EU and Member State funding for making MPs and circular migration schemes work on the ground' (Carrera and Hernández i Sagrera 2011, 107). From a purely utilitarian perspective, in the end they seem to benefit from MPs much more than any other actors involved (the EU, Member States, partner countries and migrants).

Interestingly, it seems that whilst the Commission is prone to support the involvement of international organisations, Member States may not always be satisfied with having the latter implementing MP initiatives. The report from the Expert Group meeting on the GAMM held on 26 February 2014 is revealing. With regards to the MP with Georgia, the report shows a certain discontent on the part of some Member States (the Czech Republic, Poland and France) for the Commission's decision to contract out to the IOM and the ICMPD the implementation of new projects in the framework of both the MP and the Visa Liberalisation Action Plan. Member States regretted they have not been involved and claimed this choice could result in loss of visibility and leadership for Member States (European Commission 2014b, 3-4).

With regards to private actors, it seems their role in the development and

implementation of MPs is rather marginal, compared to that of international organisations. A DG HOME official I interviewed affirmed that they do not participate neither in preliminary discussions nor in the negotiations of MPs; as concerns the implementation phase, generally they are not involved, except in the case of specific activities that need to be contracted out to a service provider, who may be a private company (as in the case of EURAs). To the knowledge of my interviewees, private actors do not participate in meetings to monitor the implementation of MP projects (neither at the EU level nor with third countries) unless they are mandated with a specific role.

Finally, as concerns non-governmental organisations, an EU official I interviewed explained that the Commission tries to involve local NGOs and civil society organisations in prospective partner countries by organising meetings with them prior to the conclusion of a MP; this happened for instance in the cases of Tunisia and Morocco. However, the interviewee admitted that these meetings are not real public consultations, because organisations are not consulted on the content and text of the MP; the aim of these meetings is rather to reach out to civil society, explain the purposes of MPs and get a general feedback (which in the cases of Tunisia and Morocco was very negative). However, this EU attempt to involve civil society in partner countries looks like a mere 'façade strategy', which is not intended to a truthful involvement of local non-governmental and civil society actors in the MP decision-making and which does not help increasing the level of 'shared ownership' of MPs.

In conclusion, if the role of private actors and NGOs in MPs appears to be still limited, the involvement of international organisations is deep and widespread. This situation may evolve in the future, leading to an even more radical penetration of non-state actors in migration and asylum policy-making. As brilliantly summarised by Carrera and Hernández i Sagrera,

> There is a patchwork of non-state and non-EU institutional actors driving the circular migration agenda at the EU level and putting the mobility partnerships into practice. Their involvement adds to the complexity and obscurity of the Mobility Partnership regime in light of the multiplicity of the interests, agendas and actors involved in the transnational governance of migration (Carrera and Hernández i

Sagrera 2011, 107).

4.4.4. What is their human rights content?

The human rights content of Mobility Partnerships is as limited as that of European readmission agreements. First of all, an analysis of the official documents issued by the EU institutions on the MPs and the GAMM shows very few traces of the human rights discourse. In most EU documents, indeed, the respect for the fundamental rights of migrants, including their right to seek asylum, is mentioned only in relation to the objectives of fighting irregular immigration and improving return and readmission; usually a general reference is made to the fact that actions in this field should be pursued in the respect of international human rights standards and the dignity of migrants. An example is the 2007 Commission Communication that introduced MPs as the main instrument of the GAMM. After listing the commitments expected from third countries in order to establish a MP (all of which concerned readmission, irregular migration, border control, etc.), it is stated that: 'this type of measures must be implemented in full compliance with the fundamental rights of the persons in question, including the specific rights of persons who might be in need of international protection' (European Commission 2007a, 5).

The 2011 Communication on the renewed GAMM tried, to some extent, to expand the human rights content of MPs. In this document the Commission affirmed that 'the human rights of migrants are a cross-cutting dimension, of relevance to all four pillars in the GAMM' and referred explicitly to the need to pay special attention to vulnerable migrants, i.e. unaccompanied minors, asylum seekers, stateless persons and victims of trafficking. It mentioned the Charter of Fundamental Rights of the EU and the respect of its provisions as a key element in EU policies on migration; it also recommended a thorough assessment of the human rights impact of initiatives taken in the framework of the GAMM (European Commission 2011e, 6). Finally, the Commission emphasised that 'the GAMM should strengthen respect for fundamental rights and the human rights of migrants in source, transit and destination countries alike' (European Commission 2011e, 7).

Unfortunately, it seems that this reinforced human rights framework was not

transposed in the MPs that followed this Communication, which (as analysed below for the cases of Morocco and Tunisia) do not reflect neither in their text, nor in their implementation a more migrant-centred and human rights-oriented approach. Notably, post-2011 MPs were not enriched with any concrete initiatives aimed at reinforcing the respect for the fundamental rights of migrants, refugees and asylum seekers, despite repeated Commission statements affirming that 'the protection of the human rights of migrants is a cross-cutting priority in the EU's cooperation with third countries' (European Commission 2014a, 17).

Only the MPs with Morocco and Tunisia include among their objectives the strengthening of the third country's capacities to assist victims of human trafficking and unaccompanied minors (MP with Morocco, paras 17-18; MP with Tunisia, paras 12-13). However, an analysis of the two scoreboards reveals that in practice the EU and Member States proposed mainly training and capacity-building initiatives addressed to Moroccan and Tunisian authorities, whose real impact on vulnerable migrants is doubtful. Moreover, as concerns unaccompanied minors, proposed projects are meant to prevent their emigration and encourage their return, rather than assisting them (see also section 4.5).

The 2014 Commission report on the implementation of the GAMM highlighted that MPs are implemented in an unbalanced manner and recommended that they better reflect all four thematic areas of the GAMM, 'including more actions with regard to legal migration, human rights and refugee protection' (European Commission 2014a, 9). The Commission thus stressed the need to improve MPs not only as concerns their offer of legal migration opportunities, but also with regards to their human rights content, so that human rights issues can be addressed in a more systematic way (European Commission 2014a, 18). In addition, MPs should be improved also with regards to the implementation of concrete initiatives in the area of international protection (European Commission 2014a, 16).

However, an analysis of the text of existing MPs uncovers the limited scope of their human rights and international protection provisions. In the Preamble to all MPs one can find only a minimal reference to the respect of the fundamental rights and dignity of migrants and/or of the international human rights and refugee law

instruments, but always in relation to the objectives of fighting irregular migration and improving cooperation on return and readmission (similarly to other EU documents and to the above-mentioned 2007 Communication)[32].

As concerns international protection, all MPs include at least one provision on the strengthening of the partner country's institutional and administrative capacity in the area of asylum, to be pursued through institution-building, development of a legislative framework, capacity-building, technical assistance, and cooperation with specialised agencies (UNHCR and EASO). The first MPs with Cape Verde and Moldova contain only a small reference to initiatives in the area of international protection (MP with Cape Verde and MP with Moldova, para 3), while the following MPs usually include two provisions focusing more precisely on the development of national asylum systems in partner countries, in compliance with international and European standards.

The section on asylum and international protection is more developed in the MPs which followed the 2011 GAMM renewal and in particular in the MPs with Southern Mediterranean countries. For instance, the MPs with Morocco and Tunisia contain a provision encouraging the adequate implementation of the 1951 Geneva Convention and its 1967 Protocol (MP with Morocco, para 28; MP with Tunisia, para 24). And the MP with Tunisia, which counts four provisions under the international protection pillar, is the only one to include a commitment to the full application of the principle of *non-refoulement* (MP with Tunisia, para 25).

Notwithstanding this gradual expansion of the international protection section in MPs' texts, moving from the paper to the practice, the development and concrete implementation of initiatives in this area have so far been insufficient. Moreover, no systematic assessment has been conducted of the human rights impact of projects implemented under existing MPs, neither by the Commission nor by an independent body. The only detailed evaluation report, drafted for the MP with Moldova, makes no

[32] There are a few exceptions, which however do not contribute in any substantial way to increase the human rights content of MPs. In the MP with Azerbaijan the respect of human rights and international refugee law instruments is connected not only to measures in the area of migration control, but also to the objective of maximising the development impact of migration (MP with Azerbaijan, 3). The Preambles to the MPs with Morocco and Jordan include an (identical) additional recital recalling that respect for fundamental rights underpins the EU's and the partner country's migration policies, including in relations with third countries (MP with Morocco, 2; MP with Jordan, 1).

reference at all to how the respect of fundamental rights of migrants has been promoted, strengthened or enforced in the framework of the MP (Ministry of Foreign Affairs of the Republic of Moldova 2012).

Scholars, NGOs and grass root organisations in Europe and in partner countries have identified a number of deficiencies in the structure, nature and content of MPs, which impact negatively on the respect of the human rights of migrants. One of the main points of criticism is that MPs do not have the fundamental rights of migrants and refugees as a priority; on the contrary, their main focus is on preventing migrants and asylum seekers from reaching the EU and returning them to their countries of origin or transit. MPs may, thus, be considered as yet another instrument of the EU's 'security policy', aimed at the externalisation of border control and outsourcing of the processing and reception of asylum seekers (Brocza e Paulhart 2015; EMHRN, AEDH at al. 2014; EMHRN 2014; Papagianni 2013, 295).

As already discussed in previous sections, MPs are widely criticised for offering only very limited opportunities for legal migration, despite being promoted as a tool for facilitating mobility. NGOs denounce the EU and Member States' reluctance to open legal avenues for migrants to access the European territory as an extremely controversial policy from a human rights perspective, because it pushes thousands of people to risk their life crossing the Mediterranean (EMHRN, AEDH at al. 2014; EMHRN 2014, 13).

According to NGOs, the most critical aspect of MPs is their connection to EURAs, which entails the risk of human rights violations, relating in particular to the prohibition of collective expulsions, the right to seek asylum, the prohibition of *refoulement*, the risk of being subject to inhuman and degrading treatment upon return (EMHRN 2014, 5-9; EMHRN, AEDH at al. 2014). Indeed, the same concerns raised with regards to the human rights content of EURAs (see section 3.4.4 above) actually apply also to MPs, because MPs promote the conclusion of EURAs and increased operational cooperation on readmission but do not introduce any additional human rights guarantees compared to EURAs.

In particular, civil society organisations emphasise the risk of establishing MPs with countries having a weak human rights and refugee protection record and lacking

the institutional and legislative framework needed to guarantee adequate protection standards and living conditions to migrants, asylum seekers and refugees. NGOs focused more precisely on the overall situation and legal and institutional context in Tunisia and Morocco, highlighting that the combination of MPs and EURAs with such countries puts EU Member States at risk of committing serious human rights violations. As noted by civil society organisations, Tunisia has not completed its democratic transition and has not yet adopted national legislation implementing the 1951 Geneva Convention and its 1967 Protocol, and the provisions of the new Constitution on the right to asylum (EMHRN, AEDH at al. 2014).

As regards Morocco, both local and international NGOs and the Moroccan National Council for Human Rights (CNDH) have denounced the situation of Sub-Saharan migrants in Morocco, who are arbitrarily arrested and detained, summarily deported, exposed to violence and abuse by Moroccan authorities, subject to exploitation and criminal violence, and live in precarious conditions, deprived of any means of subsistence (MSF 2013; CNDH 2013; HRW 2014a; EMHRN 2014, 6-8; Amnesty International 2015a). Despite the adoption of a new migration and asylum policy in September 2013 based on the CNDH recommendations (CNDH 2013)[33], migrants and asylum seekers in Morocco continue to suffer from the lack of an effective asylum system, the criminalisation of irregular migration (introduced by Law 02-03 of November 2003), institutional violence and a xenophobic environment particularly hostile towards Sub-Saharan migrants (EMHRN 2014).

[33] In September 2013 the Moroccan National Council for Human Rights (CNDH) presented a report entitled 'Foreigners and Human Rights in Morocco: for a radically new asylum and migration policy'. The report entailed a critical assessment of the situation of migrants and refugees in Morocco and urged the government to substantially reform the national migration and asylum policy with a view to protecting the fundamental rights of migrants and asylum seekers in Morocco (CNDH 2013). Shortly after, the King of Morocco announced the launch of a new migration policy, whose declared aims were the regularisation and integration of migrants in Morocco and the establishment of a well-functioning national asylum system. During the year 2014, the Moroccan government took relevant measures, but their faltering implementation has reduced their potentially positive impact. The government carried out a regularisation campaign upon which 18,000 migrants obtained a one-year renewable residence permit (but 10,000 applications were rejected due to strict and non-uniformly applied criteria); it presented three new laws on immigration, human trafficking and asylum (which have not yet been adopted by the Parliament, though); it launched a broad migrant integration programme (co-funded by the EU for 10 million euros); and it unsuccessfully tried to re-open the *Bureau des Réfugiés et des Apatrides* (BRA), the national authority responsible for refugee status determination which has suspended its activities since 2004 (García Andrade et al. 2015, 129-130; Carrera et al. 2016, 11-12; EMHRN 2014).

NGOs, thus, suggest the EU establish cooperation in the field of migration only with countries that fully respect the fundamental rights of migrants and refugees and that have adopted and effectively implement legislation protecting these rights (EMHRN, AEDH at al. 2014). They should be countries that comply with the 1951 Geneva Convention, that have a functioning asylum system and that do not criminalise unauthorised immigration and emigration.

A further concern expressed by NGOs with regards to the adoption of Mobility Partnerships is the lack of transparency in their negotiation process. This issue has been raised in particular for the MPs with Morocco and Tunisia, whose negotiations did not involve neither civil society actors nor international NGOs, many of whom have been active in defending and promoting migrant and refugee rights (EMHRN 2014; EMHRN, AEDH at al. 2014). As mentioned above, a DG HOME official interviewed in Brussels actually affirmed that the Commission organised preliminary meetings with civil society organisations in those countries, but also admitted that such meetings were not public consultations aimed at discussing and negotiating the content and text of MPs; their purpose was rather to provide general information and receive a general feedback. Local and European NGOs claim a more active role also in the implementation of MP initiatives as well as in monitoring their compliance with international human rights instruments and their impact on the fundamental rights of people concerned (EMHRN 2014; EMHRN, AEDH at al. 2014).

Besides the lack of transparency in their negotiation process, scholars have questioned MPs also for their lack of democratic accountability, due to the absence of any role for the European and national parliaments in their negotiation and adoption - an element which makes them different from EURAs (see above section 4.3). In addition, due to their nature of political declarations, it is unclear whether MPs can be subject to the jurisdiction of national courts and the Court of Justice of the EU. Therefore, it is not clear whether a person who is subject to abusive practices or human rights violations by the public authorities of a participating Member State while implementing a MP initiative, will have the individual right to seek an effective remedy (Carrera and Hernández i Sagrera 2011, 106-107; Papagianni 2013, 296).

4.5. The case studies of Morocco and Tunisia

This section focuses on the case studies of Mobility Partnerships with two Southern Mediterranean countries, Morocco and Tunisia, signed respectively in June 2013 and March 2014. The conclusion of MPs with Northern African countries is the result of developments following the Arab Spring (see above section 4.1). After the 2011 uprisings, on the one hand the EU seemed willing to support democratic transition in post-revolution countries and the stabilisation of the region; on the other hand raising fears of unwanted migration to the EU pushed Member States to place their main efforts on border control and readmission agreements (Fargues and Fandrich 2012, 5-6).

The analysis that follows shows that, if on the one hand the EU offered to Southern Mediterranean countries a supposedly comprehensive and balanced instrument of cooperation, on the other hand the main purpose of these MPs was to strengthen cooperation on border control, limit irregular migration and promote the signature of EURAs, while offering limited incentives in the areas of legal migration, mobility and development. The analysis of these two case studies further proves the flaws and limits of this policy instrument, already described throughout section 4.4 above, in particular with regards to their unbalanced content, limited effectiveness, lack of transparency and poor human rights content.

4.5.1. The Mobility Partnership with Morocco

In the aftermath of the Arab Spring, the Commission proposed to start Dialogues on Migration, Mobility and Security with North African countries, within the wider scope of the European Neighbourhood Policy, as a preliminary step to the negotiation of Mobility Partnerships (see above section 4.1). The Dialogue with Morocco was launched on 13 October 2011; after six EU missions to Morocco, carried out in the period from October 2011 to February 2013, on 7 June 2013 the parties adopted a Joint Declaration establishing a Mobility Partnership. Morocco was, thus, the first Mediterranean country to sign a MP with the EU and nine of its Member States (Belgium, France, Germany, Italy, the Netherlands, Portugal, Spain, Sweden and the United Kingdom).

The structure and content of the Joint Declaration reflects entirely the standard model used in other MPs, and described under section 4.2 above. The Preamble recalls the existing relationships and broader cooperation framework between the EU and Morocco in the area of migration, i.e. the GAMM, bilateral and regional dialogues (Euro-Med Association Agreement, EU-Morocco Action Plan, Euro-Med Partnership, 5+5 Dialogue, Rabat Process, etc.) and bilateral agreements with Member States. The final part of the Preamble states the general objectives of the MP, which correspond to the four thematic priorities of the GAMM: 1) to better manage the movement of persons for short stays and legal and labour migration; 2) to combat irregular migration and human trafficking and smuggling, and to promote an effective return and readmission policy; 3) to strengthen cooperation on migration and development; 4) to comply with international refugee law instruments.

The Joint Declaration is divided accordingly into four sections, which list the specific objectives and commitments that the parties intend to take on and pursue under each thematic area[34]. A relevant element of the Joint Declaration is that the parties commit to open negotiations for a visa facilitation agreement 'in order to ensure more fluid mobility between the EU and Morocco' (MP with Morocco, para 3) and to resume negotiations of the EU-Morocco readmission agreement (MP with Morocco, para 13), which were blocked since May 2010. However, as mentioned above when analysing the EURA with Morocco (section 3.5.1), after a first round of combined VFA and EURA negotiations in January 2015 (EU Delegation to Morocco 2015), the process of parallel negotiation got stalled and has not made any progress since.

The most developed and specific sections are the first and the second ones. As concerns the first section on mobility, legal migration and integration, the main commitments are aimed to: 1) simplify procedures, improve consular services and facilitate the issuing of short-stay visas, in order to make it easier for Moroccan nationals to enter and stay in the EU; 2) better inform Moroccan citizens about aspects of legal migration to the EU (entry conditions, rights and duties), facilitate recognition

[34] The titles of the four sections are: 1) Mobility, legal immigration and integration; 2) Preventing and combating illegal immigration, people-smuggling, border management; 3) Migration and development; 4) International protection.

of diplomas, improve cooperation between employment services; 3) promote migrant integration and combat xenophobia with regards to both Moroccan nationals in the EU and third country nationals in Morocco, and ensure the portability of social security rights of Moroccan workers (MP with Morocco, paras 1-11). Evidently, there is no explicit reference to the possibility of offering to Moroccan citizens concrete legal or labour migration opportunities in the EU, not even in the form of temporary or circular migration.

With regards to the section on preventing and combating illegal immigration, people smuggling and border management, the actions foreseen are aimed to: continue cooperation on readmission and conclude the EURA; enhance information exchange and operational and technical cooperation to support Morocco in combating irregular migration, detecting trafficking and smuggling networks and controlling borders; improve the security of Moroccan travel and identity documents and residence permits; conduct campaigns on the risks of irregular migration; develop voluntary return and reintegration initiatives to Morocco and from Morocco to other third countries (MP with Morocco, paras 12-20). Interestingly, paragraphs 17 and 18 refer to the objective of increasing Morocco's capacity to assist and offer protection to two categories of vulnerable people: victims of trafficking and unaccompanied minors. However, in particular as concerns the latter, proposed actions should focus on preventing their emigration and encouraging their voluntary return.

The third section, dedicated to the development impact of migration, looks shorter and less specific. Besides a vague commitment to support the socio-economic development of regions with high migration potential, the objectives set out by the EU are: to mobilise Moroccan skills abroad and encourage Moroccan migrants to actively contribute to the development of their country of origin; to facilitate their voluntary return and reintegration in Morocco; to reduce the cost of remittances; and to prevent 'brain drain' through circular migration (MP with Morocco, paras 21-27). Evidently, the main focus of EU actions in this area is on the role Moroccan migrants can play in the development of their country: the aim is to facilitate their contribution and encourage their return.

Only two paragraphs are part of the fourth section on international protection. In

this area the EU and Member States generally commit to support: the strengthening of Morocco's legislative and institutional framework on asylum; capacity building for Moroccan authorities in cooperation with relevant asylum agencies; and the implementation of the 1951 Geneva Convention (MP with Morocco, paras 28-29). The MP with Morocco includes a further section that entails horizontal initiatives, i.e. cross-cutting issues relating to the governance of migration, which are of relevance to all four thematic areas of the MP[35].

Finally, the Joint Declaration is closed by a set of provisions concerning its implementation. Here it is reaffirmed that the MP is 'a long-term cooperation framework […] which will evolve over time' (MP with Morocco, para 38) and that the various components of the MP constitute a package and should be implemented in a balanced way, in particular the VFA and the EURA (MP with Morocco, para 39). As regards the monitoring of the implementation of the partnership and its further development, the parties commit to 'meet at least twice a year at an appropriate level decided by mutual agreement' (MP with Morocco, para 42).

The text of the MP is complemented by a detailed Annex of activities undertaken by the EU, its agencies and participating Member States in order to achieve the specific objectives set out in the Joint Declaration. The Annex takes the form of a table and is divided into two parts, listing respectively the new projects and the ongoing projects as of 25 March 2013. Its structure is very clear: both parts of the Annex are divided in five sections, corresponding to the four thematic areas of the GAMM plus the horizontal initiatives. The proposed projects are listed under the five sections depending on their specific objective (which coincides with one of the paragraphs of the Joint Declaration). The total number of proposed projects is 105; however, as stated in the Annex itself:

> the Annex is intended to be an evolving one, the listing of initiatives is purely indicative and their implementation will be subject of appropriate contacts between the Moroccan and European authorities concerned, in particular in order to take

[35] Examples of horizontal initiatives include: improving Morocco's ability to manage migration flows in accordance with the GAMM approach; increasing consultation and dialogue between the parties on the respective migration policies; developing cooperation between judicial authorities on migration issues; increasing the capacities and role of civil society actors in Morocco; promoting scientific knowledge of migration (MP with Morocco, paras 30-39).

into account the interests of the two parties and reflect their priorities (MP with Morocco, Annex, 14).

As a matter of fact, under paragraph 45 of the Joint Declaration the parties commit to update the Annex on a regular basis and to ensure coordination of their respective actions. The parties established that a first joint meeting was to be scheduled by September 2013, in order to consider if any projects were to be added, modified or cancelled (MP with Morocco, Annex, 14)[36].

Looking more carefully at the projects listed in the Annex, a number of problematic issues clearly emerge. Firstly, the unbalanced content of the MP is proved by the number of initiatives proposed under each section/thematic area. The second pillar on irregular migration and readmission counts 38 projects, 27 of which are new initiatives launched in the framework of the MP; under the first section on mobility and legal migration there are 35 projects, but only 15 of them have been introduced by the MP; the third pillar includes 20 projects, only seven of which are new; and only six projects are listed under the section on international protection.

Secondly, as mentioned in previous sections, Member States (but also the EU and its agencies) are free to participate in MPs by proposing projects that are already planned or already in progress under different cooperation frameworks, and gather them under the label of the MP. In the case of the MP with Morocco, the 43% of initiatives (listed in the second part of the Annex) were already in progress at the moment of its adoption; these initiatives obviously do not bring any added value to the MP, as they are a mere re-proposition of pre-existing projects. For instance, a relevant number of initiatives under the first and second pillars proposed by Spain and France were already in place as part of the bilateral cooperation between the two EU countries and Morocco[37] (García Andrade et al. 2015, 33 and 64-69).

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[36] On that occasion, Moroccan authorities presented a series of counter-proposals for the Annex, which for the most part were not approved by European officials, causing discontent among Moroccan officials (García Andrade et al. 2015, 128).

[37] These initiatives deal with: facilitating the issuance of short-stay visas; increasing mobility for certain categories of people; promoting legal migration for certain categories of workers and students (also on a temporary or circular basis); provide technical support and training to Moroccan authorities and promote information exchange and operational cooperation in the fight against irregular migration, people

Thirdly, the overlapping of new projects offered by individual Member States and the EU or its agencies is evident in the MP with Morocco. The overlaps occur in different areas. For instance, under the first pillar, they concern information campaigns and training courses on legal migration (three projects proposed by Italy, Belgium and Spain) and capacity building for employment services (three projects set forth by the EU, Spain and Sweden). Overlapping projects characterise also the fourth pillar: six projects on capacity building in the area of international protection have been offered by the EU, EASO and three Member States (the Netherlands, Germany and Portugal). But the most significant overlapping concerns training and information exchange initiatives on border management, prevention and fight against people smuggling and trafficking, and document security: 11 projects have been proposed by Frontex, the United Kingdom, the Netherlands, Belgium, Spain, France and Portugal. Although each project may bring its own added value, coordination between different initiatives with the same objective is crucial in order to avoid duplications and waste of funding.

Also with a view to ensuring this kind of coordination, and more in general to adequately monitor the implementation of the MP, the participating parties resort to a scoreboard. As described above under section 4.4.2, scoreboards are the main instrument for monitoring the implementation of MPs and are regularly updated by the Commission, with contributions from participating Member States and EU agencies involved. Normally these documents are for internal use only, but I was kindly provided a copy of the scoreboard of the MP with Morocco by a DG HOME official I interviewed in March 2016[38]. This version of the scoreboard is updated to June 2015 and lists a total of 92 initiatives, which are either ongoing, in preparation or under consideration. The ongoing initiatives are a total of 59.

For each project, the scoreboard provides the following information: objective pursued, Member State(s) or institution(s) that proposed and implement it, short description of the project, indicative implementation period, current status of the project, funding source and indicative budget. However, it must be noted that

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smuggling, trafficking and border control.

[38] The scoreboard of the MP with Morocco (as well as the one with Tunisia analysed in the next section) is an Excel file and is drafted in French.

information is not complete for all initiatives listed: details on the implementing period, funding source and budget are often lacking. Besides that, the main limit of the scoreboard seems to be that it fails to provide a real assessment of the progress made in the implementation of projects over time and it does not seem to be used to evaluate on a regular basis if and how ongoing projects contribute to achieve the objectives set out in the Joint Declaration (García Andrade et al. 2015, 128). This certainly limits its usefulness when it comes to evaluate the effectiveness of the MP; however, according to an EU official I interviewed, the scoreboard has proved to be a helpful instrument to increase the coherence and complementarity of different projects, the coordination of funding and the sharing of information among actors involved.

In the areas of legal migration, mobility and development, the majority of ongoing projects clearly promote: 1) a model of temporary and circular migration for low-skilled migrants linked to seasonal work[39]; 2) the mobilisation of skills of Moroccans living in the EU, in view of their contribution to the development of Morocco; 3) the return and reintegration of Moroccan nationals, with a strong focus on highly-skilled qualified migrants and entrepreneurs, whose return (even on a temporary or circular basis) may contribute to the development of Morocco[40]. The latter is the objective of at least 14 ongoing projects listed in the scoreboard and implemented by individual Member States, groups of Member States or the EU.

These are the main purposes also of the 'Sharaka Project', the flagship initiative funded by the EU to support the implementation of the MP with Morocco. It was launched in 2014 with a budget of 5 million euro over three years; the project involves a partnership of seven Member States (Belgium, France, Germany, Italy, the Netherlands, Spain and Sweden) and the EU and is implemented by a French public agency, Expertise France[41]. Its focus is on supporting Moroccan policies in the area of mobility

[39] However, there is only one concrete initiative aiming to put this model in practice; it is proposed by Italy and consists of a circular migration programme for young Moroccan workers who wish to acquire competences in specific sectors, e.g. agriculture or tourism.

[40] An interesting measure has been adopted by Germany aimed to foster mobility and circular migration: Moroccan nationals who are permanent residents in Germany will be able to leave Germany for a maximum period of 24 months without losing their permanent residence permit.

[41] As reported in its website, Expertise France is 'the leading public agency of French international technical assistance'; 'the agency promotes French public expertise with a view to building public

and labour migration and on maximising the development impact of migration, through capacity building and reinforced cooperation between Moroccan and European administrations[42].

In the area of readmission, along with the relaunch of the EURA negotiations, both the Annex and the scoreboard contain two initiatives proposed by the Netherlands. The first one consists of an exchange of best practices on readmission between European and Moroccan authorities, concerning in particular the identification, nationality determination and re-documentation of persons to be readmitted. This initiative is coordinated by the Dutch Ministry of Security and Justice, with the participation of the EU and Belgium. According to the information provided in the scoreboard, the project is ongoing and has been implemented through two working group meetings and an EU mission to Morocco in autumn 2014, which allowed European authorities to share the problems they face and discuss practical solutions with Moroccan authorities.

The second Dutch initiative is still in preparation, as it is linked to the previous signature of the EURA with Morocco. Its purpose is to support Morocco in the implementation of the EURA, especially 'in implementing the return of third-country nationals, for the most part Sub-Saharan Africans' (MP with Morocco, Annex, 19). This would include establishing standard procedures for the identification and verification of the nationality of returnees, as well as assisting Moroccan authorities in obtaining travel documents from third countries of origin. The Netherlands foresee the possibility to facilitate cooperation on readmission between Morocco and third countries of origin through the establishment of AVR programmes (i.e. a continuation of a pre-existing project funded by the Netherlands and implemented by the IOM). Clearly, achieving an

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policies meeting the institutional, economic, demographic, social and environmental challenges of partner countries'. http://www.expertisefrance.fr/eng. Accessed on 28 October 2016.

[42] The Sharaka Project consists of four components, which are mentioned separately in the scoreboard, according to their specific objective: 1) mapping of existing 'migration and development' projects in Morocco and scaling up of the most effective ones; 2) capacity building in mobilisation of the skills of qualified Moroccan nationals residing in the EU; launch of pilot mechanisms to foster their return or circular migration, in view of their contribution to national development; 3) capacity building in labour migration management, concerning both the international placement of Moroccan workers in Europe and the integration of regular migrants in the Moroccan labour market; 4) supporting the reintegration of returning Moroccan migrants.

effective cooperation on readmission with regards to both Moroccan nationals and 'third country nationals of Sub-Saharan origin' represent a major priority for the Netherlands. This is an example of how Member States consider MPs as an opportunity to pursue their national interests and preferences (Reslow 2012a).

As reported by García Andrade et al. in their study for the European Parliament on EU cooperation with third countries, in August 2015 there were 25 EU-funded ongoing projects in the area of migration in Morocco, for a total of more than 20 million euro over their implementation period[43]. They thus observe that the implementation of the MP has translated into a more than doubling of EU resources allocated to cooperation initiatives in the area of migration in Morocco (García Andrade et al. 2015, 130). As discussed in previous sections, the various projects funded under the MPs are intended as a 'financial support package' offered, in this case, to Morocco as an incentive in exchange for its expected commitments in the area of readmission. However, the Moroccan side may continue to perceive this kind of incentive as insufficient compared to the efforts required by the EU side with regards to the readmission of nationals and non-nationals (Carrera et al. 2016, 7; Fargues and Fandrich 2012, 8). As noted by scholars like Carrera and Cassarino, the funding of projects alone does not address Morocco's concerns and interests and has not led to any progress in EURA negotiations so far[44]; only the opening of channels for legal entry and residence in the EU and the offer of real mobility (possibly through something more than visa facilitation) would address Moroccan priorities in a substantial way (Carrera et al. 2016, 7).

4.5.2. The Mobility Partnership with Tunisia

After Morocco, the second Southern Mediterranean country to sign a Mobility

[43] Of this amount, 10 million euro correspond to a new programme launched in 2015 to promote the integration of regular migrants in Morocco; this funding supports directly the new national immigration policy adopted by the Moroccan government in 2014 (see footnote 33 in the previous section 4.4.4). Another 5 million euro are earmarked for the implementation of the Sharaka Project described above; 1 million euro is allocated to a return programme from Morocco to countries of origin and 1.6 million euro funds a multi-country project (involving Morocco, Tunisia and Senegal) on voluntary return and reintegration. Remaining funds are dedicated to smaller technical assistance and development projects.

[44] This issue has been discussed also in the previous chapter, under section 3.5.1.

Partnership with the EU was Tunisia in 2014. As recalled in previous sections, following the Arab Spring (of which Tunisia was one of the main protagonists), the Commission offered to launch Dialogues on Migration, Mobility and Security with North African countries. The EU began a Dialogue with Tunisia on 6 October 2011; discussions continued for two years leading to the finalisation of negotiations for a MP on 13 November 2013 (European Commission 2014c). The Joint Declaration establishing a Mobility Partnership was signed on 3 March 2014 by Tunisia, the EU and ten Member States (Belgium, Denmark, France, Germany, Italy, Poland, Portugal, Spain, Sweden and the United Kingdom).

The negotiation process with Tunisia took longer and was more complicated than the one for the MP with Morocco because, following the 2011 uprising, Tunisia was undergoing a complex phase of political transition and reforms, characterised by social instability and a serious economic downturn. On the Tunisian side, in fact, the MP was signed by an interim technical government, which had entered into force only two months before, to prepare the second democratic elections of the country after the revolution. This peculiar situation may also explain why the MP with Tunisia was adopted without an Annex of activities complementing the text of the Joint Declaration, as in the case of all the MPs concluded until that moment. Negotiations actually continued after the signature of the MP, in order to define the list of initiatives to be included in the Annex.

Under paragraph 37 of the Joint Declaration, the parties committed to create a 'Mixed Committee' to monitor the implementation of the MP. They established that the first task of this committee would be to meet immediately after the adoption of the MP to decide the set of concrete actions to be carried out in order to achieve the MP's objectives (as provided for also by paragraph 36), and to draft the relative scoreboard. After this task would be achieved, as in the case of the MP with Morocco, the Mixed Committee should meet twice a year at an appropriate level decided by mutual agreement, in order to evaluate the progress made in the implementation of the MP, re-examine the priorities of the parties and update the list of initiatives and the scoreboard (MP with Tunisia, para 37).

A further element that complicated the negotiations of the MP with Tunisia was a

climate of explicit opposition on the part of the main Tunisian migrant associations, civil society organisations and trade unions. These organisations published several joint statements calling for the Tunisian government to refuse signing the MP with the EU and to refuse starting EURA negotiations. As mentioned above under section 4.4.4, they considered both instruments to be mere means for the EU to externalise migration control and outsource the processing and reception of asylum seekers, with the result of reducing the protection of migrants' and refugees' fundamental rights.

They also denounced the lack of transparency in the MP's negotiation process, which failed to involve civil society actors (EMHRN, AEDH at al. 2014). In their study for the European Parliament, García Andrade et al. report that the EU Delegation in Tunisia invited grass root associations to join some preparatory meetings with the Tunisian government, but at short notice and without sharing working documents; for this reason the organisations refused to participate (García Andrade et al. 2015, 132). The highly critical reaction of Tunisian civil society organisations and trade unions towards the MP was confirmed by one of the EU officials I interviewed.

As concerns the structure and content of the Joint Declaration, it largely corresponds to the standard model used for other MPs and for the MP with Morocco (see above sections 4.2 and 4.5.1), except for the lack of the Annex. The Preamble recalls the broader cooperation framework between the EU and Tunisia in the area of migration (the Euro-Med Association Agreement, the EU-Tunisia Action Plan, the 'Privileged Partnership' established in 2012, all in the context of the ENP and the GAMM) and bilateral cooperation agreements with Member States. It then sets out the general objectives of the MP, which coincide with those in the MP with Morocco: 1) to better manage the movement of persons for short stays and legal and labour migration; 2) to combat irregular migration and human trafficking and smuggling, and to promote an effective return and readmission policy; 3) to strengthen cooperation on migration and development; 4) to comply with international refugee law instruments[45].

The Joint Declaration entails four sections, corresponding to the four GAMM

[45] In addition, the MP with Tunisia mentions explicitly a fifth objective (which nonetheless falls under the first GAMM pillar): to promote the integration of regular migrants through anti-discrimination policies and by recognising their contribution to the development of both their country of origin and residence (MP with Tunisia, 3).

pillars, which detail the specific objectives and commitments pursued by the parties[46]. A key element of the MP is that the EU and Tunisia commit to 'conclude a readmission agreement in conformity with the EU standards in this domain' and they establish that 'the negotiation of this agreement will be initiated and concluded in parallel to the negotiation of a visa facilitation agreement' (MP with Tunisia, para 9; author's translation). Until very recently this commitment has remained only on paper; according to the EU officials I interviewed, this was mainly due to the Tunisian authorities not being ready to take this step yet and to the Commission not being willing to force them, considering the still vulnerable transition situation in the country. However, on 12 October 2016 the Commission announced the opening of the parallel negotiations for a EURA and a VFA with Tunisia (European Commission 2016j).

The content of the EU-Tunisia MP is similar to that of other MPs, especially the one with Morocco analysed above; however, it presents some specificities, which presumably reflect certain priorities set forth by Tunisia in the area of legal migration, and certain European interests in the area of irregular migration and border management. For instance, the paragraphs relating to legal and labour migration are more articulated and specific than in the MP with Morocco; they emphasise more explicitly and with a more concrete approach the need to improve possibilities for Tunisian citizens to enter, stay and move in the EU for working, training, study or research purposes, even on a temporary or circular basis (MP with Tunisia, paras 3-6).

Conversely, the section on combating irregular migration includes two additional paragraphs (not present in the MP with Morocco) that specifically commit the parties to an increased cooperation in joint search and rescue operations at sea (including capacity building, information exchange and Tunisia's participation in the Seahorse Mediterranean Network) and to reinforced police cooperation (including capacity building, information exchange, operational cooperation, provision of technical equipment, etc.) aimed to better control borders and detect criminal organisations (MP with Tunisia, paras 15-16).

[46] The titles of the four sections are: 1) Mobility, legal migration and integration; 2) Fight against irregular migration and human trafficking, readmission, security of travel and identity documents, border management; 3) Migration and development; 4) Asylum and international protection.

Looking more in detail into the first section of the Joint Declaration, the main objectives are: 1) to simplify procedures, improve consular services and facilitate the issuance of short-stay visas; 2) to better inform Tunisian citizens about aspects of legal migration to the EU (entry conditions, rights and duties) and about job opportunities actually available; to improve cooperation between employment agencies in Tunisia and in the EU; to better assist Tunisian candidates to emigration in solving administrative issues; to strengthen capacities of Tunisian labour authorities; to facilitate temporary and circular migration through better information and concrete initiatives; 3) to facilitate recognition of diplomas; to improve possibilities for qualified young Tunisians to access study and job opportunities in the EU; to reform the Tunisian education system in order to meet the requirements of European labour markets; to make it easier for Tunisian students and researchers to enter the EU and move from one Member State to another; 4) to promote migrant integration with regards to both Tunisian nationals in the EU and third country nationals in Tunisia; to ensure the portability of social security rights of Tunisian workers (MP with Tunisia, paras 1-8).

With regards to the second section, the commitments undertaken by the parties are aimed to: strengthen cooperation on readmission and conclude an EURA; reinforce Tunisian authorities' capacity to manage their borders, prevent irregular migration and detect trafficking and criminal networks, and enhance cooperation in all these areas; improve the security of Tunisian travel and identity documents, residence permits and other official documents; develop voluntary return and reintegration initiatives to Tunisia and from Tunisia to other third countries[47] (MP with Tunisia, paras 9-16).

The third section on migration and development is mainly focused on the role Tunisian migrants can play in the development of their country of origin, as in the case of the MP with Morocco. In this context, actions should be primarily aimed to: mobilise the skills of Tunisians abroad so that they can use them to contribute to the development of their country of origin; facilitate their voluntary return and socio-economic reintegration in Tunisia (with the same purpose); and reduce the cost of remittances. In

[47] As in the MP with Morocco, two paragraphs mention the objective of increasing the national authorities' capacity to assist and offer protection to victims of trafficking and unaccompanied minors, with a special focus on preventing the emigration and encouraging the voluntary return of the latter (MP with Tunisia, paras 12-13).

addition, paragraph 21 highlights the importance of analysing the negative impact of emigration on regions of origin and suggests the development of a support programme (MP with Tunisia, paras 17-23).

The section dedicated to international protection is to some extent more developed than in other MPs, although its fundamentals are the same. This is probably due to the fact that following the civil war in Libya in 2011-2012, Tunisia hosted a large refugee population, mainly of Sub-Saharan origin. Against this background, EU Member States had a clear interest in enhancing Tunisia's capacity to offer adequate protection to asylum seekers and - in the long run - in fostering the development of a national asylum system, in order to reduce the risk of secondary movements of refugees from Tunisia to the EU. The MP's initiatives in this area have the following purposes: to support Tunisia in the development of a national legislative and institutional framework in the area of asylum in compliance with the 1951 Geneva Convention and the new Tunisian Constitution; to ensure that the *non-refoulement* principle is fully applied; to strengthen the capacities of Tunisian asylum authorities through exchange of good practices and technical support; to promote cooperation between Tunisian asylum authorities and the UNHCR, the EASO and Member States' asylum authorities (MP with Tunisia, paras 24-27).

As in the case of Morocco, the MP with Tunisia includes also a section on horizontal initiatives relating more broadly to the governance of migration in the country (MP with Tunisia, paras 28-31). The Joint Declaration is closed by a number of provisions concerning its implementation. The MP is here described as 'a long-term cooperation framework […] based on political dialogue and cooperation, which will evolve over time on the basis of the existing relationships between Tunisia and the EU' (MP with Tunisia, para 32; author's translation). The parties express their intention to intensify the Dialogue they established in October 2011 and commit to involve civil society actors 'in a spirit of partnership' (MP with Tunisia, para 34); however, this commitment does not seem to have properly materialised yet.

As mentioned above in this section, under paragraphs 36 and 37, the parties commit to put in practice the content of the MP through an array of concrete initiatives to be established by a Mixed Committee, that would start its work immediately after the

signature of the Joint Declaration. A DG HOME official I interviewed confirmed this has actually happened: the Mixed Committee met for the first time in April 2015 (one year after the adoption of the MP) and agreed on a list of activities, which had been discussed and prepared over the year. This list was then transposed into a scoreboard. As in the case of Morocco, I received a copy of the scoreboard of the MP with Tunisia from an EU official. In the absence of an Annex, this seems to be the only document available (not publicly though) listing the MP's activities.

The version in my possession dates to May 2015 and lists a total of 101 initiatives which are either ongoing, in preparation or under consideration; initiatives reported as ongoing are only 34. Unfortunately, from the information provided in the scoreboard it is not possible to properly distinguish new initiatives from projects which were already in progress. However, considering that the list of MP's activities has been agreed upon only in April 2015, a large part of initiatives labelled as *'en cours'* in the May 2015 scoreboard were presumably already in place before. Once again, these kind of projects do not bring any added value to the MP, as they are a mere re-proposition of pre-existing initiatives.

The structure of the Tunisian scoreboard is almost identical to the Moroccan one. For each project, the scoreboard includes the following information: objective pursued, Member State(s) or institution(s) that proposed and implement it, a short description of the project, indicative implementation period, current status and funding source; differently from the Moroccan scoreboard, this one does not contain any indication of the projects' budget. Moreover, for the majority of initiatives listed, details are lacking as regards the implementation period (mentioned only for three activities) and the funding source (generically mentioned for less than half of them). This version of the scoreboard, thus, looks more like a working document, whose content is still rather vague and incomplete if compared to the scoreboard of the MP with Morocco.

Looking more in detail into its content, the first thematic area on legal migration and mobility seems to be the most developed one, as it counts 38 initiatives, 15 of which are already in progress; conversely, the second area on irregular migration

includes 25 projects, only six of which are reported as ongoing[48]. The still limited development of actions under the second GAMM pillar, combined with the predominance of measures under the first pillar, is unusual; it may be partly explained by the fact that this version of the EU-Tunisia scoreboard is an early one, produced when the implementation of the MP had just begun. Besides that, this may also be a consequence of Tunisia's ability in advancing its own priorities during the MP negotiations, as mentioned above (Fargues and Fandrich 2012, 7-8; García Andrade et al. 2015, 132). A further confirmation would come from another peculiarity of this scoreboard: it does not only entail measures proposed and implemented by the EU, its agencies and Member States, but it also includes 12 initiatives that are explicitly requested by Tunisia and whose implementation requires specific actions on the part of the Member States and the EU[49].

Therefore, most of the initiatives listed in the EU-Tunisia scoreboard (approximately 60) are focused on: providing Tunisian nationals with the means, skills and opportunities to enter and stay in the EU for working, training or studying purposes; developing the capacities of Tunisian nationals in the EU in view of their return to Tunisia, possibly on a temporary and circular basis[50]; encouraging the contribution of Tunisian nationals to the development of their country of origin; and supporting their socio-economic reintegration in Tunisia.

These are the ultimate objectives also of the flagship project proposed by the EU to support the implementation of the MP with Tunisia, which aims in particular to offer assistance, cooperation and capacity building to Tunisian authorities dealing with migration and mobility. This initiative is very similar to the Sharaka Project launched in

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[48] In addition, the scoreboard contains 21 initiatives concerning migration and development (nine of which are in progress) and only seven activities on international protection (only one of which is already being implemented).

[49] The majority of initiatives demanded by Tunisia (9 out of 12) fall under the first and third GAMM pillars and concern labour migration, vocational training, portability of social rights, circular migration, mobilisation of Tunisians abroad, remittances, bilateral migration and development agreements.

[50] Germany proposed the same measure it had proposed for Moroccan nationals: with the purpose to facilitate mobility and circular migration dynamics, Tunisian nationals who are permanent residents in Germany will be able to leave Germany for a maximum period of 24 months without losing their permanent residence permit. This initiative is in preparation. On its part, Tunisia advanced the request that this measure is adopted by other Member States and ideally by the whole EU.

the framework of the MP with Morocco: it has a budget of 5 million euro over three years under the Asylum Migration and Integration Fund (AMIF); it involves a partnership of seven Member States (Belgium, Spain, France, Italy, Poland, Portugal and Sweden) and the EU; and it is implemented by the French public agency Expertise France. It consists of three components, which were already identified and clearly spelled out in the May 2015 version of the scoreboard, although at that early stage the project did not have a name yet[51].

As observed by García Andrade et al. (2015, 132) in their study published in October 2015, one year and a half after the signature of the MP with Tunisia, its flagship project had not started yet, whereas the Sharaka Project had begun within nine months of the adoption of the MP with Morocco. The project, called 'Lemma - together for mobility', was finally launched in July 2016 (Agence Tunis Afrique Presse, 26 July 2016). The Lemma Project is reported as 'under way' in the press release issued by the Commission on 12 October 2016 announcing the beginning of visa facilitation and readmission negotiations with Tunisia (European Commission 2016j); however, no further detail about the project implementation has been provided by the Commission so far.

As concerns readmission, along with the commitment to negotiate and conclude an EURA, the scoreboard lists two more initiatives, one proposed by Portugal, the other one by Tunisia. Portugal offered to support Tunisian authorities responsible for readmission through information exchange at expert level on good practices in this field. Tunisia asked the partners to implement a project that would allow its national authorities to increase their capacity in the identification of migrants to be readmitted. However, both initiatives are still *'à l'étude'*, i.e. they are only proposed on paper and possibilities for their actual implementation are still under consideration.

A final feature characterising the scoreboard of the MP with Tunisia is a

[51] The three components of the projects, as indicated in the scoreboard, are: 1) strengthening the capacities of relevant Tunisian authorities to manage labour migration and trade-related mobility through enhanced cooperation with EU partners; 2) improving the knowledge of the features and trends of the main Tunisian communities in Europe and establishing a targeted diaspora mobilisation programme; 3) strengthening the capacities of relevant Tunisian authorities and civil society organisations to provide support for the reintegration of returnees.

significant overlapping of projects. As in the MP with Morocco, overlaps are present under all thematic areas. A first evident case is in the area of labour migration, where 14 initiatives have been proposed by the EU, France, Italy, Germany, Poland, Sweden and Tunisia[52]; under the third pillar, France, Germany and Sweden have proposed three different voluntary return and reintegration programmes; also in the area of international protection, five capacity-building initiatives have been offered by the EASO, France, Denmark, Germany and Poland. But probably the most significant example concerns (as in the case of Morocco) training, capacity building and information exchange initiatives on border management, prevention and fight against irregular migration, and document security: 13 projects of this kind have been proposed by the EU, Frontex, France, Germany, Italy, Poland and the United Kingdom. It is worth recalling that, as mentioned in previous sections, coordination between different initiatives that share the same objective and target is essential in order to ensure the overall coherence and effectiveness of the instrument. For this reason, in the context of the MP, one multilateral project involving a group of Member States would be more advisable than a plurality of separate projects, each implemented by an individual Member State.

To conclude, it seems from the information I could access that the MP with Tunisia underwent a prolonged negotiation process, also due to a delicate situation in the country; discussions and consultations continued after its signature, causing a delay also in its implementation. However, in recent months, a more general revitalisation of EU-Tunisia relations, marked also by the adoption of the September 2016 Joint Communication on Strengthening EU Support to Tunisia (European Commission and High Representative 2016i), led to the launch of two key elements of the MP: the Lemma Project and the parallel negotiation of readmission and visa facilitation agreements.

Nevertheless, according to García Andrade et al. (2015, 133), Tunisian authorities complain about three main issues: the MP does not provide for any additional labour migration opportunities; the existing bilateral labour migration agreements with certain

[52] All these initiatives concern the provision of information and assistance to prospective migrant workers, capacity building for the relevant Tunisian authorities, the creation of connection mechanisms between employment agencies, and the offer of circular migration schemes and other temporary migration programmes targeting specific categories of workers.

Member States (e.g. France) are not fully exploited; and support measures offered by the EU and Member States are mainly limited to technical assistance. On a positive note, the process leading to the adoption of the MP and preparation of the scoreboard has allegedly already helped Tunisian authorities developing expertise in this field, which may turn out to be beneficial to the formulation of a national migration and asylum policy and to the development of a sound legal and institutional framework in this area.

CHAPTER 5
COOPERATION ON READMISSION AT BILATERAL LEVEL. THREE CASE STUDIES

5.1. Origins and evolution of formal and informal bilateral cooperation on readmission in the Mediterranean area

Having analysed in detail cooperation on readmission at the European level, this chapter addresses cooperation policies at the bilateral level. It considers both formal and informal modalities of cooperation on readmission established between EU Member States and third countries, focusing on the Mediterranean area. Analysing bilateral cooperation on readmission is crucial if one considers that formal and informal agreements concluded by EU Member States with third countries constitute a wide network; compared to EURAs, they represent by far the largest share of the overall number of existing instruments of cooperation on readmission[1]. This section 5.1 provides a general introduction to the topic, describing the origins, development and main features of bilateral cooperation on readmission in the Mediterranean area. The following sections 5.2, 5.3 and 5.4 analyse three case studies of bilateral cooperation concerning, respectively, Italy and Libya, Spain and Morocco, and Greece and Turkey[2].

In Europe, cooperation between States aimed at facilitating the readmission of unauthorised foreigners to their country of origin has long-standing origins, dating back to the nineteenth century. Coleman (2009, 12-19) identifies three waves of bilateral readmission agreements in Europe. The first readmission agreements concluded between European countries in the nineteenth and early twentieth century were not linked to migration management, but rather served the purpose of enabling the expulsion of undesirable persons (vagabonds, criminals, etc.) to their country of nationality. Conversely, the second wave of bilateral (and multilateral) RAs concluded

[1] In his study for the European Parliament on the EU readmission policy, Cassarino talks about 'a predominant bilateral dimension' (2010c, 22ff.).

[2] The reasons for choosing these three case studies have been mentioned in Chapter 1, section 1.3.

between European countries in the 1950s and 1960s were actually used to regulate the movements of persons from one country to the other. However, Coleman observes that the practical relevance of these agreements was rather limited as they were hardly implemented in practice; moreover, even though they already reflected the contemporary purpose of regulating migration flows, they were not informed by a securitarian perception of migration as a problem or a threat.

The scenario changed completely in the 1990s, a period that Coleman defines as 'a veritable *renaissance* of European readmission agreement' (2009, 16). Along with a proliferation of bilateral RAs[3], this period was marked by a relevant change concerning the countries involved. While until the 1990s bilateral RAs were mainly concluded between European countries, starting from that period Member States have begun to negotiate bilateral RAs also with third countries of origin and transit outside the EU, and in particular with countries in Central and Eastern Europe and the Western Balkans. Coleman identifies three main elements that determined this development in the 1990s: 1) the prospective EU enlargement eastward[4]; 2) the European integration process; 3) and a significant influx of refugees and migrants from the Western Balkans and Central and Eastern Europe.

With regards in particular to the European integration process, as mentioned above in section 2.1, the creation of an area of free movement of persons and the lifting of internal border controls required the introduction of new migration control policies focused on the EU's external borders. In this new context, the Member States' readmission policies focused more decisively on establishing effective mechanisms for the expulsion of unauthorised migrants to third countries of origin or transit outside the EU (i.e. outside the borderless Schengen area). Therefore, in order to facilitate the effective implementation of removals, throughout the 1990s EU Member States have concluded a large number of formal bilateral readmission agreements, mainly with countries in Central and Eastern Europe.

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[3] According to Noll (2000, 203) an estimated 220 bilateral readmission agreements were concluded during the 1990s worldwide.

[4] The lifting of visa requirements for nationals of Central European countries in view of their future EU membership was combined with the conclusion of readmission agreements, which served as a 'compensating safeguard' (Coleman 2009, 16-17).

These new wave of agreements differ from the previous ones in several ways (Coleman 2009, 18-19). In particular, despite their formally reciprocal nature, since they are concluded with major third countries of origin or transit, they imply a predominantly unidirectional expulsion process (from a Member State to a third country); thus, readmission does not take place anymore on an equal and bidirectional basis, as it was with RAs between EU countries. Moreover, while previous bilateral agreements concerned mainly the readmission of own nationals, since the 1990s RAs have usually included also obligations relating to third country nationals, who shall be readmitted to transit countries in the immediate neighbourhood of the EU.

Between the late 1990s and the early 2000s the Member States' attention partly shifted from the eastern to the southern neighbourhood of the EU. The development of cooperation on readmission in the Mediterranean area became increasingly important, in light of the intensification of migration flows across the Mediterranean Sea and into Europe, and the increasingly crucial role played by North African countries and Turkey as countries of origin and/or transit. Some EU Member States, namely those located at the EU's southern borders (Italy, France, Spain and Greece), engaged proactively in trying to establish cooperation on migration management, border control and readmission with third countries in the Southern and Eastern Mediterranean. However, bilateral negotiations on readmission between Mediterranean Member States and third countries turned out to be lengthier and more complex (Cassarino 2007, 179-180, 185-188).

Differently from countries in Eastern Europe and the Western Balkans, Mediterranean and African third countries proved to be reluctant towards the conclusion and/or the actual implementation of formal readmission agreements due to a number of reasons, analysed in details in section 6.3 below. Among the main reasons, there was a lack of incentives comparable to those offered by the EU and its Member States to the EU's eastern neighbours. In fact, countries in Eastern Europe and the Western Balkans accepted the conclusion of bilateral readmission agreements (and EURAs as well) because they perceived them as the *quid pro quo* to obtain visa facilitation, visa liberalisation and prospective EU membership. On the contrary, countries in the Southern Mediterranean were not offered this prospect; therefore, in most cases they

opposed the negotiation of formal bilateral RAs with EU Member States (and EURAs, as discussed above in Chapter 3). Even in cases when they agreed to sign formal bilateral RAs, the concrete implementation of the latter was usually hindered by a substantial lack of cooperation on the part of the authorities of Mediterranean third countries.

Faced with these difficulties in concluding (or implementing) formal readmission agreements with Mediterranean third countries, some Member States (i.e. mainly southern EU Member States, which for reasons of geographic proximity and migration salience are the most interested in controlling effectively migration flows across the Mediterranean) started to devise a broader bilateral cooperation framework based on a variety of informal instruments (Cassarino 2007, 179-180). The use of informal agreements linked to readmission[5] rather than, or in addition to, formal readmission agreements was meant to foster a more effective collaboration on the part of Mediterranean third countries. In fact, for the reasons discussed below in section 6.3, Southern Mediterranean countries proved to be more keen to cooperate with EU Member States in the field of readmission on the basis of informal arrangements and in the framework of a broader bilateral cooperation encompassing different policy areas and issues. In sum, based on empirical data, Cassarino (2007, 185-188; 2010b, 9-14) demonstrates that across the 1990s and the years 2000s there has been a parallel growth of, on the one hand, formal bilateral readmission agreements with non-EU countries in Eastern Europe and the Western Balkans, and on the other hand, of informal agreements linked to readmission with Mediterranean and African countries[6].

Examples of these informal instruments of bilateral cooperation on readmission established between EU Member States and (mainly) third countries in the Mediterranean and Africa are: memoranda of understanding (MoUs); exchanges of letters; administrative arrangements; operational protocols; provisions on readmission

[5] The expression 'agreements linked to readmission' was coined by Cassarino (2007).

[6] As of January 2007, EU-27 Member States had signed 87 formal bilateral RAs with countries in Eastern Europe and Western Balkans and only four informal agreements with the same countries. Conversely Member States had concluded 32 known informal agreements linked to readmission with countries in Southern and Eastern Mediterranean and Africa; the formal RAs concluded with the latter were 13 (Cassarino 2007, 188, Table 1).

included in broader police cooperation agreements; 'oral processes' and other kinds of unwritten agreements; etc.. These informal agreements are usually negotiated and signed by the executives of the respective countries, i.e. by heads of governments, ministries (usually of interior or foreign affairs), heads of police and other officials, while national parliaments are usually not involved[7].

The general trends described so far may be confirmed through a short analysis of formal and informal bilateral agreements linked to readmission concluded during the last two decades by Italy, Spain and Greece (i.e. the Mediterranean Member States that are object of the case studies included in this chapter). This account is based on the 'Inventory of the agreements linked to readmission' compiled by Jean-Pierre Cassarino and updated to December 2016[8].

Starting from the second half of the 1990s and (indicatively) until the first half of the years 2000s, Italy, Spain and Greece have signed formal readmission agreements with other European countries (including EU Member States) and third countries in Central and Eastern Europe and the Western Balkans. Throughout the years 2000s, they have negotiated intensely with countries in the Southern and Eastern Mediterranean, to conclude mainly informal readmission arrangements (i.e. MoUs, exchanges of letters, administrative arrangements and operational protocols) or broader police cooperation agreements including provisions on readmission[9]. In some cases southern EU Member States concluded also formal RAs with Mediterranean third countries[10]; however, while

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[7] The features of these informal instruments of bilateral cooperation on readmission are analysed in depth in Chapter 6, sections 6.1 and 6.3.

[8] The inventory does not include oral agreements; moreover, as admitted by Cassarino himself, data concerning informal agreements should not be considered complete. For instance, the list of informal agreements between Italy and Libya seems to lack several instruments, *inter alia* the operational protocols signed on 4 February 2009 and 7 December 2010. In an interview I had with Cassarino in July 2016, he explained that tracing and accessing informal agreements is a challenging task; many of them may remain hidden, or even if their existence is disclosed, their content may not be published (as in the case of the two operational protocols mentioned above). I am grateful to Jean-Pierre Cassarino for sharing data from his inventory with me.

[9] Italy concluded this kind of informal agreements linked to readmission with Algeria, Egypt, Libya, Tunisia and Turkey; Spain with Algeria, Morocco and Turkey; Greece with Tunisia, Egypt and Turkey.

[10] This happened in the case of Italy with Morocco in July 1998, with Tunisia in August 1998, with Algeria in February 2000 (entered into force in October 2006) and with Egypt in January 2007; in the case of Spain with Morocco in 1992 (entered into force in 2012) and Mauritania in 2003; and in the case of Greece with Turkey in 2001.

the informal instruments identified by Cassarino are 22 (12 concluded by Italy, five by Spain and five by Greece), formal RAs are only seven (four signed by Italy, two by Spain and one by Greece). Finally, Italy and Spain have negotiated agreements linked to readmission also with Sub-Saharan African countries, mainly since the second half of the years 2000s[11]. Interestingly, with these countries they have concluded only informal arrangements (especially MoUs) or broader police cooperation or migration cooperation agreements including readmission clauses; the only exception seems to be the Italian-Nigerian bilateral readmission agreement entered into force in June 2011[12].

The following sections describe the features and peculiarities of three case studies of bilateral cooperation between a southern EU Member State and a Mediterranean third country. As already anticipated in section 2.1.6, a common feature emerges from these case studies, concerning the nature of relations between countries on the two shores of the Mediterranean. These case studies prove that the establishment of cooperation on readmission cannot be seen as a unilateral process where EU Member States impose their interests and priorities on third countries. On the contrary, third countries may prove reluctant to acquiesce to the requests of EU Member States or unwilling to abide by the commitments they have undertaken. In this context, third countries have acquired their own negotiating power and have become capable to impose their own interests and priorities, affecting the behaviour and choices of their counterparts and making the bargaining over migration control and readmission a bidirectional and interactive process (Paoletti 2010; 2011a; 2011b; Cassarino 2005; 2007; 2010b; Cuttitta 2010).

This aspect of bilateral cooperation on readmission is further discussed under section 6.3 below, which describes how the very choice of using informal rather than formal instruments of cooperation has been largely determined by the reluctance of Mediterranean and North African third countries to conclude formal readmission agreements, which they perceived as detrimental to their own interests.

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[11] Italy concluded this kind of informal agreements linked to readmission with Djibouti, Gambia, Ghana, Niger, Nigeria, Senegal and Sudan; Spain with Cameroon, Cape Verde, Gambia, Ghana, Guinea Bissau, Guinea Conakry, Mali, Niger, Nigeria and Senegal.

[12] For a broader account of Member States' bilateral cooperation policies and practices in the field of migration and asylum with a focus on the Mediterranean area, see: García Andrade et al. 2015, 64-69.

5.2. The Central Mediterranean: cooperation on readmission between Italy and Libya

The case of Italian-Libyan cooperation on readmission is peculiar because it is the only case of bilateral cooperation between an EU Member State and a Mediterranean third country to be entirely based on informal arrangements. Indeed, although since the end of the 1990s Italy and Libya have been negotiating over cooperation in the area of migration in a rather intense way, readmission *per se* has never been the subject of a formal agreement between the two countries. Readmission has been, instead, at the core of many informal administrative arrangements, operational protocols, MoUs and even oral agreements concluded between the Italian and Libyan executives over the last decades.

In some cases the content of these informal agreements has been published, in other cases it has been kept secret. Nonetheless, in two distinct periods the practical effects of informal (and partly unknown) agreements between the two countries have manifested themselves in very clear and controversial ways. From October 2004 to March 2006 Italy has readmitted to Libya groups of third country nationals (mainly Egyptians) by means of charter flights; from May to November 2009 Italy has carried out several push-back operations at sea, intercepting migrants (mainly from Sub-Saharan Africa and the Horn of Africa) in international waters and bringing them back to Libya and/or rendering them to Libyan authorities. These two readmission practices had no apparent legal basis in the agreements concluded by the two countries, whose content is known to the public. However, the periods preceding the implementation of these two practices were characterised by intense discussions between Italy and Libya in different policy areas, including: colonial compensations and resolution of other post-colonial disputes; bilateral economic relations, trade and investments (in particular in the energy sector); fight against international terrorism - and migration control. As further argued below, readmission was most probably embedded into this broader cooperation framework, and it was dealt with in an informal and mainly secret way.

Italy and Libya began to discuss on the joint management of migration in the late 1990s. On 4 July 1998 they signed two documents, a so-called ‘Oral Process’ and a

'Joint Communication', which represented a highly significant step in Italian-Libyan relations. The 1998 Joint Communication formally acknowledged, for the first time, the suffering caused by Italy during the colonial period and set out a series of measures and reparations to compensate for that, while simultaneously aiming to boost economic relations between the two countries. This was also the first written agreement between Italy and Libya to mention the need to cooperate in the fight against irregular migration, laying the bases for the subsequent 2000 agreement (Paoletti 2011a, 116-119)[13].

In the period following the signing of the Joint Communication, Italian and Libyan authorities intensified dialogue[14]. A number of meetings on migration-related issues were held, leading to the conclusion of a bilateral agreement 'on cooperation in the fight against terrorism, organised crime, traffic in drugs and irregular migration', which was signed on 13 December 2000 and entered into force on 22 December 2002[15]. The agreement contains a separate section concerning the fight against irregular migration, suggesting three measures: 1) the exchange of information on irregular migration flows and on criminal organisations that favour them, their *modus operandi* and itineraries; 2) the exchange of information on organisations specialised in the counterfeiting of documents and passports; 3) reciprocal assistance and cooperation in the fight against illegal immigration (2000 Agreement, Art. 1(d)). The agreement foresees also the establishment of different modalities of police cooperation and periodic joint expert meetings (2000 Agreement, Arts. 2-5). Overall, the content of this document is rather general: in fact, the 2000 Agreement looks more like a framework

[13] Many of the questions addressed and compensations proposed by the 1998 Joint Communication will be recalled in the notorious Treaty of Friendship, Partnership and Cooperation, which will be signed ten years later, on 30 August 2008 (Ronzitti 2009, 3).

[14] The then Italian Prime Minister Massimo D'Alema was the first head of government to visit Libya, in December 1999, after the imposition of UN sanctions to the country in 1992.

[15] Considering its content, purpose and form, this may be considered a formal bilateral agreement. For the Italian part, it was signed by the then Minister of Foreign Affairs Lamberto Dini, it entered into force in December 2002 and was published on the Official Journal in May 2003 (GU n. 111, 15 May 2003, supplement). However, the role played by the Italian Parliament is not clear. The agreement includes a provision saying that it will enter into force after the parties will notify each other the fulfilment of internal procedures, without mentioning ratification (2000 Agreement, art. 9). While certain scholars affirm that the Parliament ratified the agreement (Paoletti 2011a, 120), Favilli (2005, 161-162) observes that the agreement entered into force without a formal exchange of ratifications between the parties; the Italian Parliament did not intervene with any law of 'ratification and execution' or 'approval and execution' of the agreement.

agreement with a programmatic function than a text immediately applicable in practice; nonetheless, it set the basis for all formal and informal bilateral agreements that followed.

Between 2000 and 2007, no formal agreements on migration were signed between the two countries; however, under the Berlusconi government (2001-2006) discussions and meetings with Libyan authorities continued intensely, in view of solving the pending issues related to the colonial era and deepening cooperation in different areas – especially in the areas of economic relations and joint migration management (Paoletti 2011a, 121-131). With regards to the latter, negotiations focused in particular on the actual operationalisation of the commitments undertaken in the 2000 Agreement; in this respect, the measures informally agreed upon by the Italian Minister of Interior and the Libyan Minister of Justice on 3 July 2003 were extremely relevant.

The informal agreement signed on that occasion allegedly regulated practical cooperation between the security forces of the two countries and addressed the technical implementation of specific cooperation initiatives aimed at tackling irregular migration and human trafficking (Klepp 2010b, 80). The agreement involved 'among other things, the exchange of information on migration flows and the provision to Libya of specific equipment to control sea and land borders' (Paoletti 2010, 58). As affirmed by the Minister of Interior – and reported by Paoletti (2011b, 141) – the agreement included the construction of a number of centres for irregular migrants in Libya, funded by Italy. The 2003 Technical Agreement may be linked also to the Italian practice of financing and coordinating the repatriation of migrants from Libya to their countries of origin via charter flights, which reportedly started precisely in 2003[16] (Paoletti 2011a, 151-152). Conversely, on that occasion Libya refused the Italian proposal to conduct joint patrols in Libyan territorial waters, being determined to protect its national sovereignty (Cuttitta 2008, 5; Tondini 2010, 4; Paoletti 2011a, 125). However, details about the

[16] As documented by the European Commission Report on the Technical Mission to Libya on Illegal Immigration 27 Nov-6 Dec 2004, between August 2003 and the end of 2004, Italy financed 50 return flights from Libya to Egypt, Ghana, Mali, Eritrea, Nigeria, Sudan, Niger, Pakistan, Bangladesh and Syria, expelling a total of 5,688 migrants (European Commission 2005c, 61-62). As reported by Paoletti, based on figures provided by the Libyan Ministry of Interior, between January 2003 and August 2006, 8,899 migrants were repatriated from Libya with the financial assistance of Italy (Paoletti 2011a, 151-152).

content of this agreement are uncertain. Indeed, probably the most relevant characteristic of the 2003 Technical Agreement is its secrecy: this text has been neither discussed nor ratified by the Italian Parliament and its content has never been disclosed to the public[17].

The decision to maintain the terms of this deal hidden is particularly controversial also because, according to some scholars, this agreement may be linked to the Libyan decision to start accepting the readmission of irregular migrants from Italy (Cuttitta 2008, 5; Paoletti and Pastore 2010, 12). In fact, as part of the cooperation established with Italy, until September 2004, Libyan authorities used to repatriate to their countries of origin only third country nationals apprehended within the Libyan territory, either while they were trying to leave for Italy from the Libyan coasts or on a more 'random' basis. It was only starting from October 2004 that Libya began to accept also the readmission of third country nationals from Italy, even in the absence of a formal readmission agreement (Cuttitta 2008, 5).

As documented in detail by Paoletti (2010, 61-65; 2011a, 143-148), between October 2004 and March 2006 Italy organised and financed the removal via charter flights from Sicily and Calabria of approximately 3,043 migrants (mostly of Egyptian nationality) who had recently arrived from Libya; most of them were immediately repatriated to their country of origin. This practice has been widely criticised, e.g. by the European Parliament (2005a), international organisations (UNHCR 2005; CPT 2006a) and NGOs (Amnesty International 2005; HRW 2006, 106-113); criticisms concerned both the dubious legal basis of the return flights and their legality on human rights grounds, as further analysed under section 7.2. In fact, this practice gave rise also to a number of applications before the European Court of Human Rights; however, after having initially admitted them (joined in the case *Hussun and Others vs Italy*), the Court struck out of the list or rejected all applications due to different reasons, the main one being that the representatives had lost contact with all of the applicants (except one) and therefore, according to the Court, a further examination of the applications was not

[17] It is especially telling that this agreement was kept secret not only at the time of its signature, but also over the years, by all the following Italian governments, until the present day (Paoletti and Pastore 2010, 12).

justified[18].

With regards to the legal basis of the return flights carried out in the period 2004-2006, as mentioned above, apparently no formal readmission agreement had been signed by Italy and Libya. However, between the 2003 Technical Agreement (whose exact content remains unknown) and the beginning of return flights there was another probably crucial and equally obscure informal agreement between the two countries. On 25 August 2004, during his third visit to Libya, the then Italian Prime Minister Silvio Berlusconi met the Libyan President Muammar Gaddafi; allegedly, it was precisely during this meeting that the two leaders agreed upon the actual implementation of readmissions from Italy to Libya (Paoletti 2011a, 125). However, the details of this oral agreement were never disclosed; moreover, as in the case of the 2003 Technical Agreement, the Italian Parliament was not involved in the procedure and the agreement was neither transcribed in a written form nor published in the Official Journal[19] (Favilli 2005, 162-164).

Based both on public statements and confidential interviews with high-ranking officials at the Ministries of Interior and Foreign Affairs, Paoletti (2010, 65-67) argues that removals to Libya were carried out on the basis of informal agreements developed in the course of the bilateral discussions conducted at the executive and ministerial level over the years. Therefore, return flights from Italy to Libya and the subsequent repatriations from Libya to third countries were implemented with the consent of Libyan authorities, but in the absence of a formal readmission agreement; instead, arrangements linked to readmission were embedded into the broader Italian-Libyan cooperation framework. In the account of Paoletti, certain officials stressed some highly significant elements: e.g. the fact that oral agreements hold juridical value and therefore a readmission agreement may be concluded in non-written form (2010, 66), and the fact that for Italy it may be preferable to have an agreement, even if it is informal and the

[18] ECtHR, *Hussun and Others v. Italy*, Applications No. 10171/05, 10601/05, 11593/05 and 17165/05, Judgment of the Court (Struck out of the List), 19.01.2010. For details on the reasons why the applications were rejected and a reference to scholars' critical views on the judgement, see: Tondini 2010, 7.

[19] As further discussed in section 6.3.2, Favilli (2005) argues that this practice is incompatible with the Italian Constitution, being in violation of art. 80 and art. 10 (2).

counterpart wants its content to remain secret, than to have no agreement at all (2010, 67).

Presumably, the regular implementation of removals in the period 2004-2006 was linked also to the continued pressure exercised by the Italian government on Libyan authorities, e.g. through repeated high-level visits to Libya and the conclusion of additional informal agreements, such as the two memoranda of understanding signed on 6 February 2005 and 17 January 2006 (Cuttitta 2008, 5). These MoUs were aimed at further strengthening bilateral police cooperation in the areas of irregular migration, human trafficking and border control (Paoletti 2011a, 129-130). This gradual development of practical and operational cooperation with Libya culminated in the adoption of a Protocol and an Additional Technical-operational Protocol on cooperation in the fight against irregular migration, signed on 29 December 2007 by the Italian Minister of Interior and the Libyan Minister of Foreign Affairs, and the Italian head of police and its Libyan counterpart, respectively.

The two 2007 Protocols are largely considered as a watershed in Italian-Libyan migration cooperation because for the first time they allowed for the joint patrolling of Libyan territorial waters; moreover, as examined below, they indirectly paved the way for the implementation of push-back operations in 2009 (Klepp 2010b, 81; Paoletti 2011a, 155-156; Giuffré 2013b, 701; Cuttitta 2010, 35-36). As in the case of previous informal agreements concluded at the ministerial level, the Italian Parliament was not involved in the negotiation and adoption of these Protocols and was not called to ratify them; moreover, at first their content was kept secret, to be disclosed only in 2009[20] (Giuffré 2013b, 701).

Pursuant to Article 2 of the 2007 Protocol, the parties agreed to organise joint maritime patrols using six vessels temporarily supplied by Italy embarking a mixed

[20] However, the Italian Parliament was not unaware of the content of the 2007 Protocols. Indeed, already in January 2008 it approved the allocation of 6 million euro to the *Guardia di Finanza* (a specialised Italian police force) for the implementation of the agreement on joint patrolling in Libya; the following year it earmarked further 4.8 million euro for the same purpose (Paoletti 2011a, 155). This is an example (among others) of the actual standpoint of the Italian Parliament towards the government's practice of concluding informal agreements with third countries in the area of migration. Even when the Parliament had the opportunity to raise the issue of the lack of transparency and democratic decision-making and object this government's practice by vetoing the funding of implementing measures, it did not do it. On this point, see also the example analysed by Favilli (2005, 159 and 164).

crew composed of both Libyan and Italian personnel. The joint patrolling missions would include both control and search and rescue activities, to be conducted both in Libyan territorial waters and international waters. Article 1(1) of the 2007 Additional Protocol specified the typology and characteristics of the six *Guardia di Finanza* vessels that would be provided to Libya. With regards to their crew, Article 1(3) and 1(4) of the 2007 Additional Protocol clarified that for the first 90 days the vessels would be provided with a full Italian crew, responsible for training the Libyan personnel on board; during this initial training period the vessels would not carry out operational missions. After the first 90 days, the Italian staff on board were to be progressively reduced and operational missions were to stArt.

Along with training activities, the Italian personnel were tasked with technical assistance and maintenance of the vessels (Art. 2, 2007 Protocol). Conversely, Libyan authorities were totally entrusted with the command and responsibility for all initiatives conducted during both the training and operational missions (Art. 1(5), 2007 Additional protocol). In addition, a Joint Operational Command was created with the task of arranging the daily implementation of joint (training and operational) patrolling operations; the responsibility for the command of this unit was assigned to a Libyan representative, supported by an Italian vice-commandant with advisory function (Art. 2, 2007 Additional Protocol). The wording of the 2007 Protocols, thus, was clearly aimed to avoid that any direct responsibility for actions carried out during joint patrolling operations could be ascribed to Italy and to its police personnel, whose tasks were formally limited to training, assisting and advising Libyan personnel (Art.3(5), 2007 Additional Protocol).

The actual implementation of the 2007 Protocols, however, did not follow suit. As noted by Pastore, in June 2008 the six patrol boats promised by Italy were still 'anchored in some Italian port waiting for the Libyans to declare themselves ready to accept the offering' (2008, 2). Considering that in the same period migrant arrivals to Italy kept increasing[21], Libyan reluctance to put the 2007 agreement in practice caused sharp disappointment and frustration in Italian authorities, who therefore engaged in

[21] Pastore reported a threefold increase in the first five months of 2008, compared to the same period in 2007 (2008, 2).

trying to push Libya to comply with the commitments undertaken.

For instance, the Italian Prime Minister Berlusconi chose Libya as the destination of the first official international trip of his new mandate (started in May 2008) and in the meeting he had with President Gaddafi on 28 June 2008 the main topic of discussion was precisely the implementation of the agreement on joint patrolling (Paoletti 2011a, 134). Also, in finally signing the long-negotiated Treaty of Friendship, Partnership and Cooperation on 30 August 2008, Italian authorities hoped that the impasse on joint patrolling was eventually overcome (Paoletti 2011a, 156). But in fact, it was only when the Treaty of Friendship was ratified by the Italian Parliament in February 2009, that Libya agreed to sign an Additional Executive Protocol allowing for the actual operationalisation of the 2007 agreement (Cuttitta 2010, 35).

Nonetheless, the 2008 Treaty of Friendship represented a crucial step towards the implementation of the 2007 Protocols. The conclusion of this agreement was in itself a historic turning point for Italian-Libyan relations: it marked the culmination of a ten-year long history of complex negotiations, covering a broad variety of issues[22]. In particular, this comprehensive agreement was meant to conclude the long dispute over the compensations claimed by Libya for the damage deriving from the Italian colonial occupation. Therefore, a crucial element of the agreement was the Italian pledge to pay five billion US dollars over 20 years in reparations; these would materialise in the construction of several infrastructural projects to be carried out by Italian companies (Arts. 8(1) and 8(2), 2008 Treaty of Friendship). These projects would include the coastal highway connecting Tunisia to Egypt – a major work with a highly symbolic value, which had been insistently requested by Libya[23].

Italian authorities had great expectations about the impact of the 2008 Treaty on Libyan authorities' collaboration in the joint management of migration: the underlying idea was that, having settled the historic dispute over colonial compensations, Libya

[22] The content, form, purpose and procedure followed suggest that this treaty can be considered a formal bilateral agreement. It was signed in Benghazi on 30 August 2008 by Berlusconi and Gaddafi; even though its text was first disclosed (and published online) in October 2008 by the Italian newspaper *La Repubblica*, it was then presented to the Italian Parliament in December 2008, ratified with Law n. 7 on 6 February 2009 and published on the Official Journal (GU n. 40, 18 February 2009). The treaty was ratified also by the Libyan Parliament on 2 March 2009.

[23] For a detailed analysis of the content of the treaty, see: Ronzitti 2009.

would be available to fully cooperate in controlling irregular migration towards Italy. As reported by Paoletti (2011a, 135), the Italian Minister of Interior explicitly affirmed the existence of a direct connection between the building of the highway and the implementation of joint patrols in Libyan territorial waters.

In fact, Article 19(1) of the Treaty of Friendship provided for the intensification of the ongoing Italian-Libyan cooperation in the fight against terrorism, organised crime, drug trafficking and irregular migration; as a legal basis, it makes reference to the 2000 Agreement and 'the subsequent technical arrangements', mentioning in particular the 2007 Protocols on joint patrolling. Furthermore, Articles 19(2) and 19(3) foresaw, respectively, the creation of a satellite system for the control of Libyan land borders (to be jointly financed by Italy and the EU) and the development of bilateral and regional initiatives aimed at preventing irregular migration directly in the countries of origin.

On 4 February 2009, Libya and Italy signed an Executive Protocol additional to the 2007 Protocols, which allowed for the implementation of the latter to finally stArt. Indeed, in March 2009 the first three *Guardia di Finanza* patrol boats were handed over to Libya (the other three followed in February 2010), while training activities and joint patrolling operations started shortly after, in May 2009 (Tondini 2010, 5-6). If on the one hand the effects of the conclusion of this agreement were immediately visible, its precise content was kept secret and its text has never been published. Based on the limited information reported by Tondini (2010) and Giuffré (2013b)[24], the 2009 Executive Protocol established that the six Italian vessels would be supplied on a permanent basis to Libya (Giuffré 2013b, 713) and joint patrolling operations would be carried out by an equal number of Italian and Libyan officials in both Italian, Libyan and international waters, under the responsibility respectively of Italy, Libya and either country (Tondini 2010, 6).

Allegedly, this re-definition of the operational modalities of cooperation between the two countries and the actual handing over of the Italian vessels to Libya changed the context of Italian-Libyan collaboration, fostering a more proactive action on the part of Libyan authorities in patrolling and intercepting migrant boats in their territorial waters

[24] Tondini affirms that he obtained the text of the 2009 Executive Protocol during his fieldwork activities in the context of the INEX Project (2010, 4, footnote 8).

and high seas – with financial and technical resources being provided by Italy (Giuffré 2013b). Building upon the 2007 Protocols, the 2008 Treaty and the 2009 Executive Protocol, a different and more collaborative form of cooperation in the fight against irregular migration was gradually developed and eventually put in place. This new and strengthened modality of cooperation, however, did not remain limited to joint patrolling; on the contrary, it opened the way for the first Italian push-back operations, which were carried out between the 6th and 10th of May 2016.

Based on figures provided by the Italian Ministry of Interior, from May to November 2009 Italian authorities carried out nine push-back operations towards Libya resulting in the readmission of 834 migrants (UNHCR 2011, para 2.1.2) and two push-back operations towards Algeria resulting in the readmission of 51 migrants (Tondini 2010, 4)[25]. The push-back operations towards Libya were carried out by different Italian police and military forces and consisted of intercepting migrant boats in international waters, taking migrants on board of the Italian vessels, and either returning them directly to Libya or handing them over to Libyan patrol boats on the high seas, the latter vessels being operated by mixed Italian-Libyan crews, as provided for by the 2007 Protocols (UNHCR 2011, paras 2.1.3 and 2.1.5).

However, the Italian push-back practice does not seem to have any apparent legal basis in none of the above-mentioned formal and informal agreements concluded by Italy and Libya between 2007 and 2009. Tondini (2010) and Giuffré (2013b) argue that neither the 2007 Protocols nor the 2009 Executive Protocol (which regulate the technical aspects of Italian-Libyan cooperation) include any explicit provision concerning the interception of migrants in international waters and their deflection to Libya or their handing over to Libyan authorities. As reported by the two scholars, Article 2 of the 2009 Executive Protocol refers only in extremely generic terms to the duty for both countries to repatriate irregular migrants and to conclude agreements with countries of origin in order to limit irregular migration (Tondini 2010, 4; Giuffré 2013b, 711)[26].

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[25] For a detailed account of the push-back operations carried out by Italy in 2009, see: UNHCR 2011, 1-3; Tondini 2010, 4-5.

[26] In addition, Article 2(1) of the 2007 Additional Protocol establishes that the above-mentioned Libyan-

Therefore, as argued by Giuffré (2013b, 703-716), even though the 2007 and 2009 Technical Protocols and the 2008 Friendship Treaty individually taken do not stand *per se* as the legal basis of push-backs, this series of agreements taken as a whole and framed within the broader context of Italian-Libyan relations, constitutes the legal framework within which the Italian push-backs were performed; outside of this broad bilateral cooperation framework, the implementation of this kind of operations would have been impossible[27]. In addition, Giuffré noted that the legal framework of the 2009 push-backs most probably includes also other informal instruments, such as the notes exchanged by relevant authorities and other informal arrangements communicated via telephone or fax in the contingency of the maritime operations. Arguably, it is on the basis of these informal operational accords that, for each operation, Libyan authorities consented to the entry of Italian vessels in their territorial waters and authorised the readmission of third country nationals.

Expectedly, Italian push-back operations gave rise to a national and international outcry. The Italian actions were widely criticised for being in violation of European and international human rights and refugee law; the Committee for the Prevention of Torture of the Council of Europe (CPT 2010a), NGOs (HRW 2009) and international organisations (UNHCR 2011) raised serious concerns over the fate of the persons who had been forcibly readmitted to Libya without having their individual case considered and without being granted the possibility to apply for asylum[28]. The Italian practice gave rise to several judicial and quasi-judicial actions; in particular, an application was filed before the ECtHR by a group of 24 Somali and Eritrean migrants who were

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led Joint Operational Command responsible for arranging and coordinating joint patrols may request the intervention of Italian vessels ordinarily deployed by the island of Lampedusa for conducting anti-immigration activities. Since push-back operations could be considered as 'anti-immigration activities', the generic wording of this provision might be interpreted as allowing for push-back operations to be carried out by Italian vessels at the request of the Joint Operational Command. However, it does not seem possible to consider this highly generic provision as the actual legal basis for the implementation of push-backs.

[27] Paoletti (2011a, 163-164) interpreted the Libyan decision to accept both the joint patrolling of its territorial waters and the return of migrant boats to its shores as a relevant policy shift and explained it as an outcome of the deal finally reached with the 2008 Friendship Treaty, 'consistent with the overall give-and-take dynamics' characterising Italian-Libyan relations.

[28] These issues are further discussed under section 7.2.

readmitted to Libya during the first push-back operation carried out on 6 May 2016[29].

As further analysed in section 7.2, in its landmark judgement on the *Hirsi case*, the Grand Chamber of the Court found that, in forcibly returning the applicants to Libya without examining their case, Italy exposed them to a risk of ill-treatment in Libya and to a risk of further repatriation to Somalia or Eritrea, in breach of the *non-refoulement* principle (double violation of Article 3 ECHR). The Court also found that, due to the modalities of its implementation, their return amounted to a collective expulsion (violation of Article 4 of Protocol No. 4 ECHR). Furthermore, the applicants were deprived of any remedy which would have enabled them to challenge their expulsion before a competent authority and to have their complaint duly examined before their removal was enforced (violation of Article 13 in conjunction with Article 3 and Article 4 of Protocol No.4 ECHR).

In November 2009 Italy suddenly interrupted push-back operations, due to unspecified reasons (allegedly linked to the *Hirsi case*). However, according to some scholars, in reality 'interdictions and joint push-backs of boat migrants continued even in 2010 in different forms' (Giuffré 2013b, 698). While in 2009 interdiction operations were carried out by Italian officials using Italian vessels, in 2010 Italy delegated to Libyan vessels the task of intercepting migrant boats and returning them to Libyan ports. Still, according to Tondini (2010, 5), these operations were '*de facto* coordinated by, or at least conducted with the support of, Italian […] authorities, which first detect[ed] the boats to be intercepted and then request[ed] the assistance of their Libyan partners'.

This policy shift was most probably made 'official' by a further Additional Operational Protocol signed on 7 December 2010, whose text was neither scrutinised by the Parliament nor made public. Information on the content of this informal agreement may be traced in a parliamentary hearing held on 1 March 2011 with *Guardia di Finanza* officials, who were called to report on mechanisms of border surveillance[30]. On

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[29] ECtHR, *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, Judgement of the Grand Chamber, 23.02.2012.

[30] The text of the parliamentary hearing is available at the following link: http://www.camera.it/_dati/leg16/lavori/stenbic/30/2011/0301/s020.htm (accessed on 10 December

that occasion, the speaker explained that the modalities of cooperation established by the 2007 and 2009 Protocols had been substantially reviewed on 7 December 2010; the revised terms of Italian-Libyan cooperation did not include any more joint patrolling operations but rather a more structural collaboration, focused on training activities and the provision of technical assistance and equipment (Italian Parliament 2011, 8). After having detailed all the initiatives foreseen by the 2010 Protocol, the speaker explained that due to the events that were taking place in Libya in early 2011, such activities had been suspended and the presence of Italian officials in the country had been radically reduced.

In fact, the events that occurred in 2011 – the February uprisings against the Gaddafi government, the civil war that followed and the military intervention of a coalition of Western countries against the Gaddafi government, which ended in October after the death of the Colonel – caused the suspension of the agreements signed between the two countries (Giuffré 2013b, 695; Perrin 2012) and the interruption of the operational cooperation on migration management and readmission that they had established in the previous years. However, Italy aimed to preserve its good relations with Libya and to secure the re-establishment of cooperation as soon as the general situation in the country would have allowed for it (Paoletti 2012).

Therefore, in April 2011 Italy recognised Libya's National Transitional Council (NTC) and only two months later the two governments signed a new informal migration cooperation agreement. In the Memorandum of Understanding of 17 June 2011 they confirmed their commitment to a joint management of migration, based on the application of the 2000 Agreement and of the following Operational Protocols signed in 2007, 2009 and 2010. The 2011 MoU recalled the commitments previously undertaken by the parties using the same wording of Article 1(d) of the 2000 Agreement[31]; in addition it specified that cooperation in the fight against irregular migration would include also the readmission of irregular migrants.

2016).

[31] The parties committed to exchange information on irregular migration flows, the criminal organisations that favour them, their *modus operandi* and itineraries, and on organisations specialised in the falsification of documents and passports; moreover they committed to reciprocal assistance and cooperation in the fight against irregular migration, including the readmission of irregular migrants.

A second and more detailed agreement, the 'Oral Process of the Meeting between the Italian Minister of Interior and the Libyan Minister of Interior', was signed on 3 April 2012. This agreement was preceded by an official visit to Libya by the new Italian Prime Minister Mario Monti, which took place on 21 January 2012; on that occasion the Italian Prime Minister and the Prime Minister of the NTC signed the 'Declaration of Tripoli', which reportedly included the main provisions of the 2008 Friendship Treaty[32] (FIDH 2012, 35-36).

The 2012 Oral Process entails specific measures aimed at re-establishing a well-functioning bilateral cooperation in the field of migration control. The agreement counts six sections, which provide for, respectively: 1) the organisation of training programmes for Libyan police forces and the establishment of a centre for the detection of false documents and a centre for nautical training; 2) the reactivation of existing migrant reception (in fact detention) centres with the support of the EU, and the building of a new reception centre in Kufra; 3) the improvement of border control activities at the Libyan land and sea borders, in order to contrast the departure of irregular migrants from the Libyan territory[33]; 4) the facilitation of migrants' voluntary return to their countries of origin in cooperation with the IOM, and the strengthening of Italian-Libyan cooperation on readmission; 5) the creation of a system of data management for civil registration; 6) the establishment of follow-up mechanisms to ensure the proper implementation of the agreement, e.g. 'Friendship offices' jointly staffed by police personnel from both countries to be opened both in Libya and in Italy, and a 'Joint Security Committee'.

The text of the 2012 Oral Process was neither discussed nor ratified by the Parliament and remained secret until it was published by the Italian newspaper *La Stampa* in June 2012 (FIDH 2012, 36). A peculiarity of this document is that it is the first agreement signed by Italy and Libya to include a 'human rights clause'. Indeed, the third section entails a general commitment on the part of the two countries to respect

[32] The Friendship Treaty had been reactivated in December 2011 (La Repubblica, 15 December 2011).

[33] To this purpose Italy committed to provide technical assistance and equipment to Libya, and both parties agreed to exchange operational information and coordinate maritime operations in their respective areas of competence and in international waters, as provided for by existing bilateral agreements and in accordance with the international law of the sea.

human rights when conducting anti-immigration activities and during the permanence of irregular migrants in reception/detention centres in Libya. However, considering the general security situation in Libya at the time when this agreement was signed – a situation where 'the country is wracked by chaos and violence with widespread xenophobia and the authorities cannot even protect their own population' (Perrin 2012) – this human rights clause appears to be a mere *façade* provision, hardly applicable in practice.

As argued by Paoletti (2012), the Italian policy towards Libya (as well as towards Tunisia and Egypt) following the 2011 Arab Spring has been characterised by a substantial continuity with the previous period, whereby domestic security-oriented interests linked to migration control have been prioritised over a more comprehensive human rights policy framework (despite a declared support to the democratisation process). As observed by the International Federation for Human Rights: 'it is very worrying that, although the European political establishment is well aware of the situation of insecurity faced by migrants and asylum seekers in Libya and the serious violations of their human rights, the objective of controlling migration continues to outweigh all other considerations' (FIDH 2012, 34).

The actual implementation of the initiatives set out by the 2012 Oral Process and the re-establishment of migration cooperation between Italy and Libya were hampered by the outbreak of a new civil war in 2014 between two rival governments based in Tobruk and Tripoli. The second Libyan civil war – which is still ongoing, despite an attempt of pacification through the creation of a Government of National Accord in 2016 – caused a further deterioration of the security situation in the country. In particular, the lack of a central authority produced a condition of deep political instability and substantial anarchy, with negative effects on Libya's capacity to exert control over migration flows. In fact, migrant arrivals across the Central Mediterranean route have increased exponentially in the period 2014-2016[34] (although this increase is

[34] Official figures from the Italian Ministry of Interior and the UNHCR show that, while during the 2011 Arab Spring migrant arrivals to the Italian shores had increased to 62,692, in 2012 they went down to 13,267. In 2013 the number of arrivals by sea raised again to 42,925, but it was the year 2014 that recorded the unprecedented amount of 170,100 arrivals, mainly from Libya. This trend remained substantially stable in 2015 (153,842 arrivals) and 2016 (175,244 arrivals until 11 December 2016). See:

linked to different factors, not all of which can be ascribed to Libya's lacking cooperation).

To conclude, from this account it clearly emerges that informality and secrecy have characterised the development of Italian-Libyan bilateral cooperation in the area of migration control and readmission since the late 1990s and until the present day (Klepp 2010b, 78-82). The widespread use of a wide array of informal agreements has allowed for parliamentary scrutiny to be circumvented and for certain deals to remain secret or to be published only years later – a practice that has resulted in a total lack of transparency and accountability, as well as in the faulty adherence to (if not the violation of) international human rights norms (as analysed in detail in Chapter 7). In fact, some of the most controversial practices carried out as part of Italian-Libyan migration cooperation, i.e. the return flights between 2004 and 2006 and the push-backs in 2009, were the result of informal (in some cases oral and in part even secret) operational agreements, embedded into a broader bilateral cooperation framework (Paoletti and Pastore 2010, 28).

As concerns the effectiveness of this kind of cooperation, the Italian government has measured it in terms of numbers of migrant arrivals to the Italian shores. From this standpoint, as argued also by Paoletti and Pastore, 'overall, bilateral and largely informal cooperation in the field of migration has been, at least in the short term, a satisfactory match' (2010, 14). In particular, unauthorised arrivals to the Italian shores, which had steadily increased between 2000 and 2006, have sharply decreased in 2009-2010 (Paoletti 2011a, 176). According to the Ministry of Interior, the year 2009 (i.e. the year of push-backs) witnessed a 90% drop in migrant arrivals from Libya[35] and the downward trend continued in 2010 (Tondini 2010, 6; Paoletti and Pastore 2010, 4). Although it would be too simplistic to entirely attribute this decrease in arrivals to Italian-Libyan cooperation (or more specifically to Italian push-back operations),

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http://www.interno.gov.it/sites/default/files/dati_statistici_marzo_2015.pdf (figures for the period 2011-2014); http://www.interno.gov.it/sites/default/files/trend_sbrachi_migranti_2013-2014-2015.pdf (figures for the period 2013-2015); http://data.unhcr.org/mediterranean/country.php?id=105 (figures for the year 2016). Accessed on 12 December 2016.

[35] Between 5 May and 31 December 2009 only 3,185 migrants arrived from Libya, compared to 31,281 over the same period in 2008 (Tondini 2010, 6; Paoletti and Pastore 2010, 4).

reportedly, 'as of March 2010, collaboration on migration seems to have achieved one of its primary objectives of containing the migration pressure on Italy and Libya' (Paoletti 2011a, 179) – a situation that has radically changed, first in 2011 and then since 2014[36].

In 2009-2010, official figures showing a sizeable reduction in the migrant flow were sufficient for Italian authorities to claim the success of bilateral cooperation with Libya. However, this merely quantitative evaluation did not consider neither the constitutionality of the government practice of signing informal agreements in the area of migration (avoiding parliamentary scrutiny and keeping their text secret), nor the potential human rights issues arising from the practical implementation of this kind of agreements.

5.3. The Western Mediterranean: cooperation on readmission between Spain and Morocco

Cooperation on readmission between Spain and Morocco has been established both through formal and informal agreements. However, without denying the relevant role played by the latter (especially by an informal agreement signed in December 2003), in a long term perspective both kinds of instruments seem to have exercised a relatively limited impact on the operationalisation of cooperation on readmission between the two countries. In fact, the actual implementation of 'effective returns' from Spain to Morocco appears to depend much more, on the one hand, on the technical and administrative arrangements established between the competent authorities (e.g. identification and re-documentation procedures carried out at the consular level) and, on the other hand, on daily operational practices as they are performed by police and security forces at the borders; in this respect, the case of Ceuta and Melilla (the two Spanish enclaves on the northern Moroccan coast) represents a prime example.

Spain and Morocco took the first steps in view of establishing a bilateral

[36] As mentioned in footnote 34 (above in this section), the year 2011 (i.e. the year of the Arab Spring) and the years 2014-2016 recorded two new peaks in arrivals to the Italian shores.

cooperation on readmission already in the early 1990s[37]. In February 1992 the two countries signed a formal readmission agreement, as part of a process of reconciliation and *rapprochement*, which resulted in the conclusion of a Treaty of Friendship, Good-neighbourliness and Cooperation on 4 July 1991[38]. This Treaty created a broad framework for establishing and deepening bilateral cooperation relations between the two countries in different fields.

The document is opened by a Preamble, which recalls the long-standing historical and cultural ties connecting Morocco and Spain, and reaffirms their commitment to promote mutual understanding, dialogue and international cooperation as a guarantee of peace, stability and security in the Western Mediterranean region. After stating the general principles that inform the relations between the two countries, including the respect for human rights and fundamental freedoms, the Treaty details the parties' commitments to collaborate on economic and financial issues, in the areas of defence, development, culture, and in the legal and consular field. In this text, migration is not mentioned *per se* as an area for enhanced bilateral cooperation; however, as said above, shortly after the signature of this framework agreement, Morocco and Spain concluded a specific 'Agreement concerning the Movement of People, the Transit and the Readmission of Foreigners who Have Entered Illegally'.

The 1992 Readmission Agreement, signed on 13 February 1992 by the Spanish and Moroccan Ministers of Interior, focused in particular on the readmission of third country nationals who have entered illegally the territory of one of the parties coming from the territory of the other party, rather than on the readmission of own nationals (Art. 1, 1992 RA). Reportedly, Morocco accepted to sign this agreement for a number

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[37] When Spain joined the Schengen Convention in 1991, it had to reinforce controls at its external borders. As a first step, in May 1991 it introduced visa requirements for Moroccan citizens; this had a remarkable impact on Spanish-Moroccan border dynamics, discouraging circular mobility and leading to the emergence of irregular migration from Morocco to Spain. Carrera et al. (2016, 4) argue that this and the following developments (in terms of securitisation of the Spanish-Moroccan border, externalisation of migration control to Morocco and enhanced cooperation on readmission) were partly the result of Spain's participation in the EU integration process and were partly financed by the EU, thus emphasising the role of the EU in the development of migration cooperation between the two countries.

[38] This Treaty is a formal international agreement. It was signed by the Prime Ministers of Morocco and Spain and entered into force on 28 January 1993, after the parties informed each other of the completion of the required internal procedures (in accordance with Article 14 of the Treaty itself). It was registered by Spain with the UN Secretariat on 24 March 1993.

of reasons. Firstly, as mentioned above, the RA was part of a more general *rapprochement* process; being embedded into a broader cooperation framework, which included other policy areas, there were higher and diversified interests at stake. Secondly, in the early 1990s the migration of Sub-Saharan nationals transiting through Morocco towards Spain and the EU was not yet perceived as a significant phenomenon by Moroccan authorities (Cassarino 2007, 183-184). Thirdly, Morocco's acceptance to conclude this agreement was motivated also by the ambition to obtain a special status in its political and economic relations with Spain and the EU (Mrabet 2003, 380).

The 1992 RA established procedures for the readmission of third country nationals (Arts. 1-5) as well as for their transit for the purpose of expulsion (Arts. 6-8). With regards to the former, the text specifies that the readmitted migrants shall be sent back to their countries of origin as soon as possible (Art. 5, 1992 RA); as concerns the latter, interestingly, the parties may refuse transit for the purpose of expulsion when the persons concerned are nationals of countries members of the Arab Maghreb Union[39] (Art. 8(e), 1992 RA). The text provides also for the creation of a Spanish-Moroccan Joint Committee responsible for monitoring the implementation of the agreement and resolving contentious cases that may arise from it; the Committee is also tasked with the organisation of 'mutual assistance in the development of border control measures, especially with regards to equipment and training of border control personnel' (Art. 11, 1992 RA). Finally, the 1992 RA does not include neither a human rights clause, nor any other reference to the substantial and procedural safeguards that should be granted to migrants who are subject to a readmission procedure[40].

On 25 April 1992, shortly after its signature, the Spain-Moroccan readmission agreement was published on the Spanish Official Journal. The agreement has been provisionally applied since the day of its signature (as established by Article 16 of the agreement itself); however, it entered into force officially only two decades later, on 21 October 2012 – 'thirty days after both Parties have notified each other of the fulfilment

[39] The Arab Maghreb Union (*Union du Maghreb Arabe* – UMA) consists of: Algeria, Libya, Mauritania, Morocco and Tunisia. This provision was most probably included as a safeguard for Morocco, in order to protect its relations with neighbouring countries.

[40] For instance, the exceptions to the obligation of readmission mentioned under Article 3 of the agreement do not include the principle of *non-refoulement* (Amnesty International 2015a, 21).

of constitutional requirements for its ratification' (Art. 16, 1992 RA). Nonetheless, the fact that the agreement was immediately applicable, independently of its ratification, did not ensure its prompt implementation.

On the contrary, the 1992 RA has never been fully implemented. This was partly due to the Moroccan authorities' reluctance to accept the readmission of third country nationals from Sub-Saharan Africa, based on the argument that their transit through the territory of Morocco could not be incontrovertibly proven; indeed, Moroccan authorities have often claimed that Sub-Saharan migrants in fact transited through Algeria, not Morocco, before arriving in Spain (Cassarino 2007, 183). In addition, Morocco's reluctance to cooperate on readmission was also due to the acute tensions that characterised diplomatic relations between the two countries under the governments of José María Aznar (1996-2004), in particular in the early 2000s[41]. It was only towards the end of the second Aznar government that efforts were made to resume dialogue and normalise bilateral relations. The succeeding government, led by José Luis Rodríguez Zapatero, further promoted the resumption of good relationships with Morocco, starting precisely from the reinforcement of bilateral cooperation on migration (Paoletti 2011a, 46-47; Coslovi 2007, 3).

On 4 December 2003 the two countries signed an informal agreement (or a MoU) where they committed to cooperate in the fight against irregular migration and migrant trafficking. To this purpose, the agreement provided for sea patrolling operations to be jointly carried out by Spanish and Moroccan authorities in the Strait of Gibraltar and in the area surrounding the Canary Islands. In return for its cooperation, Morocco was granted the considerable amount of 390 million dollars in aid (de Haas 2005); this was expected to stimulate Spanish foreign direct investments in Morocco and the delocalisation of Spanish firms in various sectors (Cassarino 2005, 229). Reportedly, as part of this agreement, along with financial compensation Morocco received 'other, unrevealed favours' (Briscoe 2004).

The signature of this MoU and the more general improvement of relations

[41] The deterioration of Spanish-Moroccan relations culminated in the July 2002 '*Perejil* island crisis', a dispute over a small uninhabited rocky islet close to the Spanish enclave of Ceuta (Ferrer et al. 2006; Paoletti 2011a, 47).

between the two countries led to the actual intensification of bilateral cooperation on migration control and readmission. Arguably, the pressures exerted by the Spanish government, which between 2000 and 2004 was faced with a constant increase in migrant arrivals from Morocco, pushed Morocco to adopt more restrictive migration policies (e.g. Law 02-03 of 11 November 2003 on the entry and residence of foreigners) and to adapt its legal and institutional framework to the EU *acquis* (de Haas 2005). Spanish pressures for increased cooperation in the area of irregular migration also led to the harshening of border control practices carried out by Moroccan police forces (Statewatch 2004; Briscoe 2004; Baldwin-Edwards 2004). As concerns readmission, Moroccan authorities were already cooperating with the Spanish ones in readmitting migrants from Ceuta and Melilla; but starting from January 2004, as a consequence of the signature of the MoU, Morocco began to accept also the readmission of migrants (both Moroccan nationals and non-nationals) who were intercepted at sea or had reached the Spanish shores, seemingly in application of the 1992 RA (Schuster 2005, 13; Baldwin-Edwards 2004; de Haas 2005).

With regards to border control, in the early 2000s Spain began to invest significant resources in the development of technologies and infrastructures for border surveillance. In particular, over the years Spain has involved Morocco in the implementation and gradual expansion of a sophisticated radar system for the surveillance of its maritime borders (called SIVE - Integrated System of External Surveillance). In addition, starting from February 2004 the two countries began to conduct joint naval patrolling operations, as provided for by the 2003 MoU (Schuster 2005, 13; Baldwin-Edwards 2004), and they intensified joint police training courses focused on intelligence sharing and (maritime) border surveillance (Paoletti 2011a, 47). Furthermore, between 2003 and 2005 Morocco carried out numerous arrests and deportations of irregular migrants from its own territory, claiming it prevented the unauthorised migration to Spain of a significant amount of both Moroccan nationals and third country nationals (Briscoe 2004; Baldwin-Edwards 2004; de Haas 2005).

Partly as a result of this intense cooperation, starting from 2005 migration flows

from Morocco to Spain have been gradually but significantly reduced[42] (Coslovi 2007, 3-7). This may suggest that the operational cooperation established between Morocco and Spain has proved effective, although a number of different factors have certainly contributed to determine a reduction in migrant arrivals along the Western Mediterranean route (Coslovi 2007, 3-7). However, if on the one hand Morocco has proved extremely collaborative and effective in pursuing tasks related to border control and the fight against irregular migration, on the other hand it did not prove equally keen to cooperate in the area of readmission (Paoletti 2011a, 48). As discussed also in section 3.5.1 above, Moroccan cooperation in the identification and re-documentation of own nationals to be readmitted has been rather erratic[43]. Moreover, Morocco has proved reluctant to massively readmit and subsequently expel Sub-Saharan migrants, *inter alia* because this could harm its strategic political relations in the Western African region and with Sub-Saharan African countries (de Haas 2014).

As argued by Paoletti (2011a, 48-50) and Cassarino (2005) and mentioned in other sections of this work, Morocco's partial compliance with the Spanish and European agenda is linked to the 'complex give-and-take framework' characterising the overall negotiations between the parties, which aggregate a variety of issues (including migration, fisheries agreements, oil resources, development aid, trade, investments, the dispute over Western Sahara, etc.). In this context, Moroccan authorities have made clear both to Spain and to the EU that their active involvement in the fight against irregular migration and their cooperation on readmission is contingent on Spanish and

[42] In 2003 migrant arrivals to Spain were 19,176, in 2004 they were 15,671 and in 2005 11,781. In 2005, it was in particular the number of migrants arriving to the Canary Islands that dropped by half compared to 2004 (from 8,426 to 4,715), while arrivals to the rest of Spain remained stable, around 7,000 (Sources: Coslovi 2007, Tab. 2, 4; De Bruycker et al. 2013, Tab. A1.4, 18). Therefore, Spanish-Moroccan cooperation had an immediate effect in reducing the flow from the Moroccan Western coast to the Canary Islands. Interestingly, in 2006 Spain recorded a peak of arrivals to the Canary Islands (31,678 migrants) but the main point of departure was no more Morocco but Mauritania and Senegal. Indeed, while until 2005 the majority of migrants landing on the Canary Islands were Moroccans, starting from 2006 they were mainly nationals of Sub-Saharan African countries (Coslovi 2007, Tab. 2, 4). Therefore, reinforced cooperation between Spain and Morocco produced a shift southwards of the Western African route, until Spain managed to strengthen cooperation on migration control and readmission also with Mauritania and Senegal. This contributed to diminish the number of arrivals to the Canary Islands to 12,478 in 2007, 9,181 in 2008 and 2,246 in 2009. Since 2010 arrivals to the Canary Islands amount to less than few hundreds per year (De Bruycker et al. 2013, Tab. A1.4, 18).

[43] This holds true for readmission of Moroccan nationals not only from Spain but from all EU Member States.

European support and concessions in other areas.

Starting from 2010, migration along the Western Mediterranean route has radically diminished (De Bruycker et al. 2013, Tab. A1.4, 18) and has remained low also in recent years, especially if compared to the peaks observed along the Central and Eastern Mediterranean routes (Manrique Gil et al. 2014, 6-7; Frontex 2015, 19 and 24; Frontex 2016, 16 and 21). This outcome has been unanimously attributed (at least in part) to improved high-tech surveillance at the Spanish-Moroccan borders[44] and to enhanced cooperation between Spain and Morocco. Indeed, cooperation between the two countries on border surveillance and migration management, partly funded by the EU, is considered to be overall 'effective' and is often seen as a model to be promoted across other European external borders (The Economist, 17 October 2015). It is thanks to this achievement that Morocco has acquired a significant bargaining power *vis-à-vis* its European counterparts[45].

In analysing Spanish-Moroccan cooperation on readmission and border control, it is essential to focus on the peculiar case of Ceuta and Melilla – the two Spanish enclaves in Moroccan territory, which represent the land borders between the two countries. Since the early 1990s the enclaves have been increasingly fenced off, by means of physical fences, high-tech surveillance and operational cooperation between Spanish and Moroccan police authorities. In the early 2000s, the enclaves have triggered significant migration flows[46]. The situation escalated in autumn 2005, when large scale and coordinated attempts to climb over the tall barbed-wire fences of the enclaves were conducted by groups of hundreds of migrants (Amnesty International 2015a, 16). The reaction of Spanish and Moroccan authorities resulted in the death of between eleven and thirteen people and several more being seriously injured, or subsequently ill-treated.

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[44] Over the years, the SIVE has been integrated with other systems and networks of border surveillance involving the border authorities of several countries across the Mediterranean and West African coasts (e.g. the SEAHORSE Network) as well as the EU external border agency Frontex (e.g. EUROSUR).

[45] As noted by Paoletti (2011a, 49) it was precisely the Spanish securitised approach to migration and the externalisation of migration control from Spain to Morocco that have actually strengthened Morocco's leverage *vis-à-vis* Spain and the EU, also in the economic and political fields.

[46] Irregular border crossings recorded in Ceuta and Melilla in the period between 2001 and 2005 ranged between 5,000 and 5,500. Source: Comisión Española De Ayuda Al Refugiado (CEAR), 'Llegadas irregulares a Ceuta y Melilla', https://www.cear.es/que-hacemos/cifras-y-estadisticas/ (accessed on 16 December 2016).

These episodes had a wide political echo across Europe, leading to a partial rethinking of the EU external migration policy towards its southern neighbourhood, and the launch of the GAM[47] (see section 4.1 above).

In the following years irregular border crossings in Ceuta and Melilla kept decreasing, also due to the reinforcement of border fences and surveillance measures (Amnesty International 2015a, 16-19). But in the summer of 2012, for the first time since 2005, numerous groups of migrants attempted to cross the fences of Melilla (MSF 2013, 14); starting from that moment, a new rise in collective attempts to jump the border fences of the enclaves has been observed[48]. During the last three years, the perpetration of excessively violent or unlawful practices by both Moroccan police forces and the Spanish *Guardia Civil* at the land and sea borders between Morocco and the territories of Ceuta and Melilla has been repeatedly documented by NGOs (MSF 2013, 14-18; ECRE 2014b; HRW 2014a, 38-46; 2014b; 2014c; Amnesty International 2015a, 30-36 and 40-48; Migreurop et al. 2015).

With regards in particular to cooperation on readmission, a special practice is carried out in Ceuta and Melilla, reportedly since 2001 (El Diario, 19 November 2013), consisting of the direct expulsion of irregular migrants from Spain to Morocco immediately after their interception at the borders. As consistently reported by NGOs, on several occasions Spanish authorities have handed over intercepted migrants directly to Moroccan security forces, without identifying them, without considering their personal circumstances, and without offering them the possibility to apply for asylum or to challenge their removal in front of a competent authority, thus in violation of

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[47] In October 2005, the European Commission carried out a Technical Mission to Morocco on Illegal Immigration, visiting Ceuta and Melilla. The Mission Report suggested the EU response to the mounting migration pressure from Africa should consist of 'intensified cooperation with and assistance to Morocco', as well as 'the urgent development of a comprehensive migration policy for the main countries of origin and transit in Sub-Saharan Africa' (European Commission 2005d, 3).

[48] In 2013 the number of irregular border crossings in Ceuta and Melilla increased from 2,800 (in 2012) to 4,200 and in 2014 it almost doubled, reaching the unprecedented number of 7,485 arrivals. Source: Comisión Española De Ayuda Al Refugiado (CEAR), 'Llegadas irregulares a Ceuta y Melilla', https://www.cear.es/que-hacemos/cifras-y-estadisticas/ (accessed on 16 December 2016). The upward trend continued in 2015. This surge in arrivals is mainly due to a new phenomenon linked to the Syrian refugee crisis: an increasing number of Syrian refugees began to irregularly enter the Spanish enclaves (especially Melilla), mainly using false documents and passing through the official border crossing points (Amnesty International 2015a, 24-25; Frontex 2016, 21).

international and European human rights and refugee law (HRW 2014a, 42-46; Amnesty International 2015a, 30-36; Migreurop et al. 2015). This type of expulsions are called *devoluciones en caliente* and they amount to push-back operations, even if they usually take place at land rather than at sea.

Starting from 2013, the practice of *devoluciones en caliente* has been increasingly criticised by the above-mentioned NGOs (Amnesty International, ECRE, HRW, Migreurop, GADEM, CEAR, etc.) as well as by the Council of Europe Commissioner for Human Rights (2015a; 2015b; 2016b) for entailing the risk of serious violations of the fundamental rights of migrants and asylum seekers[49]. Allegedly, these summary removals deprive migrants from their right to seek asylum and put them at risk of being subject to *refoulement* and to further violence and abuse by Moroccan authorities, potentially amounting to unhuman or degrading treatment (as proved by numerous first-hand testimonies collected by NGOs)[50]. *Devoluciones en caliente* have been criticised also for being carried out in a selective way, as they target almost exclusively Sub-Saharan migrants. This practice is conducted in close cooperation by Spanish and Moroccan authorities; however, although its implementation necessarily requires the consent and participation of Moroccan police forces, the responsibility for such push-back operations is on Spain. Therefore, Spain may be considered directly responsible for any violence migrants face when Spanish authorities summarily remove them to Morocco (Amnesty International 2015a, 46).

Having briefly highlighted the substantive criticisms raised with regards to the conformity of this practice with international and European law, for the purpose of this study it seems interesting to consider whether *devoluciones en caliente* have a legal basis in the existing framework of bilateral cooperation on readmission between Spain and Morocco. As mentioned above, the 1992 readmission agreement (which has long remained unapplied) was eventually ratified in October 2012. Since its formal entry into force coincided with a new surge in irregular border crossings into the Spanish enclaves

[49] This issue is further analysed under section 7.2.

[50] When they were handed over to Moroccan authorities, intercepted migrants also faced the risk of being deported to the desert border with Algeria and collectively expelled in the absence of any formal procedure. Reportedly, this practice was stopped in September 2013, after the announcement of Morocco's new migration and asylum policy (Amnesty International 2015a, 26-27).

and a consequent intensification of push-back operations, one could infer that the 1992 formal RA served as a legal basis for *devoluciones en caliente*[51]. However, this does not seem to be the case: even though the 1992 RA fails to include a number of substantial and procedural guarantees and any reference to the fundamental rights of migrants involved in a readmission procedure, it nonetheless establishes the rules of a formal readmission procedure; such rules are not followed at all in the practice of *devoluciones en caliente* (ECRE, 22 November 2012; Migreurop et al. 2015, 20).

In fact, based on interviews with representatives of the Spanish police forces in the enclaves, Amnesty International reports that, as a rule, the Moroccan government does not accept the readmission of non-nationals from Ceuta and Melilla under the 1992 readmission agreement or through other formal channels, whereas it largely accept their summary expulsion through informal practices[52] (Amnesty International 2015a, 37-38). Furthermore, with regards to the legal basis of operations carried out at the enclaves' borders in cooperation with Moroccan authorities, representatives from the Spanish Ministry of Interior and *Guardia Civil* told to Amnesty International that such actions are generally carried out on the basis of operational protocols, which – given their technical and operational nature – do not need to be made public. Spanish authorities admitted that meetings are regularly held with their Moroccan counterparts, 'where they agree on operational cooperation concerning border issues and sign documents to that effect' (Amnesty International 2015a, 44-45); however, the content of these informal arrangements is considered confidential.

Repeated calls by NGOs and the Council of Europe Commissioner for Human Rights for the Spanish government to stop *devoluciones en caliente* have so far remained unheard. In contrast, after having long denied summary removals, Spain has recently overturned its strategy and decided to provide this practice with a stronger legal

[51] Indeed, Spanish *Guardia Civil* officers operating in Ceuta and Melilla were allegedly told that the 1992 RA provides a legal basis for their actions (El País, 18 November 2013).

[52] The reason for accepting summary removals while rejecting readmissions under formal procedures from the enclaves would be allegedly linked to the historic dispute between Morocco and Spain over Ceuta and Melilla – which, according to Morocco, are illegitimately occupied by Spain (Amnesty International 2015a, 37-38).

basis, by fully including it into its national legislation on migration (HRW 2014b)[53]. In October 2014 the Spanish government proposed to amend the Spanish Immigration Law (Organic Law 4/2000) in order to introduce a special regime for expulsions at the borders in Ceuta and Melilla (ECRE 2014c); the amendment was approved by the Spanish Parliament in March 2015. The new provision stipulates that 'foreigners detected on the boundary line of the territorial demarcation of Ceuta and Melilla, attempting to overcome the border containment elements in order to irregularly cross the border, may be rejected in order to prevent their illegal entry into Spain' (transl. by Amnesty International 2015a, 38), thus codifying into law a new concept of 'rejection at the border'.

Although the amendment includes a paragraph stating that 'the rejection will be carried out in compliance with international human rights and international protection norms', it fails to describe how 'rejections at the border' would be carried out and it does not mention the substantive and procedural safeguards that normally apply to return procedures (e.g. prohibition of *refoulement*, right to apply for asylum, access to interpretation and legal aid, right to an effective remedy, etc.) (Amnesty International 2015a, 38-40; ECRE 2015). For this reason, several NGOs and international organisations (*inter alia*, the Council of Europe Commissioner for Human Rights 2015a; 2016b) have recommended that Spain reviews this new legislation in accordance with international and European human rights and refugee law.

Finally, the practice of *devoluciones en caliente* gave rise to two applications against Spain currently pending before the ECtHR (submitted in February 2015 and partly communicated to the Spanish government in July 2015)[54]. The two applicants in the joint cases *N.D. and N.T. v. Spain* reported they were part of a group of Sub-Saharan migrants who managed to climb over the fences of Melilla on 13 August 2014 and were

[53] In its 2015 report 'Fear and Fences', Amnesty International denounced that the practice is nowadays carried out 'in plain sight' and argued that what distinguishes Spanish push-backs from push-backs carried out at other EU external borders 'is the fact that the Spanish Government is not attempting to hide them, but instead tries to convince the world that they are lawful and are not in breach of Spain's national law or international obligations' (2015a, 30-31).

[54] ECtHR, *N.D. v. Spain and N.T. v. Spain*, Applications No. 8675/15 and No. 8697/15, Decision, 13.07.2015. Both the Council of Europe Commissioner for Human Rights (2015b) and a group of NGOs (The AIRE Centre et al. 2015) have submitted third party interventions in November 2015.

immediately handed over to Moroccan authorities and summarily returned to Morocco. The applicants denounced the violence suffered (and witnessed) on the part of both Spanish and Moroccan authorities, the fact that no identification procedure and no assessment of their personal circumstances were carried out before their (collective) expulsion took place, and the impossibility to challenge their return decision before a competent authority[55].

To conclude, from this account it clearly emerges that in the Spanish-Moroccan case the operationalisation of cooperation on migration management, border control and readmission has been largely prioritised. Apparently, this has contributed to the effectiveness of Spanish-Moroccan migration cooperation in terms of reduction of migrations flows, so that nowadays bilateral cooperation between the two countries is often described as a model to be promoted across Europe (The Economist, 17 October 2015). The establishment of a well-functioning operational cooperation between the authorities of Spain and Morocco, mainly through informal agreements (such as the 2003 MoU) and technical-operational arrangements (as those negotiated and agreed upon on a regular basis by the Spanish and Moroccan police forces in Ceuta and Melilla) has been key to reaching the objective of effectively controlling the borders and implementing removals of unauthorised migrants. In this context, the formal readmission agreement signed in 1992 and entered into force in 2012 appears to have only a marginal role: it seems to provide a *façade* legal framework of reference, but in practice readmissions to Morocco rarely take place under the 1992 RA. The predominant informality of cooperation on readmission between Spain and Morocco and its focus on operational aspects, which are kept secret, result in a lack of transparency and accountability, and may lead to potential human rights violations.

[55] A similar application has been submitted to the ECtHR in April 2015; the case has been communicated to the Spanish government in December 2015. ECtHR, *Doumbe Nnabuchi v. Spain*, Application No. 19420/15, Communicated Case, 14.12.2015.

5.4. The Eastern Mediterranean: cooperation on readmission between Greece and Turkey

Similarly to the case of Spain and Morocco, cooperation on readmission between Greece and Turkey has been established both through formal and informal agreements. As further discussed below, the latter (especially the 2010 Joint Statements for Cooperation, but partly also the recent EU-Turkey Agreement of 18 March 2016) have been signed with the purpose of increasing the limited effectiveness of the former (the 2001 Readmission Protocol). However, the impact of informal agreements may turn out to be likewise limited, lacking a real political willingness to cooperate – which has long been the case of Turkey in its relations with Greece (and with the EU, as analysed in section 3.5.2) in the area of readmission. As in the case of Spain and Morocco, the actual implementation of removals of irregular migrants from Greece to Turkey seems to depend, to a large extent, on the technical and administrative arrangements established between the competent authorities, as well as on daily operational practices carried out at the maritime and land borders by coast guards and police forces of both countries.

A further similarity with the Spanish-Moroccan case concerns the context where cooperation on readmission between Greece and Turkey has been first established, that is the context of an easing of diplomatic tensions. If throughout the twentieth century the history of Greek-Turkish bilateral relations was characterised by conflicts, religious-ethnic divisions and tensions over territorial and sovereignty issues[56], in 1999 a so-called 'earthquake diplomacy' took hold (Baldwin-Edwards 2006); starting from that moment the two countries engaged in a policy of dialogue, notwithstanding the persistence of tensions and occasional disputes (e.g. over the Cyprus issue and over Aegean borders). Moreover, in December 1999 Turkey was officially recognised as a candidate to the EU membership. In view of fulfilling the accession criteria, in the early

[56] Tensions between the two countries date back to the First World War, the subsequent Greek-Turkish War (1919-1922) and the 'Exchange of Populations' which followed the Treaty of Lausanne of 30 January 1923. This exchange involved the expulsion of Anatolian Orthodox Greeks to Greece and Greek and Turkish Muslims to Turkey. This is considered to be one of the most relevant events in the process of nation-building of both countries (Baldwin-Edwards 2006; Wissink and Ulusoy 2016, 129).

2000s Turkey started to harmonise its legislation to the EU *acquis* and to reform its migration policy and border control measures accordingly to the Schengen standards (Kirişci 2003; İçduygu 2011; Paoletti 2011a, 52-53).

Therefore, the early 2000s were characterised by two simultaneous processes: a *rapprochement* in Greek-Turkish bilateral relations, and the gradual 'Europeanisation' of Turkish legislation and policies in the JHA area, under the EU's pressure to strengthen control over the increasing irregular migration flows transiting through Turkey towards Europe[57]. The combination of these processes resulted in Greece and Turkey intensifying dialogue and starting to adopt instruments of cooperation in the area of migration management and fight against unauthorised migration.

On 20 January 2000 the two countries signed an 'Agreement on Combating Crime, Especially Terrorism, Organised Crime, Illicit Drug Trafficking and Illegal Migration'[58]. Shortly after, on 8 November 2001, Greece and Turkey signed a specific Implementing Protocol on readmission (in pursuance to Article 8 of the Agreement[59]) with the purpose 'to promote their cooperation in order to ensure a better application of provisions relevant to the transfer of persons who do not or who no longer fulfil the conditions in force for entry or residence' (Preamble, 2001 Readmission Protocol)[60]. Both the police cooperation agreement and its implementing protocol on readmission are formal bilateral agreements; a formal procedure was followed for their adoption, including their signature by the Greek and Turkish Ministers of Foreign Affairs, their ratification by the national parliament of both countries and their publication on the Greek Official Journal.

The 2001 Readmission Protocol sets out a basic obligation for the parties to

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[57] As reported by İçduygu (2011, 4-5), based on data from the Turkish Bureau for Foreigners, Borders and Asylum at the Directorate of General Security of the Ministry of Interior, between the mid-1990s and the early 2000s the number of irregular migrants apprehended in Turkey increased from about 11,000 in 1995 to 94,000 in 2000. The 58% of irregular migrants apprehended between 1995 and 2009 were potential transit migrants who were heading for Europe. The first five countries of origins of these migrants were: Iraq, Pakistan, Afghanistan, Iran and Palestine.

[58] The Agreement on Combating Crime was ratified by Greek Law 2926/01 and entered into force on 27 June 2001.

[59] Article 8 of the Agreement concerned cooperation on combating irregular migration (Pro Asyl 2007, 26).

[60] The Implementing Protocol on Readmission was ratified by Greek Law 3030/2002 on 15 July 2002 and it entered into force on 5 August 2002.

readmit both their own nationals and non-nationals who have irregularly entered the territory of one of the parties coming from the territory of the other party[61]. It establishes the evidences required as a proof of citizenship for the nationals of the parties (Arts. 2-3, 2001 Readmission Protocol) and as a proof of entry from the territory of the other party for nationals of third countries (Arts. 4-5). Moreover, the text provides for two different kinds of readmission procedures (Art. 6)[62] and it foresees a time limit for readmission obligations concerning non-nationals (Art. 8)[63]. The final provisions regulate several details, including the designation of six border posts at land, air and sea borders (three in Turkey and three in Greece) to be used for the transfer of readmitted persons (Art. 12).

The Protocol does not include neither an explicit clause on compliance with key international human rights conventions nor any other reference to the protection of fundamental rights and procedural safeguards during readmission procedures; it only contains a general non-affection clause stating that 'this Protocol does not affect the rights and obligations arising from other international agreements binding upon the Parties' (Art. 11). Finally, although this is not mentioned in the text of the Protocol, it emerges from other official documents produced by the Greek authorities that the two countries agreed on a compensation of 71 euro per person to be paid by Greece to Turkey for each third country national it accepts to readmit (Council of the EU 2012, 16; EMN and Greek Ministry of the Interior 2014, 26).

The implementation of the Greek-Turkish Readmission Protocol had a slow stArt. As reported by Baldwin-Edwards, by 2006 it was clear that although Turkey was accepting some readmissions, there were considerable problems and delays. Indeed, based on figures provided by the Greek authorities, between 2002 and 2006 only 6% of the readmission requests sent by Greece to Turkey resulted in the actual deportation of the persons concerned (Baldwin-Edwards 2006). Greek authorities have repeatedly

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[61] The Protocol regulates also the transit of third country nationals for the purpose of readmission (Art. 7, 2001 Readmission Protocol).

[62] The simplified procedure applies 'when a person is arrested in a frontier zone' and is meant to produce a faster readmission, whilst the normal procedure is followed in all other cases (Art. 6).

[63] Readmission requests must be submitted within 14 days from the unauthorised entry of the third country national concerned or, in exceptional cases, within 3 months (Art. 8).

attributed the limited effectiveness of cooperation on readmission with Turkey to the unwillingness of Turkish authorities to abide by the commitments undertaken in the 2001 Protocol (Paoletti 2011a, 52).

In particular, Greek authorities have often complained about the fact that their Turkish counterparts did not respect the time limits for replying to readmission requests established by Art. 6 of the Protocol[64]; they lamented that the six border posts identified by Art. 12 were not used, as all transfers were made at Evros (resulting in complex procedures and higher costs for Greece); they even claimed that the 71-euro compensation was on occasion increased by Turkish authorities to 400 or even 1,000 euro (Baldwin-Edwards 2006; Pro Asyl 2007, 26; HRW 2008, 36). Occasional diplomatic tensions between the two countries have further hampered the effective implementation of the 2001 Readmission Protocol.

Due to the persisting difficulties in actually implementing returns and to the increasing number of migrants crossing the Greek-Turkish border and consequent European pressures to stem the flow, in 2010 the two countries signed 'Joint Statements for Cooperation' – an informal agreement aimed to enhance bilateral cooperation on readmission, revitalise the 2001 formal Readmission Protocol and ensure its effective implementation (EMN and Greek Ministry of the Interior 2014, 18). Unfortunately, I could not access the text of the 2010 Joint Statements[65]; however, reportedly, on that occasion Greece and Turkey agreed that at least 1,000 irregular migrants had to be readmitted from Greece to Turkey each year (Wissink and Ulusoy 2016, 130). This was definitely an ambitious target, considering that returns carried out under the 2001 Readmission Protocol in the entire period 2002-2010 amounted to a total of 2,425 – i.e. 270 per year on average, as calculated by İçduygu (2011, 7)[66].

The first readmission of a group of migrants to Turkey after the 2010 reactivation

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[64] One week from notification of arrest at the border, in the case of a simplified procedure; 75 days for replying to a readmission request and 15 days for readmitting the persons whose readmission has been agreed upon, in the case of a normal procedure (Art. 6, 2001 Readmission Protocol).

[65] In fact, I was not able to find out whether the text of the 2010 Joint Statements has actually been published, but I strongly doubt it has. Even an experienced Turkish human rights lawyer that I interviewed in February 2016 was not aware of the disclosure of the exact content of this informal agreement.

[66] See also: İçduygu and Aksel 2014, 351.

of the Readmission Protocol took place in January 2011 (Wissink and Ulusoy 2016, 130-131). A Turkish human rights lawyer that I interviewed in February 2016 was directly involved in this event and could provide a detailed account of facts[67]; it seems interesting to briefly present this case, because it is descriptive of the readmission procedures and practices carried out by Greek and Turkish authorities. On 10 January 2011 a group of 38 migrants (including 19 children) was deported by boat from the Greek island of Leros to the Turkish city of Dikili and then transferred to Izmir, in application of the 2001 bilateral Readmission Protocol[68]. Most of them claimed they were Palestinian, but Greek authorities registered all of them as Syrians[69]; presumably, this was because Turkey had a bilateral readmission agreement in place with Syria since 2001 (İçduygu and Aksel 2014, 351), which could facilitate the subsequent straightforward transfer of the returnees from Turkey to Syria.

With regards to this practice, concerns were raised in particular about possible violations of the *non-refoulement* principle and the right to seek asylum, if persons in need of international protection are returned to a third country like Syria (or Iraq) without being granted the possibility to apply for asylum in Greece or Turkey (Wissink and Ulusoy 2016, 131). Turkish NGOs have repeatedly criticised the Greek practice to deport to Turkey, in application of the Readmission Protocol, third country nationals who may be in need of international protection without considering their asylum requests; in some cases the 'refugee' status of these returnees has been later confirmed by the UNHCR, when they applied for asylum in Turkey (Refugee Rights Coordination 2014, 5). This practice is particularly worrying if one considers that the large majority of third country nationals transiting through Turkey into Greece come from so-called 'refugee-producing countries', i.e. Iraq, Pakistan, Afghanistan, Iran and Palestine

[67] At that time the interviewee was working in Izmir for the local NGO Mülteci-Der.

[68] The group was originally composed of 40 migrants, including two women who had been separated from their families and children and had to be readmitted to Turkey while their families would remain in Leros; reportedly, in the end these two women were not deported.

[69] Reportedly, only three of them were actually Syrians (Wissink and Ulusoy 2016, 131). Based on first-hand testimonies of migrants, the NGOs Pro Asyl and HRW reported that during registration with Greek authorities Iraqi asylum seekers often claim to be Palestinian in order to reduce the likelihood of being returned to Turkey and then repatriated to Iraq (Pro Asyl 2007, 26; HRW 2008, 37).

(İçduygu 2011, 5) and nowadays Syria[70].

As concerns the 38 migrants readmitted to Turkey in January 2011, upon their arrival in Izmir none of them applied for asylum, but 30 claimed they were Palestinian. The eight persons who accepted to be Syrian were deported to Syria on the first week of February; conversely, the remaining 30 who claimed to be Palestinians were kept in a detention centre in Izmir for several weeks, while the local police was waiting for instructions from the Ministry of Interior about what to do with them (given the impossibility to deport them to Palestine). Finally, on 21 February 2011 the group of 30 was transferred back to Greece through the Evros region.

When the whole group first arrived in Izmir, the lawyer I interviewed had the chance to talk with the local head of Immigration Police, who explained that from that moment on (i.e. following the signature of the 2010 Joint Statements for Cooperation) readmissions from Greece to Turkey were to be carried out on a regular basis and would consist of the deportation of a group of 40 migrants every two weeks; Izmir police would then be in charge of the subsequent deportation of returnees to Syria, Iran and Iraq. However, the final outcome of the first readmission under this new 'regime' (which resulted in the actual removal of 8 out of 40 persons) clearly proves that obstacles arising from the practical implementation of the agreement may prevent the achievement of its original target.

Indeed, notwithstanding the 2010 attempt to strengthen Greek-Turkish cooperation on readmission, the results have not been satisfactory for Greece, as it emerges from the country report for the 2014 European Migration Network (EMN) study on 'Good Practices in the Return and Reintegration of Irregular Migrants', which draws upon information and figures provided by the Greek Ministry of the Interior (EMN and Greek Ministry of the Interior 2014). This report confirms the persistence of the same problems observed in the years preceding the 2010 informal agreement; in particular, Greece claims Turkish authorities do not respect deadlines for responding to readmission requests and show a certain reluctance in consenting to the readmission of

[70] For instance, between 2007 and 2008 NGOs denounced an increase in deportations of Iraqi asylum seekers from Greece to Turkey, followed by their detention in Turkey and their subsequent repatriation to Iraq, in violation of the right to seek asylum and the prohibition of *refoulement* (Pro Asyl 2007, 26; HRW 2008).

third country nationals – e.g. they selectively accept to readmit mainly Iraqi and Iranian nationals (EMN and Greek Ministry of the Interior 2014, 25-26). The Turkish human rights lawyer I interviewed confirmed that the limited effectiveness of Greek-Turkish cooperation on readmission is to be mainly attributed to a lack of political willingness on the Turkish side.

As a proof of the fact that even in recent years the 2001 Readmission Protocol has not been implemented correctly, the EMN country report makes reference to the following figures. Between 2002, when the agreement entered into force, and the end of 2013, Greek authorities requested the readmission of 125,742 irregular migrants; out of these, Turkey accepted to receive 12,618 persons, but only 3,832 were eventually readmitted to Turkey (EMN and Greek Ministry of the Interior 2014, 26). Hence, the recognition rate of readmission applications to Turkey is approximately 10%, while the actual return rate is only 3%[71]. Greek authorities identify as a main reason for this low return rate Turkish delayed responses to readmission requests, which allow for the migrants concerned to abscond (EMN and Greek Ministry of the Interior 2014, 26); as noted by the European Stability Initiative, 'by the time Turkey has agreed to readmit someone and paperwork is completed, the person is usually no longer in Greece' (ESI 2015c, 2).

But looking more in details into the figures reported by the EMN Greece country report (2014, 27), a recent ESI policy paper (2015c, 2), and the Council draft paper on Member States' practical experiences with readmission to Turkey (2012, 7-12), it emerges that immediately after the signature of the Joint Statements, i.e. in the years 2010 and 2011, the number of readmissions approved by Turkey had raised to 1,457 and 1,552 respectively, and the number of returns actually carried out to 501 and 730 – the highest level ever)[72]. However, in the following years there has been a substantive decrease in both numbers; with regards in particular to migrants actually readmitted to Turkey, their number decreased drastically to 113 in 2012, 35 in 2013, 6 in 2014, and 8

[71] These data are confirmed by the European Stability Initiative (ESI 2015c, 2), whose figures include also the year 2014: between 2002 and the end of 2014, Greece asked for the readmission of about 135,000 irregular migrants; Turkey accepted 13,100 of these, but in the end only 3,800 were transferred to Turkey.

[72] Please note that the figures reported by these three sources for the years 2009 and 2010 do not coincide with those reported by İçduygu (2011, 7).

in 2015[73] (ESI 2015c, 2).

Against this background and in the midst of the so-called 'refugee crisis', the EU-Turkey Agreement of 18 March 2016 (which is analysed in details in Chapter 6, section 6.2.1.1) had among its purposes that of increasing the number of irregular migrants and rejected asylum seekers readmitted from Greece to Turkey, first and foremost under the bilateral readmission agreement between the two countries (insofar as the EURA with Turkey was not yet applicable to third country nationals; see section 3.5.2 above)[74]. Therefore, similarly to the 2010 Joint Statements, the EU-Turkey Agreement of 18 March 2016 may be considered as another informal agreement signed *inter alia* in order to improve the effectiveness of the 2001 Greek-Turkish Readmission Protocol and increase the number of third country nationals removed to Turkey[75].

Apparently, this objective has been at least partly achieved: as mentioned by the Commission in its Fourth Progress Report on the implementation of the EU-Turkey Agreement issued in December 2016, a total of 1,187 irregular migrants were actually returned from Greece to Turkey in the course of 2016 under the Greek-Turkish Readmission Protocol and the EU-Turkey Agreement (European Commission 2016l, 5). This represents the highest number of yearly removals actually carried out since the bilateral Readmission Protocol entered into force in 2002; moreover, for the first time readmissions to Turkey have reached (and exceeded) the yearly quota of 1,000 migrants that had been set out by the bilateral informal agreement signed by the two countries in 2010.

However, the formal and informal instruments of bilateral cooperation on readmission analysed so far do not provide for a complete picture; an analysis of informal readmission practices at the borders is needed in order to gain a comprehensive

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[73] This number is confirmed by the Commission First Progress Report on the implementation of the EU-Turkey Agreement (European Commission 2016d, 4, footnote 5).

[74] The readmission of irregular migrants and rejected asylum seekers under the bilateral Greek-Turkish readmission agreement (and later the EURA with Turkey) is neither the only nor the main purpose of the EU-Turkey Agreement of March 2016; its broader content and aims are extensively discussed in Chapter 6, section 6.2.1.1.

[75] It is worth noting that the EU-Turkey Agreement of 18 March 2016 is not a bilateral informal agreement between Greece and Turkey, but a European instrument of informal cooperation with Turkey, which nonetheless had an extremely relevant impact on cooperation on readmission at the bilateral level between Greece and Turkey, as analysed in details in Chapter 6, section 6.2.

understanding of the Greek-Turkish case. In particular, given the similarities with the cases described in previous sections, it seems useful to focus on Greek push-back operations carried out in the Aegean Sea[76]. Throughout the last decade several NGOs have accurately documented the systematic occurrence of push-backs at sea towards Turkey (Pro Asyl 2007; 2013; HRW 2008; Amnesty International 2013; 2015a). These collective expulsions are carried out as an informal practice, apparently without any legal basis in Greek law or in the legal framework of Greek-Turkish bilateral cooperation on readmission.

Based on the first-hand testimonies of migrants and asylum seekers involved, different modalities of push-backs have been reported and described, as follows. Push-backs are generally carried out by the Greek Coast Guard[77]; this may block small migrant boats or dinghies just before they enter Greek territorial waters and divert them towards Turkey, typically by means of dangerous manoeuvres. If migrant boats are already in Greek territorial waters, Greek authorities may tow them back into Turkish waters by using a rope, or they may take the people and the dinghy on board their vessel and when they reach Turkish waters put the dinghy with its passengers down and leave it at sea. Migrants may be pushed back to Turkey even when they are a few meters off a Greek island, or even after they have made their landfall. Reportedly, Greek officials usually damage or disable dinghies so that migrants can only, at best, return to the Turkish coast. If a dinghy is already damaged or gets damaged by migrants themselves (a common strategy to avoid being towed back to Turkey), Greek authorities may take the migrants on board their vessel and bring them back to the Turkish coast or, more often, deposit them on uninhabited Turkish islands without any means of subsistence[78] (Pro Asyl 2007, 6, 9-12 and 35; HRW 2008, 41-47; Amnesty International 2013, 9-13;

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[76] Systematic push-backs at the Greek-Turkish land border in the Evros region have also been documented by NGOs (Pro Asyl 2007, 17-18; HRW 2008, 38-41; Amnesty International 2013; Pro Asyl 2013, 29-32; Amnesty International 2014a, 20-28; Amnesty International 2015a, 57-65); however, for reasons of brevity I will not analyse this practice, but rather focus on push-backs at sea.

[77] However, according to several testimonies, in some cases it was not possible to determine the identity and affiliation of officers involved in push-back operations, because they wore black uniforms and full face-covering masks (Pro Asyl 2013).

[78] These operations are usually carried out during the night, so that Turkish authorities do not detect Greek Coast Guard vessels entering Turkish territorial waters (Pro Asyl 2007, 35).

Pro Asyl 2013, 18-28; Amnesty International 2015a, 57-65).

All these practices evidently put migrants' lives in serious danger. Moreover, episodes of violence and ill-treatment are often reported by migrants and asylum seekers involved in push-backs (Pro Asyl 2007, 10-11; HRW 2008, 41-47; Amnesty International 2013, 13-14). Greek push-backs may even result in the death of migrants, as exemplified by the incident that took place offshore the Greek island of Farmakonisi on 21 January 2014, when twelve people died during what the survivors described as an attempted push-back operation. The survivors reported that their boat, which was carrying 28 people (of Afghan and Syrian nationality) and had a mechanical breakdown, capsized while it was being towed at high speed and in bad weather conditions by the Greek Coast Guard towards the Turkish coast[79] (ECRE 2014a; UNHCR 2014).

From a legal point of view, all different modalities of push-backs described above are extremely controversial and may entail (or lead to) several violations of EU and international human rights and refugee law, as further analysed in section 7.2. Migrants and asylum seekers involved in such operations are neither identified nor granted the possibility to apply for asylum, they are not heard by Greek authorities, their personal situation is not assessed on an individual basis, and they are not given the opportunity to challenge their forced removal in front of the competent authorities. NGOs report that, in some cases, even when asylum seekers explicitly requested not to be deported because they were fleeing war and seeking protection, their requests remained unheard (Pro Asyl 2013, 18). It is worth recalling that a large majority of migrants who cross the Aegean Sea from Turkey to Greece come from 'refugee-producing countries' (like Syria, Afghanistan, Iraq, Palestine, the Horn of Africa, etc.) and should thus be considered as potential asylum seekers. Therefore, the respect of the *non-refoulement* principle and the right to seek asylum appears to be of utmost importance in the Greek-Turkish context.

[79] In contrast, Greek authorities affirmed that they were conducting a rescue operation by towing the migrant boat towards the island of Farmakonisi. They alleged that the sinking of the boat was not due to their supposedly risky manoeuvre, but to the movements of migrants, who gathered on one side of the boat, causing its overturning and sinking. The UNHCR and the Council of Europe Commissioner for Human Rights denounced the suspicious circumstances of the incident and called for a thorough investigation (ECRE 2014a; UNHCR 2014).

Nonetheless, alleged push-backs at sea have been performed continuously, although with variable frequency[80]. Still, Greek authorities have never officially admitted that such a practice is in place, and have usually replied to allegations by stressing the enormous endeavour of the Greek Coast Guard in surveilling a large part of the EU external maritime borders and preventing unauthorised migration, as well as its commitment to properly implement EU law (Pro Asyl 2013, 16-17).

For the sake of clarity, it is worth specifying that in its daily activity the Greek Coast Guard does perform also search and rescue (SAR) operations in accordance with international standards and procedures[81]; in fact, first-hand testimonies have confirmed that on several occasions the Greek authorities have rescued migrants in distress at sea and taken them to the nearest safe port on the Greek islands[82]. However, even though not all migrant boats are pushed back to Turkey, the copious and consistent evidence collected by NGOs during the last decade appears to incontestably demonstrate the existence of this informal practice. Actually, based on NGOs' reports, it seems that the majority of third country nationals' removals from Greece to Turkey are carried out by means of informal summary expulsions, rather than based on the formal readmission procedures established by the 2001 Readmission Protocol (HRW 2008, 37).

In contrast to the cases of Italian push-backs towards Libya and Spanish *devoluciones en caliente* towards Morocco, Greek push-backs towards Turkey are neither based on a provision of national law, nor on informal bilateral cooperation agreements or technical arrangements. Greek push-backs appear to be a purely informal practice lacking any legal basis; and it is precisely its informal nature that has always allowed Greece to deny its existence.

Turkey, on its part, cannot but be aware of Greek push-backs; however, its standpoint towards this practice is neither clear nor unambiguous. On occasion, Turkish

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[80] The most recent episodes documented by Amnesty International took place between November 2014 and August 2015 (Amnesty International 2015a, 60).

[81] For an account (based on interviews with Greek authorities) on how the Greek Coast Guard normally operates, see: Pastore and Roman 2014, 20-21.

[82] The implementation of proper SAR operations increased between 2015 and 2016, during the peak of the 'Syrian refugee crisis'; this may be linked not only to the large number of arrivals and to the high mediatisation of the phenomenon, but also to the fact that the sea crossings began to take place also in broad daylight.

authorities have complained with Greece and have even formally requested the readmission to Greece of migrants who had been summarily deported to Turkey[83]; but, most of the time, Turkish authorities simply turn a blind eye on this practice. Based on first-hand testimonies, NGOs report that if pushed-back migrants are rescued by the Turkish Coast Guard (in Turkish territorial waters or from uninhabited islands) or arrested by Turkish police on the coast, they are usually kept in detention centres for some time and then simply released; however, depending on their nationality, returnees may face the risk of being deported to their country of origin (Pro Asyl 2013, 19).

To conclude, it seems that also in the Greek-Turkish case the operationalisation of cooperation on migration management, border control and readmission has been largely prioritised. In order to improve the limited effectiveness (in terms of return rates) of the formal Readmission Protocol signed in 2001, the two countries resorted to informal agreements, first in 2010 and later (at the EU level) in March 2016, with the purpose to revitalise bilateral cooperation and remove obstacles to the practical implementation of the readmission agreement. However, readmissions to Turkey are only partly carried out in the framework of formal or informal bilateral agreements; allegedly, they are mostly carried out through informal push-back operations, whose existence is largely documented by NGOs but has always been denied by the Greek government. The informality and secrecy of such readmission practices result in a lack of transparency and accountability, and open the way to potential human rights violations.

[83] In the 2014 country report on Greece for the EMN study on 'Good Practices in the Return and Reintegration of Irregular Migrants', Greek authorities have denounced that Turkey submits what they deem to be ill-founded readmission requests at the sea border for alleged illegal *refoulement* operations carried out by the Greek Coast Guard (EMN and Greek Ministry of the Interior 2014, 26).

CHAPTER 6
THE PROCESS OF MULTI-LEVEL INFORMALISATION OF COOPERATION ON READMISSION AND ITS FUNDAMENTAL FEATURES

6.1. The concept of multi-level informalisation

Following an in-depth analysis of cooperation on readmission at the European and bilateral level, which focused in particular on the Mediterranean area, this chapter aims to discuss and provide an answer to the first research question mentioned in Chapter 1, section 1.2: *has there been a shift towards 'informalisation' in cooperation on readmission in the Mediterranean area, both at European and bilateral level?*

At the bilateral level, the process of informalisation of cooperation on readmission has been first identified and studied by Cassarino (2007). In his works he analysed the increasingly widespread use of informal bilateral agreements or arrangements linked to readmission (such as memoranda of understanding, exchanges of letters, 'oral processes', administrative arrangements, operational protocols, etc.) focusing in particular on the Mediterranean area (Cassarino 2007; 2010b; 2010c; 2014; 2015). States may resort to this kind of informal instruments either as an alternative to or in combination with formal bilateral readmission agreements.

What I argue is that this very process of informalisation can be identified also at the European level, where cooperation on readmission is increasingly based on: policy instruments such as Mobility Partnerships or other kinds of joint political declarations, like the one signed with Ghana in April 2016 (EEAS 2016a); informal arrangements such as the EU-Turkey Agreement of March 2016 (European Council 2016c) or the EU-Afghanistan Agreement of October 2016 (EEAS 2016c); and concrete practices, on the model of the EU Member States. Also at the European level, informal arrangements may either represent an alternative to formal European readmission agreements (as in the case of the recent EU-Afghanistan Joint Way Forward Agreement), or both kinds of instruments may be used in a complementary way (as in the case of the simultaneous

and coordinated operation of the EURA with Turkey and the EU-Turkey Agreement, analysed under section 6.2.1.1 below). Thus, in light of the fact that similar informalisation dynamics in the area of readmission can be identified both at the national and European levels, I consider this process to be multi-level.

The informalisation of cooperation on readmission at the bilateral level and its main features are analysed under section 6.3, while informalisation of readmission at the European level and its main characteristics are investigated under sections 6.2 and 6.4. This section 6.1, firstly, defines the concept of informalisation, drawing upon studies on the informality of international law and law-making by Lipson (1991) and Pauwelyn, Wessel and Wouters (2012a); secondly, focusing more precisely on international cooperation on readmission, it elaborates on the distinction between formal and informal instruments; and thirdly, it examines how the process of multi-level informalisation of readmission policies in the context of the EU developed over the years.

In his article 'Why are some international agreements informal?' Lipson considers agreements to be informal 'if they lack the state's fullest and most authoritative imprimatur, which is given most clearly in treaty ratification' (1991, 498); therefore, he links the informality of an instrument of international cooperation essentially to its adoption process, and in particular to the lack of ratification. According to Lipson, 'informality is best understood as a device for minimizing the impediments to cooperation, at both the domestic and international levels' (1991, 500) and he identifies in particular three advantages of informal agreements compared to treaties. These are: 1) their flexibility, which allows for their adaptation to changing conditions; 2) the possibility to rapidly negotiate and immediately implement them, as they do not require elaborate ratification; 3) their reduced publicity and prominence (when not complete secrecy), which allows to limit or avoid democratic oversight (due to the lack of a parliamentary debate and ratification process), bureaucratic control by other parts of the executive, and the constraints of diplomatic precedents. Hence, informality allows 'the most sensitive and embarrassing implications of an agreement [to] remain nebulous or unstated for both domestic and international audiences, or even hidden from them' (Lipson 1991, 501).

Lipson summarises the main reasons for choosing 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' (1991, 501). With regards to the latter, Lipson specifies that informal arrangements may be chosen because of time pressure, e.g. in a situation of crisis, when there is no time for the lengthy negotiation of a formal agreement (1991, 538).

Lipson's analysis of the advantages of informal agreements and reasons for choosing them applies perfectly to our area of interest, i.e. international cooperation on readmission. However, Lipson's definition of informality as ultimately linked to the lack of a ratification procedure appears too limited to cover the scope and complexity of informalisation, especially in the field of readmission. In their broad empirical-based study on 'informal international lawmaking', Pauwelyn, Wessel and Wouters (2012a) provide a wider and more complete definition of the concept of informality in the framework of international law.

Similarly to Lipson, the authors consider an agreement to be informal when 'it dispenses with certain formalities traditionally linked to international law' (Pauwelyn 2012, 15). The circumvention of these formalities is what makes informal agreements more desirable and effective, but at the same time it is also the reason for claiming that they are insufficiently accountable compared to formal agreements. According to the authors, these formalities may have to do with three distinct elements of international lawmaking[1]: the output, the process and/or the actors involved[2].

With regards to the output, international cooperation may be informal when it does not lead to a formal treaty or other international law agreement, but rather to a

[1] With 'lawmaking' the authors broadly refer to any 'norm-setting or public policy-making by public authorities', which may also involve non-state actors. The output of 'lawmaking' may not necessarily be 'law' (Pauwelyn 2012, 21).

[2] However, both Lipson and Pauwelyn, Wessel and Wouters agree that not all sort of informal talks between public authorities at international level amount to informal agreements or informal lawmaking. According to Lipson, 'to be considered genuine agreements, they must entail some reciprocal promises or actions, implying future commitments' (1991, 498). In Pauwelyn's words, the output of informal international lawmaking 'must be normative in that it steers behaviour or determines the freedom of actors' (2012, 16); 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' (2012, 21).

statement, guideline, declaration or an even more informal type of policy coordination. In the authors' and in my own view, output informality does not necessarily imply the lack of legally binding character[3]: an informal agreement may, indeed, take the form of a statement or a press release, and yet it may be construed or considered by the parties as legally binding, or it may have legal and normative effects[4] (Pauwelyn 2012, 15-16).

As concerns the process, international cooperation may be informal when it occurs 'in a loosely organised network or forum', although this does not exclude informal international lawmaking may take place in the context or under the auspices of a more formal organisation (Pauwelyn 2012, 17). With regards to the actors involved, international cooperation may be informal when it does not engage traditional diplomatic actors (e.g. heads of State or government, foreign ministers, embassies) but other ministries, domestic regulators, independent or semi-independent agencies, etc.; in addition, private actors and international organisations may also participate in informal lawmaking (Pauwelyn 2012, 19).

This three-fold definition of informality applies perfectly to international cooperation in the area of readmission, both at the bilateral and European level. In terms of output, informal cooperation on readmission has materialised, at the bilateral level, in instruments such as memoranda of understanding (MoUs), exchanges of letters, administrative arrangements, operational protocols, oral agreements, etc.; and at the European level, in instruments like joint political declarations, joint statements, press releases, high-level dialogues, etc. Even if they are not international law agreements, all these instruments are meant to generate reciprocal commitments on the parties and/or to produce legal or normative effects.

With regards to the process, law-making in the area of cooperation on readmission, at both levels, may not always take place within traditional fora of international negotiation and may not follow codified rules and standard procedures. As concerns the actors involved, at the bilateral level, interior ministers and heads of police

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[3] In this the authors' and my view differ from Aust's, who defines an informal instrument as 'an instrument which is not a treaty because the parties to it do not intend it to be legally binding' (1986, 787).

[4] For example, this is the case of the EU-Turkey Statement of 18 March 2016, also called EU-Turkey Agreement, analysed under section 6.2.1.1 below.

may, for instance, take part in informal negotiations on readmission along with foreign affairs ministers and heads of government. At the European level, agencies like Frontex and the EASO may participate in informal negotiations along with representatives from the EU institutions and Member States; in addition, as discussed above under section 4.4.3, international organisations like the IOM and UNHCR may also play a relevant role in informal policy-making, while (based on information available) the involvement of private actors is less evident.

Pauwelyn provides two examples of typical instruments of informal international lawmaking. The first one concerns memoranda of understanding (MoUs), an instrument which is largely used in particular by the United Kingdom; the UK defines MoUs as international commitments that do not have a legally binding character and to which the formalities of treaty-making (including ratification and publication) do not apply[5] (Pauwelyn 2012, 16). The second example concerns French administrative arrangements concluded by a French minister with his or her homologous minister of another country; the French Ministry of Foreign Affairs does not consider these agreements as proper international law agreements[6] (Pauwelyn 2012, 19-20). Both MoUs and administrative arrangements are typically used by several EU Member States to establish informal patterns of cooperation on readmission with third countries in the Mediterranean area[7].

In line with Lipson, Pauwelyn highlights that, at the domestic level, informality (of output, process and actors) may lead to weaker forms of democratic oversight (e.g. no parliamentary ratification, no obligation of publication) and may raise accountability issues. Moreover, at the international level, informality raises the fundamental question of whether informal agreements are part of international law and whether they are

[5] The position of the UK is in contrast with that of the United Nations, which define MoU as 'a less formal international instrument than a typical treaty or international agreement' and consider it a legally binding instrument (UN Treaty Section of the Office of Legal Affairs 2012, 68).

[6] Interestingly, a 1997 circular of the French Prime Minister concerning the elaboration and conclusion of international agreements, recommended French negotiators should only resort to this kind of agreements in exceptional circumstances, given the uncertainty of the effects they produce (Pauwelyn 2012, 20).

[7] For instance, Italy has often used administrative arrangements involving interior ministers and heads of police to establish cooperation on readmission with North African countries, often within the framework of broader police cooperation (Cuttitta 2008; 2010).

subject to the consequences that normally derive from that. Indeed, it is not clear whether they are subject to the jurisdiction of international courts and to hierarchy and other systemic rules in relation to other norms of international law, including human rights and *jus cogens* (Pauwelyn 2012, 16-17).

Having analysed the concept of informality in international law- and policy-making, it is now useful to focus more precisely on the informality of cooperation instruments in the area of readmission. Both Lipson and Pauwelyn, Wessel and Wouters agree in saying that there may be different degrees and ways for an agreement to be informal. Pauwelyn (2012, 21) highlights that informality may involve only one of the three elements mentioned above (output, process or actors) or all of them; in any case, the instruments concerned may be considered informal, to a greater or lesser extent, depending on how many dimensions are characterised by informality.

Lipson (1991, 498) maintains that there may be different degrees of informality along two main variables: the actors who concluded the agreement (heads of State and government or lower-level bureaucracies); and the form or means by which the agreement is formulated (elaborate written document, exchange of notes, joint statement, oral bargain, or tacit agreement). The combination of these two variables gives rise to different levels of informality and different types of informal agreements, which may be used to meet different needs (1991, 501).

This applies also to cooperation on readmission. As a matter of fact, there seems to be a multiplicity of different informal quasi-legal agreements, whose degree of informality (and 'legality') varies depending on a number of variables. This is not only true for bilateral cooperation on readmission, but it applies also to the European level, where one can witness the increasing use of different modalities of informal cooperation in the area of migration management, asylum and readmission (see section 6.2.1 below). The most relevant variables of informality I have identified are: denomination of the instrument; form of the instrument; actors involved in its negotiation and conclusion; type of parliamentary scrutiny (formal authorisation or ratification, parliamentary debate, or none); and type of publication (official journal, unofficial publication through other institutional sources, leaked publication or none). A differentiated combination of these variables will produce different kinds of informal instruments of cooperation.

Interestingly, on the basis of these variables, in some cases it may be difficult to make a clear distinction between formal readmission agreements and informal arrangements. As an example, the bilateral readmission agreement between Morocco and Spain signed in 1992, fully complies with the standards of formality relating to its denomination, form, actors involved and type of publication. However, as concerns parliamentary scrutiny, this agreement was only ratified 20 years later and entered into force in October 2012; meanwhile it has been applied in a provisional way. Is this a formal or informal kind of cooperation? Is it based on an informal arrangement or international law agreement? The case studies of bilateral cooperation on readmission analysed above under Chapter 5 provide further examples of how the distinction between formal and informal instruments may be blurred.

A final remark concerns the use of the term 'informalisation' in this work. I have chosen to talk about 'informalisation' rather than simply 'informality' because I consider that of 'being informal' not only a feature of cooperation on readmission, but also (and most importantly) a process or a trend, which led cooperation on readmission to 'becoming (more) informal', firstly at the bilateral level and later also at the European level. Therefore, I am interested in analysing how the Member States and the EU have increasingly used informal instruments in addition to, or rather than (depending on the circumstances), formal readmission agreements, and have increasingly prioritised the operational aspects of readmission over the conclusion of international agreements regulating them. However, the identification of a process of informalisation does not imply in any way a sharp separation between two water-tightly distinct phases, i.e. a phase of formalisation of cooperation on readmission and a subsequent phase of informalisation.

Indeed, both formal and informal modalities of cooperation on readmission have always co-existed. Since the late 1990s and throughout the years 2000s informal instruments of bilateral cooperation have been used in parallel to formal bilateral readmission agreements (see Cassarino 2007, 186, Figure 1; Cuttitta 2010, 30-39 with regards to the case of Italian cooperation with North African countries); moreover, negotiations for formal readmission agreements (at both bilateral and European level) have been concluded or initiated also very recently (as discussed under section 6.2.3

below with regards to the latest EURA negotiations). In fact, cooperation on readmission may start informally and be formalised through an agreement only at a later stage; or a formal agreement may then evolve into an informal arrangement or operational protocol, usually in order to make its implementation more effective.

For this reason, with regards in particular to bilateral cooperation on readmission, it is not easy to temporally locate the process of informalisation. In his works, Cassarino shows that the number of informal agreements linked to readmission concluded by EU Member States has increased substantially over the last decade, raising from 52 in 2007 to 98 in February 2015, according to the most recent figures (Cassarino 2015, 77). However, in an interview I had with Cassarino himself, he admitted that quantifying informal agreements is problematic and figures may be insufficiently reliable, due to difficulties in tracing and accessing these kinds of instruments (which often remain hidden).

Bearing in mind this caveat concerning the separation between formalisation and informalisation and their temporal location, it seems nonetheless possible to identify a process of multi-level informalisation of readmission, which developed during the last decades both at the bilateral and European level. Formalisation and informalisation may be considered as two prevailing trends in two different phases, but their prevalence is not intended in absolute terms.

At the bilateral level, in the last decades (i.e. since the late 1990s-early 2000s) countries on the northern and southern shores of the Mediterranean have increasingly grounded their cooperation policies in the area of readmission on a broad array of informal instruments - such as MoUs, exchanges of letters, 'oral processes', operational protocols and other kinds of (written or unwritten) agreements or arrangements between governments, ministries or other officials (Cassarino 2010b, 8-14)[8]. As further discussed under section 6.3 below, these instruments have been increasingly used to regulate (or re-regulate) and operationalise bilateral cooperation in the field of

[8] As discussed above in section 5.1, this growth in informal arrangements linked to readmission concerned in particular cooperation between EU Member States and Mediterranean and African countries; conversely, in the same period, with countries in Eastern Europe and the Western Balkans there has been an increase in formal readmission agreements, both at the bilateral and European level (Cassarino 2010b, 10-11; 2007, 187-188).

readmission, without excluding the simultaneous existence also of formal readmission agreements.

At the European level, despite the attempts (starting in the early 2000s) to implement a common readmission policy through the negotiation of EU readmission agreements, the difficulties in carrying out successful negotiations, the limited results achieved in the Mediterranean area, the insufficient effectiveness and scarce relevance of concluded EURAs (all discussed in Chapter 3 above) pushed the EU to gradually downscale the role of EURAs, make a wider use of informal instruments of cooperation and focus more on the operational elements of readmission, as analysed in details in the next section.

6.2. Informalisation of cooperation on readmission at the European level

This section discusses informalisation of cooperation on readmission at the European level. Section 6.2.1 shows how MPs are part of a broader trend, which privileges the use of policy instruments, informal deals and concrete practices rather than formal legal instruments to establish cooperation on migration in general, and on readmission in particular. The EU-Turkey Action Plan for cooperation on migration management and the subsequent EU-Turkey Agreement are analysed as a peculiar example of this trend (section 6.2.1.1). With regards to the implementation of European instruments of informal cooperation, section 6.2.2 analyses how the fact that they are implemented in practice by Member States and through bilateral cooperation may affect their effectiveness. Finally, section 6.2.3 reflects on informalisation as a non-linear 'reversible' process, which may originate dynamics of 're-formalisation'.

6.2.1. Policy instruments, informal deals and concrete practices vs legal instruments

As discussed in Chapter 4, following the launch of the GAMM in 2005, readmission was firmly included into a more comprehensive policy framework for migration cooperation with third countries. In particular, in 2007 Mobility Partnerships were introduced with the main purpose to obtain more operational cooperation on

readmission on the part of third countries and push the latter to negotiate and conclude European readmission agreements, by using as an incentive the promise of increased mobility and legal migration opportunities for the citizens of partner countries. The fact that in the aftermath of the 2011 Arab Spring, the EU resorted to MPs as an instrument to establish cooperation on migration (including on readmission) with North African countries rather than simply pushing forward with EURAs may be seen as a first sign of an emerging informalisation trend at the European level.

This trend has gradually become more clear and explicit, until the Commission issued in September 2015 its landmark communication on an EU Action Plan on Return, which – as described in Chapter 3 – marked a radical change in the Commission's approach to return and readmission. Starting from that moment, the EU has increasingly prioritised the effectiveness of readmission, while neglecting whether this outcome is obtained through formal agreements, informal arrangements, political deals or concrete cooperation practices carried out at the bilateral level. The relevance of successfully implementing returns has been largely prioritised over the existence of proper legal instruments regulating readmission procedures and including, at least on paper, adequate human rights safeguards.

This shift towards the prioritisation, informalisation and operationalisation of readmission was explained by the EU officials I interviewed partly as a consequence of the political change brought about by the new Commission (in office since November 2014) and partly as a response to the 2015-2016 so-called 'European refugee crisis' (see the last paragraphs of section 3.4.4).

In an interviewed I had with Jean-Pierre Cassarino in July 2016, the scholar elaborated further on the reasons for (and factors that determined) the success of informalisation at the EU level; he identified three complementary elements. The first one is the renewed willingness, both on the part of the EU institutions and Member States, to join efforts in order to ensure the effectiveness of returns of irregular migrants and rejected asylum seekers, against the backdrop of a 'migration crisis'. A second relevant factor he mentioned is the role played by the existing bilateral cooperation arrangements of Member States, which represented a proof and an example of how informal cooperation on readmission can work in practice. A third factor concerns the

inter-institutional conflict between the Council and the European Parliament over the ordinary legislative procedure (which provides for a co-decision role of the Parliament) extended by the Lisbon Treaty to the policy area of migration and asylum. Cassarino considers that fostering the use of political dialogues and other policy or quasi-legal instruments represented a way for the Council to solve this conflict by *de facto* excluding the Parliament from participating in the adoption of such informal instruments of cooperation.

As noted already in Chapter 3, there is a sharp contrast in particular between the 2011 Commission Evaluation of EURAs and the 2015 EU Action Plan on Return, with regards to different elements, including the use of informal instruments of cooperation on readmission. Indeed, the 2011 evaluation emphasised the need for Member States to properly and consistently apply EURAs for all their returns and explicitly condemned the use of pre-existing bilateral informal arrangements (European Commission 2011a, 4). On the contrary, the 2015 Action Plan on Return and the EU documents which followed (analysed below in this section) are now promoting a similar logic of informality at the European level, favouring the use of informal readmission arrangements and political deals, including at the bilateral level, with the purpose to substantially increase 'return rates' across the EU[9] (Carrera 2016, 45). This new approach has been consistently confirmed (in more or less explicit terms) by all the EU officials I interviewed.

It is now interesting to describe more in detail the development of this approach in the period 2015-2016, by analysing the content of the main documents issued by the EU institutions on the EU return and readmission policy. Prior to the Commission Action Plan on Return, it was the European Council held on 25-26 June 2015 to lay down the bases for a renewed EU approach to readmission. Building upon the letter sent by Commissioner Avramopulous to the Council weeks before (Council of the EU 2015a), the European leaders emphasised that the effective implementation of returns is crucial to discourage irregular migration and affirmed that 'all tools shall be mobilised to promote readmission of irregular migrants'. Among the other measures, they agreed that

[9] On the problematic issue of measuring the effectiveness of the EU readmission policy in terms of return rates, see sections 1.2 and 3.4.2 above.

'high-level dialogues with the main countries of origin of irregular migrants should be launched by the High Representative as soon as possible, in close cooperation with the Member States' (European Council 2015a, para 5)[10].

The Commission upheld the European Council's proposals and elaborated them further in its September 2015 Action Plan on Return. The Commission confirmed that increasing return rates, in particular to African countries, is an EU priority and to this purpose it is essential to boost cooperation on readmission with third countries (European Commission 2015b, 10). First of all, in order to ensure the effective implementation of readmission commitments (especially those undertaken by African countries under Article 13 of the Cotonou Agreement with regards to own nationals[11]), the Commission committed to organise 'regular bilateral[12] meetings on readmission with key countries of origin in Sub-Saharan Africa', also in cooperation with the EEAS, Member States and Frontex (European Commission 2015b, 11)[13]. The explicit aim of these meetings is to enhance practical cooperation, for instance by establishing well-functioning communication channels between national authorities (in Member States and in third countries) and working arrangements for the timely identification of returnees and issuing of travel documents. The primary focus is, thus, on improving operational mechanisms of cooperation, rather than concluding formal readmission agreements[14].

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[10] In addition, the European Council required the Commission to ensure that readmission commitments are implemented effectively, ongoing EURA negotiations are concluded and new ones are launched. For this purpose, the European Council recommended that EU assistance and policies (especially in the areas of trade and development) are used to create incentives, in line with the more-for-more principle (European Council 2015a, para 5).

[11] Under Article 13 of the Partnership Agreement between the African, Caribbean and Pacific (ACP) countries and the EU and its Member States signed in Cotonou on 23 June 2000 (Cotonou Agreement), the parties commit to accept the readmission of any of their nationals who are illegally present in the territory of the other party, at the other party's request and without further formalities.

[12] In this context, 'bilateral' does not mean between two countries, but between the EU and its Member States, on the one hand, and the third country concerned on the other hand.

[13] As mentioned under section 3.4.2, in this Communication the Commission proposed to focus the EU readmission policy on countries of origins (especially in Sub-Saharan Africa) rather than on countries of transit. The idea is that this would facilitate a better cooperation also on the part of transit countries (in North Africa), which would be less concerned about the readmission of non-nationals.

[14] The Commission identified also a number of priority countries with which such meetings are to be organised: starting from Nigeria and Senegal, the list includes also Mali, Ethiopia, Congo, Guinea, Ivory Coast and Gambia (European Commission 2015b, 11).

Secondly, as requested by the European Council of June 2015, the Action Plan foresees that the High Representative for Foreign Affairs launches 'high-level political dialogues on readmission' with relevant countries of origin and transit. High-level dialogues are intended either to improve the implementation of already existing readmission commitments, or to establish cooperation instruments with countries where these are still lacking[15]. In addition to this new dedicated forum of political dialogue, the Commission recalled that the EU will continue to use Mobility Partnerships and other GAMM instruments and fora to enhance cooperation on readmission (European Commission 2015b, 12)[16]. Therefore, without neglecting the importance of concluding ongoing EURA negotiations and possibly opening new ones with relevant countries of origin, the EU Action Plan on Return put a strong emphasis on two elements: the improvement of operational cooperation on a practical (even bilateral) level and the use of political dialogue and other policy instruments to obtain more from third countries.

The Council Conclusions on the Future of the Return Policy adopted in October 2015 welcomed the Commission Action Plan, embraced fully the measures it proposed and provided further details on their operationalisation. Under paragraph 11, the Council reaffirmed that 'the EU and its Member States will strive to ensure the effective implementation of all readmission commitments, whether undertaken through formal readmission agreements, the Cotonou Agreement or other arrangements', including in this wording also informal instruments.

With regards to the bilateral meetings on readmission proposed by the Commission, the Council recommended their 'swift launch' and reaffirmed that they should focus on enhancing 'practical cooperation with all relevant countries of origin

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[15] In fact, the list of possible priority countries for high-level dialogues includes a differentiated set of countries: countries that have already signed a EURA (like Pakistan and Sri Lanka), countries that have ongoing negotiations (Morocco and Algeria) and countries that have never started (or had refused to start) readmission negotiations with the EU: Egypt, the Sub-Saharan African countries mentioned also in the previous list (Nigeria, Senegal, Mali, Ethiopia, Congo, Guinea, Ivory Coast and Gambia), and two Asian countries (Afghanistan and Bangladesh) (European Commission 2015b, 12).

[16] The introduction of high-level political dialogues on readmission has been criticised by García Andrade et al. (2015, 29), who questioned the choice of creating a new forum of this kind, given that the issue of readmission could be dealt with either in the framework of Joint Readmission Committees under existing EURAs (for Pakistan and Sri Lanka) or, in their absence, under other existing fora for bilateral dialogue between the EU and third countries.

and transit' and should build 'on the experience of EU Member States having a record of successful return operations to these third countries'. Therefore, the example of Member States' bilateral readmission practices and arrangements should play a relevant role in the establishment of EU-level operational cooperation on readmission.

In addition, depending on the progress achieved with these bilateral dialogues until June 2016, the Council invited the Commission to propose negotiating mandates for EURAs 'with relevant countries of origin where it is necessary to formalise the practical cooperation arrangements'. This recommendation highlights that operational cooperation has become a priority for the EU, whereas formal readmission agreements represent an option, which may be pursued 'if necessary' only at a second stage, in order to formalise pre-established informal cooperation (Council of the EU 2015b, para 11).

The EU's preference for informal working arrangements on readmission developed in the framework of political dialogues with African countries emerged also in the EU-Africa Valletta Summit held on 11-12 November 2015. In the Valletta Summit Action Plan, indeed, the EU Member States agreed to 'develop practical cooperation arrangements and bilateral dialogues on implementation of returns with regard, in particular, to identification and issuance of travel documents' (Council of the EU 2015c, 16). The same approach to readmission is restated in the Council Conclusions on External Aspects of Migration of 23 May 2016 (Council of the EU 2016c, para 8).

But the most clear and explicit acknowledgment of a shift towards informal cooperation on readmission at the European level is included in the Council Conclusions on the Expulsion of Illegally Staying Third-country Nationals of 11 May 2016. Here, the Council affirmed that,

> in addition to readmission agreements, legally non-binding working arrangements on identification, return and readmission could be established with third countries at EU level, pertaining in particular to own nationals and including the holding of regular, informal meetings at expert level to review implementation and address possible obstacles. The Council should be involved in the negotiating process, as appropriate. Such legally non-binding arrangements should be fully compatible

> with existing bilateral readmission agreements of the Member States, and may in cases contribute to creating the conditions for the negotiation and conclusion of future readmission agreements as cooperation develops (Council of the EU 2016b, 4).

In this provision the change in the EU approach to readmission is perfectly summarised. Cooperation on readmission with third countries does not need to be based on EURAs, but may be established through 'legally non-binding working arrangements' and 'regular informal meetings at expert level'. The main focus is on readmission of own nationals by countries of origin, rather than on readmission of non-nationals by transit countries in the EU's neighbourhood. Unlike EURAs, these EU informal arrangements are 'fully compatible' with Member States' bilateral readmission agreements and practices; in fact, they actually draw on Member States' experience and their implementation usually relies on Member States' existing practices. Finally, the use of these informal instruments of cooperation may also lead to the adoption of formal EURAs.

In its Communication on Establishing a New Partnership Framework with Third Countries of 7 June 2016, the Commission confirmed the approach promoted by the Council. The Commission described plans to develop 'a new Partnership Framework', i.e. 'a new comprehensive cooperation with third countries on migration' based on so-called 'compacts' or 'comprehensive partnerships', which would put together the full range of EU policies and external relations instruments with the purpose to stimulate third countries' enhanced cooperation in the management of migration (European Commission 2016f, 5-6). The EU aims to use in particular its development and trade policies as a leverage to obtain 'specific and measurable increases in the number and rate of return and readmissions'; indeed, 'the essential part of any compact will be joint efforts to make returns and readmission work' (European Commission 2016f, 7).

In order to achieve this goal, the Commission stressed the need to prioritise and secure coordinated and coherent action in the field of readmission on the part of the EU and Member States and clearly reaffirmed that 'the paramount priority is to achieve fast and operational returns, and not necessarily formal readmission agreements' (European Commission 2016f, 7). This statement resounds the words pronounced by a DG HOME

official I interviewed in March 2016 (three months before), who said that the new Commission approach did not have as a priority that of signing formal readmission agreements, but rather making readmission work in practice. Apparently, in the view of both the Council and the Commission[17], improving operational cooperation in close relation with Member States comes first, while the eventual formalisation of such cooperation has become an optional element.

A further confirmation of this new approach comes from the European Council of 28-29 June 2016, which endorsed the Commission proposal for a new Partnership Framework and committed to its swift implementation, starting with a limited number of priority countries[18]. Paragraph 2 of the Council Conclusions is worth quoting in full:

> Building on the Commission communication, the EU will put into place and swiftly implement this Framework based on effective incentives and adequate conditionality, starting with a limited number of priority countries of origin and transit, with the following objectives:
> - to pursue specific and measurable results in terms of fast and operational returns of irregular migrants, including *by applying temporary arrangements, pending the conclusion of full-fledged readmission agreements*;
> - to create and apply the necessary leverage, by using all relevant EU policies, instruments and tools, including development and trade;
> - to also mobilise elements falling within Member States' competence and to seek synergies with Member States in relations with the specific countries.
> *Cooperation on readmission and return will be a key test of the partnership* between the EU and these partners (European Council 2016d, para 2) [emphasis added].

Finally, the European Council Conclusions on Migration of 20 October 2016 acknowledged the outcomes achieved in the implementation of the Partnership

[17] Cassarino stressed in our interview how, in an institutional perspective, the position of the JHA Council has become the prevalent one and how the Commission has aligned its own views to those of the Council (sometimes to the point of neglecting the fundamental principles of the Treaties and the respect for human rights). In fact, the analysis carried out in this section demonstrates that the core elements of the new EU approach to readmission may be equally found in documents produced by the Council and the Commission, proving a rare unity of vision between the two institutions.

[18] From June to October 2016 most of the EU efforts in the implementation of the new Partnership Framework focused on five priority countries: Niger, Nigeria, Senegal, Mali and Ethiopia. The progress made with each of them is described in the First Progress Report on the Partnership Framework issued by the Commission on 18 October 2016 (European Commission 2016k; see in particular Annex 3).

Framework with the first priority countries (Niger, Nigeria, Senegal, Mali and Ethiopia) and confirmed the EU's willingness to continue to pursue this new approach to migration cooperation, since 'more efforts are needed to stem the flows of irregular migrants, in particular from Africa, and to improve return rates' (European Council 2016e, para 4).

To sum up, instruments of informalisation of cooperation on readmission at the European level include (but are not limited to): 1) Mobility Partnerships, aimed at improving cooperation on readmission by offering incentives in the areas of legal migration and mobility; 2) high-level political dialogues on migration, aimed at prioritising return and readmission in the EU relations with specific third countries of origin and transit; and 3) informal quasi-legal agreements linked to readmission. The latter are usually referred to by the EU institutions as 'legally non-binding' agreements or arrangements, as for instance in the above-mentioned Council Conclusions on the expulsion of illegally staying third country nationals of May 2016 (Council of the EU 2016b, 4). However, I prefer to call them more generally 'quasi-legal' instruments, because in some cases they may be considered to have legally binding nature even if they are not formal international law agreements (as in the case of the EU-Turkey Agreement discussed below). Having analysed in details Mobility Partnerships in Chapter 4 above, it is worth providing a few examples also of the second and third types of informal instruments.

Considering that they have been introduced only in the last two years, high-level political dialogues and informal readmission deals have developed rather rapidly and their use is deemed to grow exponentially in the coming years. Their very denomination and form, the actors involved in their negotiation and conclusion, the avoidance of any parliamentary scrutiny and the modality of their publication bear witness to the informality of these kinds of European instruments of cooperation on readmission.

As regards the second category, the Communication establishing a new Partnership Framework included in annex an impressive list of High-Level Dialogues on Migration held in the period comprised between July/September 2015 and May 2016

with 16 countries in Africa, Asia and the Mediterranean area[19]. Most of these dialogues were carried out by the High Representative and the Commission, whilst some of them by the foreign ministers of some Member States on behalf of the EU (European Commission 2016f, Annex 2).

One of the first outcomes of a High-Level Dialogue was the Joint Declaration on Ghana-EU Cooperation on Migration, signed on 16 April 2016[20]. This document resembles in many respects the text of joint declarations establishing Mobility Partnerships, being similarly built around the four GAMM pillars; however its content is more general and less structured and it lacks any reference to concrete measures and projects. With regards to readmission, paragraph 11 of the Joint Declaration states:

> In this context and in line with the Valletta Declaration and Action Plan, both parties agreed on the need to significantly increase in the short-term the speed and efficiency of procedures for returning and receiving irregular migrants and the timely issuance of travel documents required for return. The parties agreed to deepen the discussions at the technical level. Ghanaian authorities committed to organise pilot identification missions in EU Member States [not later than June 2016] (EEAS 2016a, para 11).

Two additional examples of EU informal instruments of cooperation on readmission can be found among quasi-legal agreements (the third category of informal instruments mentioned above). The first one is the EU-Turkey Statement, also called 'EU-Turkey Agreement', signed on 18 March 2016[21]. This is an extremely interesting case of informal cooperation between the EU and a third country (Turkey) in the area of migration and asylum, interconnected in a peculiar way also with the formal EURA with Turkey and to bilateral cooperation on readmission between Greece and Turkey. The EU-Turkey Agreement will be analysed in detail in the next sub-section 6.2.1.1.

The second example is the 'Joint Way Forward on Migration Issues between

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[19] Ethiopia, Eritrea, Mali, Niger, Nigeria, Senegal, Somalia, Sudan, Ghana, Ivory Coast, Algeria, Morocco, Tunisia, Afghanistan, Bangladesh and Pakistan.

[20] The text of the EU-Ghana Joint Declaration is available at the following link: https://eeas.europa.eu/headquarters/headquarters-homepage/5249_en. See Table 2, section 4.1 above.

[21] The text of the EU-Turkey Agreement is available in the form of a European Council press release at the following link: http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/. It will be analysed in the next sub-section.

Afghanistan and the EU', also called 'EU-Afghanistan Joint Way Forward (or JWF) Agreement' signed on 2 October 2016[22]. In the joint press release that introduced it, the deal is presented as the outcome of a six-month long negotiation in the framework of a Senior Officials' Dialogue on Migration[23]. The document is described as 'a joint political commitment to effectively tackle the challenges linked to irregular migration' (EEAS 2016b). However, since Afghan nationals represented in 2015 the second largest group of asylum seekers in the EU after Syrians with 196,170 applications (EASO 2016a, 10), the EU-Afghanistan deal is mainly focused on the readmission (and reintegration) of rejected asylum seekers to Afghanistan.

The legal nature of this arrangement is clarified in its introduction, in a way that aims to clearly distinguish it from a formal EURA, notwithstanding the fact that its purpose, and partly also its content, are similar to those of a formal readmission agreement:

> The JWF is not intended to create legal rights or obligations under international law. It paves the way for a structural dialogue and cooperation on migration issues […]. It comes in support of the EU Member States bilateral relations with Afghanistan and cannot be interpreted as superseding the existing or preventing the conclusion of future bilateral agreements between the EU Member States and Afghanistan (EEAS 2016c, Introduction)[24].

As part of the deal, Afghanistan commits to readmit any Afghan citizen who has not been recognised international protection in the EU and who refuses to voluntarily return to Afghanistan. Interestingly, the text establishes 'a limitation to the number of non-voluntary returnees to 50 persons per flight in the first six months following the signature of the declaration'; however, there seems to be no limit to the total number of

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[22] The text of the EU-Afghanistan deal is available at the following link: https://eeas.europa.eu/headquarters/headquarters-homepage/11107/joint-way-forward-on-migration-issues-between-afghanistan-and-the-eu_en.

[23] Indeed, both the May 2016 Council Conclusions on External Aspects of Migration and the June 2016 Commission Communication on establishing a new Partnership Framework identified Afghanistan as a priority country in Asia, towards which the EU committed to ensure a more effective cooperation on readmission (Council of the EU 2016c, para 8; European Commission 2016f, para 16).

[24] In describing the relations (of compatibility) between this text and Member States' bilateral readmission agreements with Afghanistan, this paragraph recalls the words of the Council Conclusions on the expulsion of illegally staying third country nationals quoted above (Council of the EU 2016b, 4).

daily deportation flights that can be carried out by EU Member States individually or jointly under the coordination of Frontex. Expecting a large number of deportations, 'both sides will explore the possibility to build a dedicated terminal for return in Kabul airport' (EEAS 2016c, Part II, para 3).

One of the most worrying aspects of the agreement in terms of human rights protection is that it opens up to the possibility of deporting unaccompanied children, single women, elderly and seriously sick people. Even though it specifies that 'special measures will ensure that such vulnerable groups receive adequate protection, assistance and care throughout the whole process' and clarifies that unaccompanied children will not be returned 'without successful tracing of family members or without adequate reception and care-taking arrangements having been put in place in Afghanistan' (EEAS 2016c, Part I, paras 4-5), according to NGOs these provisions are questionable because the practice of deporting vulnerable people to Afghanistan had so far been rarely used among Member States.

In addition, this informal agreement is particularly controversial for two reasons. Firstly, it was signed in the run-up to the Brussels Donor conference on Afghanistan, which took place on 4-5 October 2016[25]. This is a clear evidence of the EU's attempt to make humanitarian and development aid conditional to a third country's cooperation on migration management, and especially on return and readmission. This practice is actually part of a broader European strategy, based on the previous experience of the EU-Turkey Agreement of March 2016, which is grounded exactly on the same *quid pro quo* (see next section).

Following the EU-Turkey Agreement, several EU leaders have strongly encouraged the replication of the same model with other relevant countries of transit or origin, in particular in Africa[26]. In the context of the new Partnership Framework (for which the EU-Turkey Agreement is credited as an inspiration), the EU itself committed to conclude before the end of 2016 informal migration deals with Ethiopia, Mali, Niger,

[25] Information on the Brussels Donor Conference on Afghanistan is available at the following link: http://www.consilium.europa.eu/en/meetings/international-summit/2016/10/05/.

[26] For instance, Austria has suggested the negotiation of an agreement of this kind with Egypt (EU Observer, 20 September 2016) and the German chancellor has directly engaged in migration talks with several African countries - Mali, Niger, Nigeria, Ethiopia and Chad (EurActiv, 7 October 2016).

Nigeria and Senegal focused on the provision of aid in return for increased cooperation on the readmission of irregular migrants and rejected asylum seekers (EU Observer, 13 October 2016; EurActiv 21 October 2016). The long-standing conditionality principle seems, thus, to have further evolved into a logic of trading humanitarian and development aid to countries that are in vital need of it, in exchange for their cooperation in stemming migration flows.

The second most controversial element of this informal agreement is the critical security situation in Afghanistan, which is consistently reported as having deteriorated further in the last two years. This is the conclusion not only of several NGOs' accounts, but also of two recent Country of Origin Information (COI) reports by the EASO focused, respectively, on the recruitment by armed groups (EASO, 2016b) and on the general security situation across the country (EASO, 2016c). Moreover, concerns were expressed even by the Commission and the EEAS in a restricted non-paper 'on enhancing cooperation on migration, mobility and readmission with Afghanistan' produced in March 2016 and transmitted to the Council's Permanent Representatives Committee in preparation to the EU-Afghanistan agreement. In this document the EU institutions noted that:

> the main push factors [of Afghan migration to Europe] are: a deteriorating security situation with record levels of terrorist attacks and civilian casualties (over 11,000 civilian casualties recorded in 2015), compounded by a deteriorating economic situation. Both are likely to grow stronger (Council of the EU 2016a, 3).

Therefore, NGOs have strongly criticised the EU and its Member States because, despite being well-aware of the situation in Afghanistan, they are ready to forcibly repatriate rejected asylum seekers to a country in conflict (Amnesty International 2016f). In this respect the Joint Way Forward Agreement appears to be even more dangerous for migrants and asylum seekers than the EU-Turkey Agreement.

6.2.1.1. The EU-Turkey cooperation on migration management in the context of the 'refugee crisis'

This section analyses the recent intensification of migration cooperation between the EU and Turkey, which occurred between 2015 and 2016, as one of the most interesting cases of informalisation of cooperation on readmission at the European level. Since the summer of 2015 the EU has struggled to cope with the so-called 'refugee crisis', a mass influx of mainly (but not exclusively) Syrian, Iraqi, and Afghan asylum seekers along the Eastern Mediterranean and Western Balkan routes into Europe[27]. Besides representing a serious humanitarian crisis affecting hundreds of thousands of human beings, this migration flow has challenged the fragile geopolitical balance of the Western Balkan region, exacerbated tensions among Member States and raised concerns about the future of the borderless Schengen area.

EU Member States have shown limited capacity to agree on a common strategy to deal with the 'crisis'; one of the few issues European leaders seemed to agree upon was the need to obtain from Turkey a stronger commitment to reduce the flow of migrants and asylum seekers crossing the Aegean sea to the Greek islands. Therefore, the EU institutions and Member States took a series of decisive steps to improve migration cooperation with Turkey; this includes in particular the adoption of an EU-Turkey Action Plan in October/November 2015 and the EU-Turkey Agreement of March 2016.

The EU-Turkey Action Plan

During the informal European Council meeting of 23 September 2015, European leaders decided to 'reinforce the dialogue with Turkey at all levels […] in order to strengthen our cooperation on stemming and managing the migratory flows' (European Council 2015b). Starting from that moment, an intense negotiation was launched between European and Turkish diplomacies, counting several high-level meetings. On 5

[27] Arrivals along the Eastern Mediterranean route amounted to more than 850,000 in 2015; 90% of them originated from the world's top ten refugee-producing countries (more than 50% came from Syria, approximately 25% from Afghanistan and 15% from Iraq). Source: UNHCR Refugees/Migrants Emergency Response: Mediterranean, http://data.unhcr.org/mediterranean/country.php?id=83 (accessed on 10 November 2016).

October 2015 Turkish President Erdoğan was invited to Brussels to discuss the issue with the representatives of the European institutions; the outcome was a first draft Action Plan 'stepping up EU-Turkey cooperation on support of refugees and migration management in view of the situation in Syria and Iraq' (European Commission 2015c). A slightly modified joint version of the Action Plan was agreed *ad referenda* on 15 October 2015 (European Commission 2015d) and was finally activated at the extraordinary meeting of the EU heads of State or government and Turkey, which took place on 29 November 2015 (European Council 2015c).

On the basis of the EU-Turkey Action Plan and EU-Turkey Statement of 29 November, the EU committed to provide humanitarian and financial assistance amounting to 3 billion euro under the 'Refugee Facility for Turkey' (European Commission 2015e) in order to support Syrians under temporary protection in Turkey and help host communities, thus reducing the push factors of Syrians' onward movements to Europe. In return, Turkey committed to strengthen its efforts to both prevent irregular migration towards the EU and take back irregular migrants and rejected asylum seekers who entered the EU coming from Turkey. However, probably learning from its past failures, the EU did not only offer financial assistance to Turkey, but it also committed to accelerate the visa liberalisation process with a view to achieving the lifting of visa requirements for Turkish nationals by October 2016. In addition, the Commission engaged to reactivate the process for Turkey's accession to the EU.

The content and structure of the Action Plan are revealing of the European approach to the refugee crisis: cooperation with Turkey is primarily aimed at reducing the number of asylum seekers and migrants reaching the EU. In the first section of the Action Plan (dealing with Syrians in Turkey) the 'crisis' is depicted as a refugee issue, while in the second section (dealing with irregular migrants trying to enter the EU from Turkey) the same crisis is described as an irregular migration problem (Farcy 2015). The Action Plan overlooks the figures showing that a large majority of those 'irregular migrants' mentioned under Part II are actually asylum seekers. The overlapping of two distinct legal categories appears to serve the purpose of promoting migration control measures, which would affect not only migrants who are not in need of protection, but

also (and according to figures, mainly) asylum seekers and refugees who *are* in need of protection.

Both the Action Plan and the EU-Turkey Statement make reference both to the EU-Turkey readmission agreement and to 'established bilateral readmission provisions' (European Council 2015c, para 7) as essential tools to ensure the deportation of migrants who are not in need of protection. When mentioning bilateral readmission arrangements, these documents refer (implicitly) in particular to cooperation between Greece and Turkey, which, despite the existing 2001 readmission protocol, was considered to be insufficiently effective, due to the limited number of returns actually carried out (see section 5.4 above). For this reason the Action Plan includes a commitment on the part of Turkey to 'step up cooperation [with Greece] and accelerate procedures in order to smoothly readmit irregular migrants who are not in need of international protection and were intercepted coming from the Turkish territory' (European Commission 2015d, Part II - Turkey, para 3).

With regards to the EU-Turkey readmission agreement, as mentioned under section 3.5.2, when it entered into force in October 2014 it applied only to Turkish nationals (and stateless persons and nationals of third countries with which Turkey had already concluded bilateral RAs); the obligation to readmit all third country nationals was meant to become applicable only three years later, starting from October 2017. The EU-Turkey Statement brought this deadline forward to June 2016 (European Council 2015c, para 5). Evidently, the EU and its Member States were interested in having at their disposal an additional instrument (besides bilateral cooperation between Greece and Turkey, which already applied both to nationals and non-nationals) that could facilitate the removal of irregular migrants who had entered the EU coming from Turkey and were considered as not being in need of international protection. The EU-Turkey Action Plan and Statement exemplify how a policy instrument covering *inter alia* cooperation on readmission can be used with the aim to rapidly upgrade and operationalise the provisions of a legal instrument, the EURA with Turkey. Hence, starting from 1 June 2016 the EU-Turkey readmission agreement should have become

fully applicable[28]. However, it seems that the actual implementation of this part of the EURA is still hampered by a certain reluctance on the Turkish side to take the necessary formal steps; indeed, as stated by the Commission in its Third Progress Report on the implementation of the EU-Turkey Agreement issued in September 2016, 'regarding the EU-Turkey Readmission Agreement, no progress has been recorded in the implementation of the third-country nationals provisions. The Turkish Council of Ministers has not yet taken the decisions authorising the application of these provisions' (European Commission 2016h, 6).

It is worth noting that the combined implementation of the EU-Turkey Action Plan and the EU-Turkey readmission agreement may result in an increased risk of human rights violations. As a matter of fact, in the period during and following the negotiation of the Action Plan, NGOs reported an increase in arbitrary arrests and detention of asylum seekers in Turkey, push-backs at sea and episodes of *refoulement* of Syrians at the Turkish-Syrian border (Amnesty International 2015b; HRW 2015b). In addition, there may be a risk of 'readmission chains', eventually amounting to 'chain *refoulement*'[29]; this risk emerges explicitly from the Action Plan, where the EU committed to support cooperation between Member States and Turkey in organising joint return operations towards countries of origin and to support cooperation with the countries of the 'Silk Route's Partnership for Migration'[30] on combating irregular migration (European Commission 2015d, Part II - EU, paras 3-4).

The EU-Turkey Agreement

However, in the months following its activation, the EU-Turkey Action Plan did not seem to produce any significant outcome in terms of flow reduction; rather, the living conditions of asylum seekers and refugees in Greece and along the Western

[28] This was announced by the Commission in its daily press release of 1 June 2016: http://europa.eu/rapid/press-release_MEX-16-2021_en.htm. Accessed on 10 November 2016.

[29] Readmission chains occur when rejected asylum seekers are deported from State to State based on readmission agreements back towards their country of origin (or another transit country); this may amount to 'chain *refoulement*' if there is no assessment of possible risks of persecution or torture (see above section 3.4.4).

[30] These countries are: Iraq, Iran, Afghanistan, Pakistan and Bangladesh; most of them are considered to be refugee-producing countries.

Balkan route kept deteriorating, while escalating tensions between Balkan countries and between EU Member States led to the building of new fences at the EU external borders and to the temporary reintroduction of internal border controls within the Schengen area.

This stagnant situation was suddenly turned over in March 2016 by a proposal for a new deal between the EU and Turkey presented at the international summit of the EU heads of State or government and Turkey held on 7 March 2016. On that occasion, the new plan (promoted by Germany and the Netherlands in concert with Turkey) was enunciated in its six fundamental principles (European Council 2016a, para 1); details and operational issues of the plan were agreed ten days later at the European Council meeting of 17-18 March 2016. The second day (18 March 2016) was dedicated to another meeting between the EU leaders and Turkey, during which a more elaborated version of the so-called 'EU-Turkey Agreement' was approved, in the form of a joint statement[31] (European Council 2016c).

In this document, the content of the new EU-Turkey deal is introduced by a very straightforward declaration: 'in order to break the business model of the smugglers and to offer migrants an alternative to putting their lives at risk, the EU and Turkey *today decided to end* the irregular migration from Turkey to the EU' [emphasis added]. The EU-Turkey Agreement does not substitute but rather complement the previous EU-Turkey Action Plan; its main features, as introduced by the 7 March statement and detailed in the 18 March statement, may be summarised as follows.

The Agreement is grounded on the parallel functioning of two mechanisms: 1) 'all new irregular migrants' – an expression that includes persons not applying for asylum as well as asylum seekers whose application is deemed unfounded or inadmissible based on the Asylum Procedures Directive (APD) – crossing from Turkey to the Greek islands starting from 20 March 2016 will be returned to Turkey; 2) for every Syrian returned to Turkey from the Greek islands, another Syrian will be resettled directly to the EU from Turkey (based on a so-called 'one-for-one' principle), giving priority to those who have not previously entered or tried to enter the EU irregularly. Resettlement

[31] The EU-Turkey Agreement of 18 March 2016 is officially called 'EU-Turkey Statement'; this is of course different from the above-mentioned EU-Turkey Statement of 29 November 2015.

under this new mechanism will, however, be carried out within the Member States' pre-existing commitments, which for the year 2016 amount to a total of 72,000 places for resettlement available across the EU[32] (European Council 2016c, paras 1-2). The text of the Agreement further specifies that, once irregular crossings between Turkey and the EU are ending or have been substantially reduced, a Voluntary Humanitarian Admission Scheme will be activated to substitute the 'one-for-one' resettlement mechanism (European Council 2016c, para 4).

In return for Turkey's commitment to take back 'all new irregular migrants' and to take any necessary measures to prevent the opening of new sea or land routes for irregular migration (European Council 2016c, para 3), the EU committed to: i) advance further the fulfilment of the Visa Liberalisation Roadmap from October 2016 (as established by the EU-Turkey Statement of 29 November 2015) to the end of June 2016, provided that all benchmarks have been met[33]; ii) speed up the disbursement of the initially allocated three billion euro under the Facility for Refugees in Turkey and, once these resources are almost exhausted, mobilise additional funding for up to three billion euro until the end of 2018; iii) revitalise Turkey's accession process, as established also in the EU-Turkey Statement of 29 November 2015 (European Council 2016c, paras 5-8).

The EU-Turkey Agreement builds upon the EU-Turkey Action Plan, but it also introduces two unprecedented (and highly controversial) principles in EU-Turkey cooperation in the area of migration and asylum. The first one is the extension of Turkey's readmission obligations to all migrants, including not only irregular migrants and rejected asylum seekers (i.e. asylum seekers whose application is considered

[32] Also the European Council Conclusions of 17-18 March reiterated that 'the EU-Turkey Statement does not establish any new commitments on Member States as far as relocation and resettlement are concerned' (European Council 2016b, para 3).

[33] In reality, at the moment of writing, visa liberalisation benchmarks have not been fully achieved yet (European Commission 2016h, 10). Both the June 2016 and the October 2016 deadlines have been missed, even though in May 2016 the Commission issued a legislative proposal to transfer Turkey to the list of visa-free countries (amending Regulation 539/2001), despite acknowledging that not all requirements had been fulfilled (European Commission 2016e). The Commission proposal is currently being discussed by the Council and the EP. Allegedly, at the present moment Turkey aims to obtain visa liberalisation by the end of 2016-beginning of 2017, even if not all benchmarks will be met (EurActiv, 22 September 2016).

unfounded in the merits) who are normally subject to voluntary or forced removal, but also asylum seekers (Syrian refugees included) to whom readmission agreements usually do not apply. The second new element consists of a mechanism where the resettlement of a Syrian refugee from Turkey to the EU is offered in exchange for the readmission of another Syrian refugee from the Greek islands to Turkey, thus making resettlement conditional to readmission[34].

With regards to the first element, it should be noted that the deportation of an asylum seeker to a third country without violating EU and international law may only be possible if the third country concerned, in our case Turkey, can be considered a 'safe third country'[35] (STC) or a 'first country of asylum'[36] (FCA) for a particular applicant, based on the definitions set out respectively under Articles 38(1) and 35 of the Asylum Procedures Directive. In both cases the asylum application would be deemed inadmissible based on Article 33(2) of the Procedures Directive and the asylum seeker could be returned to Turkey because he/she either already benefits from sufficient protection in Turkey (Turkey is a FCA) or he/she may request and receive protection in accordance with the 1951 Geneva Convention (Turkey is a STC)[37].

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[34] However, these two elements are not completely new. Indeed, the extension of readmission obligations to all migrants including asylum seekers (based on the application of the STC concept) and the principle of resettlement for readmission represent the fundamental pillars also of the so-called 'Samsom Plan'. This proposal (whose name comes from the Dutch politician who made it public in January 2016) was elaborated and promoted by a think tank called European Stability Initiative (ESI) and was supported by the Netherlands (during their semester of Presidency of the Council) and Germany. For a critical analysis of the Samsom Plan, see the relevant sections in: Peers and Roman 2016; Roman et al. 2016.

[35] Art. 38(1) APD sets out a series of legal requirements that need to be met in order for a third country to be considered 'safe' (a STC) for an asylum seeker: a) life and liberty shall not be threatened on account of race, religion, nationality, membership of a particular social group or political opinion; b) there shall be no risk of serious harm (consisting of: death penalty; torture or unhuman or degrading treatment; or a serious threat to the applicant's life due to indiscriminate violence in situations of conflict, as defined by art. 15 of the Qualification Directive); c) the principle of *non-refoulement* shall be respected; and d) the possibility shall exist for the applicant to claim refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.

[36] Art. 35 APD establishes that a third country can be considered to be a FCA for a particular applicant in two cases: a) if the applicant has been recognised as a refugee in that country and can still avail himself or herself of that protection; or b) if the applicant otherwise enjoys sufficient protection in that country, including benefiting from the principle of *non-refoulement.* Article 35 further specifies that in applying this concept Member States may take into account Article 38(1), i.e. the legal requirements used to establish whether a country is a STC.

[37] The application of the concepts of STC and FCA to Turkey is not discussed in the EU-Turkey Statement of 18 March 2016, but it is mentioned in the concomitant European Council Conclusions (European Council 2016b, para 3). The latter refer to the Commission Communication 'Next operational

Therefore, this new deal marks a radical change: while until that moment cooperation with Turkey on migration control and readmission was mainly focused on 'irregular migrants who are not in need of international protection' (this is the terminology used by the EU-Turkey Action Plan), with the EU-Turkey Agreement the focus of cooperation on stemming migration flows has explicitly shifted to asylum seekers and the scope of readmission has become larger, to include irregular migrants, asylum seekers and refugees alike.

The Agreement is undoubtedly the product of a strong political will on the part of the EU to find a radical and effective solution to the 'refugee crisis'; however the solution proposed is controversial both in terms of its compliance with international and EU law, and in terms of its actual implementation. A number of problematic issues have been highlighted by the UNHCR (2016a; 2016b; 2016c), the Commissioner for Human Rights of the Council of Europe (2016a) and the Parliamentary Assembly of the Council of Europe (2016a; 2016b); strong criticism was raised also by NGOs like Amnesty International (2016a), the European Council for Refugees and Exiles (2016a; 2016b) and Human Rights Watch et al. (2016). Several aspects of the Agreement were fiercely debated by scholars, many of whom were critical on its legal basis and its compliance with EU and international law (Carrera and Guild 2016; Thym 2016; Hathaway 2016a; 2016b; Hailbronner 2016; Peers 2016a; 2016b; Pascouau 2016; Emmanouilidis 2016; Collet 2016; Labayle and De Bruycker 2016; den Heijer and Spijkerboer 2016; Corten and Dony 2016; Favilli 2016).

In this section I will not discuss the most controversial substantive elements of the Agreement, concerning in particular the respect of the right to seek asylum, the prohibition of collective expulsions, the principle of *non-refoulement* and the right to an effective remedy, as established on paper and implemented in practice; these will be analysed under section 7.3 below. Here I will focus on a specific feature of the Agreement, relating to its form rather than to its content, which is of particular interest to this work – i.e. its legal nature.

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steps in EU-Turkey cooperation in the field of migration' of 16 March 2016 for a more detailed analysis of how the asylum application of a person coming from Turkey to Greece can be declared inadmissible in accordance with EU and international law (European Commission 2016b, 3-4).

The question is whether the so-called 'EU-Turkey Agreement' is a legally binding international agreement or a non-binding political declaration. The text of the Agreement makes no reference to the issue, differently, for instance, from the text of all Mobility Partnerships and of the EU-Afghanistan Joint Way Forward Agreement, both clarifying explicitly the nature of the instruments, which are 'not intended to create legal rights or obligations under international law'.

The procedure established by Article 218 TFEU for the negotiation and conclusion of international agreements between the EU and third countries (which is followed, for instance, to conclude formal EURAs) has not been respected. The Treaties establish that, for agreements in the area of migration and asylum (a field to which the ordinary legislative procedure applies), the Council shall adopt the decision concluding the agreement only after obtaining the consent of the European Parliament (Art. 218(6) TFEU); moreover, the European Parliament shall be immediately and fully informed at all stages of the procedure (Art. 218(10) TFEU). In the case of the EU-Turkey Agreement, the EP has been neither informed during the negotiation process, nor asked to give its consent before the European Council agreed with Turkey on the text of the agreement and made it public in the form of a statement through a press release on 18 March 2016.

Considering that the formal procedure for international agreements has not been followed and that the Agreement has the form of a joint statement (and is actually denominated 'EU-Turkey Statement'), one may conclude that it is a non-binding political declaration. However, den Heijer and Spijkerboer (2016) argued that the particular form or terminology of a text cannot be the decisive criteria allowing for the Council or the Commission to neglect the constitutional safeguards of Art. 218 TFEU. Based on the case law of the International Court of Justice, the authors argued that the question of whether a text is an international agreement does not depend on its form, but on whether the parties intended to bind themselves.

Similarly, based on the case law of the Court of Justice of the EU, Corten and Dony (2016) argued that it is not the form of a text to determine whether it is an international agreement; on the contrary, it is based on its purpose and content that one can establish whether the text contains commitments of a voluntary or legally binding

nature for the parties. The authors come to the conclusion that the EU-Turkey Statement contains legally binding commitments and thus is an international agreement (whose validity and legal effects may however be questioned).

Therefore, two more elements should be taken into consideration. Firstly, the purpose and content of the text, the terminology used and the context in which it was drawn up support the view that the parties intended to bind themselves, thus intended the text as a binding agreement. Secondly, the EU-Turkey Agreement certainly had legal effects: its implementation required legislative changes at the national level both in Turkey and Greece[38], and at the European level (e.g. amendments to the EU-Turkey readmission agreement[39] and to the Council Decision 2015/1601 of 22 September 2015 establishing an emergency relocation mechanism[40]). These legislative changes, which were necessary in order to implement the EU-Turkey deal, have been promptly adopted (or launched) between March and April 2016, proving that all the parties involved actually intended the agreement as legally binding and aimed to put it in practice as rapidly as possible.

Therefore, a number of elements (its denomination and form as well as the procedure followed and the actors involved in its negotiation and conclusion) suggest the EU-Turkey Agreement is an example of 'informal international lawmaking' as defined in section 6.1. However, the intention of the parties to bind themselves and the legal effects it produced suggest that this 'statement' is not a mere political declaration

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[38] On 1 April 2016 the Greek Parliament adopted under urgent procedure an important reform to its national asylum law (Law 4375/2016, entered into force on 3 April 2016) which introduced a considerable number of changes to the institutional framework, first reception procedures, asylum procedure and accelerated border procedure, application of the FCA concept, etc. For an analysis of the main changes introduced by the new law, see: AIDA 2016a.

[39] The EURA with Turkey had to be amended in order to advance the deadline for extending its application also to non-nationals from October 2017 to June 2016. See: Council Decision (EU) 2016/551 of 23 March 2016 establishing the position to be taken on behalf of the EU within the JRC on a Decision of the JRC on implementing arrangements for the application of Articles 4 and 6 of the Readmission Agreement between the EU and Turkey from 1 June 2016.

[40] On 21 March 2016 the Commission adopted a legislative proposal for the amendment of the September 2015 Council Decision that established an EU emergency relocation mechanism (European Commission 2016c). The purpose of the amendment was to make the 54,000 unused places originally earmarked for relocation from Hungary, available for the resettlement of Syrians from Turkey. The Commission proposal was adopted by the Council in September 2016 (see: Council Decision (EU) 2016/1754 of 29 September 2016 amending Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece).

lacking legally binding nature; on the contrary, it plays the functions of a legally binding international agreement, even though of an informal kind[41]. Indeed, as I argued above under section 6.1 drawing upon the work of Pauwelyn, Wessel and Wouters (2012), an informal agreement may take the form of a statement or a press release, and yet it may be construed and intended by the parties as legally binding, or it may have legal and normative effects[42].

Hence, it seems that disregarding the procedure established by the Treaties and the institutional role of the European Parliament was an intentional strategy pursued by the Council and EU Member States with the support of the Commission and motivated by the alleged need to rapidly adopt controversial but urgent measures and avoid possible obstacles emerging from a democratic scrutiny of the text by the EP or from an opinion of the CJEU on the compatibility of the Agreement with the Treaties[43]. An analysis of the most problematic elements relating to the content of the EU-Turkey Agreement (which considers also the most recent developments at a judicial level) is carried out in Chapter 7, section 7.3.

6.2.2. The implementation of European instruments of informal cooperation at the bilateral level: impact on their effectiveness

Notwithstanding its increasing diffusion, the informalisation of migration cooperation at the European level is characterised by a relevant limitation that concerns the relationship with Member States with regards to the actual implementation of European instruments of informal cooperation. Indeed, Mobility Partnerships, political dialogues and informal agreements usually provide only for a general framework for

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[41] For this reason, throughout this work I prefer to use the term 'EU-Turkey Agreement' instead of 'EU-Turkey Statement'.

[42] The legal service of the EP does not agree with this conclusion and has argued that the EU-Turkey Statement is not a legally binding agreement but a mere catalogue of measures to be adopted on their own legal basis. On the contrary, several Members of the European Parliament are extremely critical towards the Council and the Commission for neglecting the role of the EP, which they claim had to be involved (in compliance with art. 218 TFEU) in the negotiation and conclusion of what they consider to be a binding agreement with Turkey (EU Observer, 10 May 2016).

[43] This latter possibility is also foreseen as an optional step in the framework of the art. 218 procedure (art. 218(11) TFEU).

cooperation with a given third country; these instruments then need to be implemented by individual Member States through bilateral initiatives, concrete practices and operational arrangements with the third country concerned.

In the framework of the EU return and readmission policy, thus, European informal cooperation instruments play a relevant but partial function: they facilitate, encourage and support (both politically and financially) cooperation on migration management and on readmission, but the operationalisation of such cooperation is ultimately a responsibility of the Member States. For this reason, the effectiveness of European informal instruments of cooperation actually depends on how these instruments are implemented in practice at a bilateral level.

The EU institutions' efforts to establish cooperation with a given third country may be frustrated if Member States do not follow up with bilateral initiatives and operational arrangements which translate general commitments into practice. This is especially true in the case of informal European instruments that are not legally binding, such as Mobility Partnerships or, for instance, the Joint Declaration on Ghana-EU Cooperation on Migration and the EU-Afghanistan Joint Way Forward Agreement mentioned above. In all these cases, lacking the willingness and actual engagement on the part of Member States to operationalise the provisions included in these instruments, the latter risk to be completely ineffective.

The example of MPs is telling. As described in Chapter 4, the specific objectives of each MP (as listed in the main text of the Joint Declaration) are implemented through an evolving list of concrete initiatives and projects proposed either by Member States or by EU institutions and agencies, and usually included in the Annex to the MP (or scoreboard in the case of the MP with Tunisia). In particular, since Member States retain the exclusive competence to determine volumes of admission of migrant workers in their territory (Art. 79(5) TFEU), in the framework of a MP it is their sole responsibility to propose concrete initiatives in the area of legal migration, namely to offer labour migration opportunities, introduce circular migration schemes, etc. But so far this has happened only in a very limited way and the Commission does not have the competence and power to substitute Member States or to force them in the opposite direction.

As argued also in section 4.4.1 above, the lack of political willingness on the part of Member States to actually implement the objectives included under the MPs' first pillar and to offer concrete opportunities for migrant workers to enter the EU frustrates the Commission's efforts to present a balanced and comprehensive cooperation instrument to third countries, given the fact that one of the MPs' fundamental components (the one third countries are most interested in) is lacking. This deficiency impacts, of course, on the overall effectiveness of MPs as a policy instrument aimed at strengthening cooperation on migration control and readmission, because the lack of Member States' initiatives in the area of legal migration and mobility translates into the lack of a crucial incentive for third countries to cooperate in the area of readmission.

However, the predominance of the bilateral dimension in the implementation of cooperation on readmission is not a peculiar feature of informalisation: rather, it characterises both informal instruments and formal European readmission agreements. Indeed, EURAs are also implemented by Member States at a bilateral level (Cassarino 2010c, 17-18); their effectiveness, thus, depends on whether and how Member States put them in practice. As discussed under section 3.4.1 above, when Member States need to readmit a third country national to a given country, they tend to apply pre-existing (often informal) bilateral practices, even when an EURA is in place[44]. This may not affect the effectiveness of readmission *per se*, as long as readmission is actually carried out; but if EURAs prove useless compared to bilateral arrangements, this may jeopardise the effectiveness of EURAs as an instrument aimed at pursuing a harmonised readmission policy at EU level. This is one of the reasons that led the EU to learn from the Member States' experience of informal cooperation with third countries and gradually shift its common readmission policy towards informalisation.

Furthermore, the Commission seems to have recently acknowledged the crucial role of Member States in ensuring the effectiveness of European instruments of cooperation on readmission: in the communications issued in the last two years, besides fostering the expansion of informal modalities of cooperation on readmission, the Commission emphasised the need to strengthen cooperation with Member States.

[44] This practice has been explicitly criticised by the Commission in its 2011 EURAs' evaluation (European Commission 2011a, 4).

Actually, the EU's support for a combination of informalisation and cooperation with Member States in the area of readmission emerges not only from the Commission communications but also from the Council conclusions analysed under section 6.2.1 above[45]. In these documents the EU institutions have consistently emphasised the importance of reinforcing operational cooperation at the bilateral level and have committed to support the launch of new (or the improvement of existing) working arrangements, *ad hoc* procedures and communication channels between national authorities in Member States and third countries, with the purpose to increase the effectiveness of cooperation on readmission at the EU level.

Apparently, at the present moment EU institutions are pursuing a strategy where informal cooperation with third countries is negotiated, established and operationalised in close collaboration with the Member States' authorities[46]. From an EU perspective, this is doubly beneficial. First of all, the expertise and prior relations of some Member States with certain third countries may be extremely helpful in the launch and successful progress of political dialogues and informal agreements at the EU level. Secondly, an active involvement of Member States' authorities in the launch of informal cooperation with a given country may be useful to ensure those Member States' collaboration also in the implementation phase, and ultimately contribute to the effectiveness of European instruments of informal cooperation.

For instance, in the case of the EU-Turkey Agreement, the German and Dutch governments played a crucial role in negotiating a new European plan for migration cooperation with Turkey (building upon the so called 'Samsom Plan', as mentioned in section 6.2.1.1) and in promoting it at the EU level. Most importantly, the role played by Greece has been, and still is, of uttermost importance for the EU-Turkey Agreement to work properly and to produce effective results. Indeed, the implementation of the most crucial (for the EU) elements of the agreement is entirely within the competence

[45] I.e. in the EU Action Plan on Return (European Commission 2015b), the Council conclusions on the future of the return policy (Council of the EU 2015b), the Valletta Summit Action Plan (Council of the EU 2015c) and the Communication on establishing a new Partnership Framework with third countries (European Commission 2016f).

[46] For instance, the German chancellor has recently engaged in migration dialogues with several African countries (Mali, Niger, Nigeria, Ethiopia and Chad) as part of the EU plan to establish a new Partnership Framework with a number of priority countries in Africa (EurActiv, 7 October 2016).

and responsibility of Greece; moreover, the smooth functioning of the readmission of all new arrivals depends on the degree of operational cooperation at the bilateral level between Greek and Turkish authorities.

The demanding tasks attributed to Greece by the EU and the other Member States in the framework of the EU-Turkey Agreement is worth attention. First of all, as mentioned above under section 6.2.1.1 (see footnote 38), Greece had to amend its national asylum law in order to make it apt to implement the agreement at best, including several changes with regards to first reception, accelerated procedures, application of the STC and FCA concepts, appeal procedures, and its institutional framework. Secondly, the implementation of the agreement has posed several procedural and operational challenges.

Starting from 20 March 2016, Greek authorities have to register the asylum applications of every person who arrives on the Greek islands and they have to rapidly determine, in the first place, whether applications are admissible or not (ensuring at the same time full compliance with EU and international law). This is already a serious effort for Greece, considering that it has to deal also with a huge backlog of asylum applications (dating back to the years before the 2013 reform of its national asylum system). In addition, when the EU-Turkey Agreement was adopted there were approximately 50,000 unregistered asylum seekers and refugees in the country, who were prevented from continuing their onward journey along the Western Balkan route, following the EU leaders' decision to 'close' the Greek-Macedonian border.

Moreover, Greece has to ensure the application of Article 46 of the Asylum Procedures Directive[47]; thus, authorities have to manage the presumably high number of appeals that may follow first instance inadmissibility decisions and they have to decide upon them in accordance with EU law. However, authorities must also ensure that asylum seekers do not leave the country during the whole procedure; the solution adopted by Greece has been the automatic and arbitrary detention of all new arrivals in

[47] Art. 46 APD establishes that if an asylum application is found inadmissible, the applicant has the right to an effective remedy before a court or tribunal (art. 46(1)) and has the right to remain in the territory of the Member State pending the outcome of the appeal; the suspensive effect is automatic if the inadmissibility of the application is grounded on the STC concept (arts. 46(5)-(6)).

so-called 'hotspots' on the Greek islands[48]. This practice poses several problems, both in procedural and substantial terms[49].

Finally, it is worth recalling that, more in general, the Greek asylum system is extremely weak. As established by both the European Court of Human Rights and the Court of Justice of the EU in two landmark judgements[50], it is affected by serious systemic deficiencies that limit the possibility for asylum seekers to exercise their right to seek asylum, have their application duly examined, receive adequate reception, and be treated in a humane manner. With the EU-Turkey Agreement, the EU expects from this very system an additional effort to implement a plan that, from a procedural and practical point of view, is very complex.

As concerns the implementation of the agreement, in practice it began on 4 April 2016, with the readmission of about 200 migrants (who had not applied for asylum) from the Greek islands to Turkey and the simultaneous resettlement of about 40 Syrians from Turkey to Germany and Finland (European Commission 2016d). In the following months operations progressed rather slowly, in particular with regards to readmission from Greece to Turkey, as admitted also by the Commission in its third progress report on the implementation of the EU-Turkey Statement (European Commission 2016h, 2). According to the most recent figures provided by the Commission, as of 17 November 2016, only 721 migrants have been readmitted from Greece to Turkey and 2,351 Syrians have been resettled from Turkey to EU Member States[51].

On the other hand, the EU-Turkey Agreement seems to have produced, to some

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[48] Hotspots were established in September 2015 in Greece (and Italy) as part of the EU mandatory mechanism for the relocation of Syrians and Eritreans across the EU. They were originally meant to be open centres for the reception, identification and registration of asylum seekers, but in practice they soon turned into detention centres for all new arrivals. In the case of Greece, the EU-Turkey Agreement marked the divide between open centres and closed detention facilities.

[49] As reported by NGOs, the legal basis of detention is unclear; there is no evaluation of the risk of absconding and of the vulnerability of specific categories of people; there is no validation of detention by a judicial authority; no information is provided to detainees on the reasons and duration of their detention; and conditions of detention are extremely critical (Amnesty International 2016c; HRW 2016a; 2016d).

[50] ECtHR, *M.S.S. v. Belgium and Greece*, Application No. 30696/09, Judgement of the Grand Chamber, 21.01.2011; CJEU, *N.S. and M.E. and others*, Joined cases C-411/10 and C-493/10, Judgment of the Court (Grand Chamber), 21.12.2011.

[51] Figures available at the following link: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/press-material/docs/state_of_play_-_eu-turkey_en.pdf (accessed on 21 November 2016). These figures are regularly updated by the Commission.

extent, the expected results, since starting from April 2016 there has been a sharp decrease in the number of arrivals to the Greek islands: while in January-February 2016 there were around 2,000 arrivals per day, in September-October 2016 daily arrivals were around 100[52]. The Commission has heralded this outcome as a factual proof of the effectiveness of the agreement: 'the substantial fall in both crossings and fatalities since the entry into force of the Statement is testament to its effective delivery' (European Commission 2016h, 2).

However, due to the fact that arrivals to the Greek islands have reduced but have not stopped, whilst deportations from Greece to Turkey have proceeded at a slow pace, the situation on the Greek islands has been deteriorating, causing an escalation of tensions and violence in the hotspots. The already fragile Greek asylum system is suffering from increasing pressure at all levels, from first reception to appeal procedures; recently, this situation has started to cause concern among Member States and EU institutions, with raising fears that the agreement may soon collapse (EurActiv, 2 November 2016).

The short analysis of this case study shows that the endurance and effectiveness of the EU-Turkey Agreement depend entirely on the capacity of Greece to keep implementing it (despite the huge challenges it poses to its asylum system), as well as on an improvement in bilateral cooperation on readmission between Greek and Turkish authorities. In conclusion, this proves how the effectiveness of a European instrument of informal cooperation depends on how it is implemented by Member States at the bilateral level.

[52] In January and February 2016 arrivals on the Greek islands were 67,500 and 57,000 respectively; in March 2016 (when the EU-Turkey Agreement was discussed and adopted) they were 27,000; in April 2016 (when the implementation of the agreement actually began) they fall to 3,650 and in May 2016 to 1,260. From May to July 2016 arrivals were on average 1,500 per month, while from August to October 2016 they were approximately 3,000 per month. Source: UNHCR Refugees/Migrants Emergency Response: Mediterranean, http://data.unhcr.org/mediterranean/country.php?id=83 (accessed on 21 November 2016).

6.2.3. The reversibility of informalisation: possible 're-formalisation' dynamics resulting from informalisation

Section 6.2 has so far analysed the increasingly widespread use of informal instruments of cooperation on readmission at the European level; in this sub-section I argue that this recent informalisation trend should not be regarded as a linear irreversible process and the occurrence of dynamics of 're-formalisation' should not be completely excluded.

Even though in recent years there has been an evident gradual shift towards informalisation, this does not mean that the EU institutions have renounced the idea of negotiating formal instruments of cooperation on readmission with third countries. Indeed, EURAs have not disappeared from the Commission's and the Council's official documents; on the contrary, the need to finalise pending readmission negotiations has been repeatedly affirmed and the opening of new negotiations has also been suggested.

For instance, the launch of EURA negotiations with the main countries of origin of irregular migrants in Sub-Saharan Africa is presented as the first of three ways to enhance cooperation on return by Commissioner Avramopoulos, in its letter to the Council of June 2015 (Council of the EU 2015a, 5). This proposal is upheld in the EU Action Plan on Return of September 2015, where, besides launching two new informal modalities of cooperation with third countries[53], the Commission recommends the conclusion of ongoing negotiations with North African countries and the opening of negotiations for new EURAs with key countries of origin in Sub-Saharan Africa (European Commission 2015b, 10-12). Also the European Council Conclusions of June 2015 make reference to the need for the Commission to accelerate and conclude ongoing negotiations and launch new ones (European Council 2015a, para 5(b)).

Against this background, the Council Conclusions on the future of the return policy of October 2015 mark an interesting development. In this document readmission agreements are for the first time presented as an instrument 'to formalise the practical

[53] As mentioned above in section 6.2.1, the EU Action Plan on Return put a strong emphasis on two informal ways of establishing or improving cooperation with third countries: bilateral readmission meetings with Sub-Saharan countries of origin aimed at improving operational cooperation; and high-level political dialogues on readmission with relevant countries of origin and transit.

cooperation arrangements' established through informal bilateral dialogues (Council of the EU 2015b, para 11). More explicitly, the Council Conclusions on the expulsion of illegally staying third country nationals of May 2016 recommend the establishment of 'legally non-binding working arrangements on identification, return and readmission' and note that these instruments 'may in cases contribute to creating the conditions for the negotiation and conclusion of future readmission agreements as cooperation develops' (Council of the EU 2016b, 4). Furthermore, the Commission Communication establishing a new Partnership Framework with third countries refers to formal readmission agreements only to stress that they are no more a priority in the EU return and readmission policy, as 'the paramount priority [of cooperation on readmission] is to achieve fast and operational returns' (European Commission 2016f, 7).

This short account shows that in the most recent EU documents formal readmission agreements are still an option, but they are presented along with informal instruments of cooperation on readmission and, compared to the latter, they are not considered a priority anymore. Instead, EURAs represent an eventual possibility, which may be pursued in order to formalise a previously established informal modality of cooperation, if this formalisation is deemed useful to further improve cooperation with a given country. The two most recent negotiations for new EURAs, both launched by the Commission in 2016, represent clear examples of this trend.

The first one is the opening of negotiations for an EURA with Tunisia, for which the Commission received mandate in December 2014 and which formally began on 12 October 2016. The conclusion of a readmission agreement was one of the initiatives explicitly included in the Mobility Partnership signed with Tunisia in March 2014 (see Chapter 4, section 4.5.2). Therefore, the launch of readmission negotiations with Tunisia may be seen as a case of 're-formalisation' linked to prior informalisation, as the opening of negotiations for a EURA with Tunisia is a direct consequence of the previous adoption of an informal instrument of cooperation (the MP), which laid the bases and created favourable conditions for initiating discussions on a formal readmission agreement.

The second example is the opening of negotiations for an EURA with Nigeria, for which the Commission received mandate in September 2016 and which were launched

on 26 October 2016. Also in this case, the negotiation of a formal readmission agreement originates from a context of informal cooperation. In March 2015 the EU and Nigeria signed a Common Agenda for Migration and Mobility (CAMM), another policy instrument of the GAMM, introduced in 2011 as an alternative to MP, requiring reduced commitments from the parties[54] (García Andrade et al. 2015, 34-35). This instrument provided a solid framework for cooperation between Nigeria and the EU in the four thematic areas of the GAMM, including in the field of readmission. In this area, the CAMM focused on strengthening operational cooperation (i.e. swift identification of own nationals, issuance of travel documents, efficiency of return procedures), while also mentioning the possibility to conclude formal readmission agreements (CAMM with Nigeria, para 4).

The CAMM was accompanied by the establishment of a High Level Dialogue with Nigeria, which has intensified in particular in the first half of 2016 (European Commission 2016f, Annex 2). The new Partnership Framework introduced by the Commission in June 2016 (with Nigeria being selected as one of the first priority countries) has significantly reinforced cooperation between the EU and the third country. As reported in the First Progress Report on the Partnership Framework of 18 October 2016, since the launch of this new cooperation framework, 'negotiations for an EU-Nigeria readmission agreement have been accelerated, with the formal adoption of the mandate for negotiations by the Council in September 2016 and the opening of negotiations planned for 25 October' – only one month after. According to the report, 'Nigeria is particularly interested in simplifying cooperation on readmission by concluding an EU-wide agreement' (European Commission 2016k, 7).

The launch of negotiations for a EURA with Nigeria can, thus, be considered as a further instance of 're-formalisation' deriving from informal cooperation. The latter was developed thanks to a number of informal instruments: the CAMM, the High Level

[54] CAMMs are offered in alternative to MPs when the EU and a third country wish to establish an advanced cooperation on migration but one of the parties is not willing to undertake the full set of obligations and commitments associated with MPs, namely the signature of an EURA in exchange for a VFA (European Commission 2011e, 11). The CAMM with Nigeria is the only CAMM adopted so far. It is very similar to existing MPs in terms of structure, content and purpose; however, it makes few references to concrete cooperation projects and focus more on research, data collection, exchange of information and good practices, etc. (García Andrade et al. 2015, 34-35).

Dialogue on readmission and the new Partnership Framework.

To conclude, both the EURA with Tunisia and the EURA with Nigeria are examples of a possible re-formalisation trend, which is interestingly linked to a previous informalisation process. In these cases, informal cooperation seems to play a relevant function in preparing the conditions for the introduction of formal agreements: interestingly re-formalisation appears to be generated by informalisation. Therefore, it seems possible to argue that in the area of cooperation on readmission at the European level, informalisation and re-formalisation dynamics may coexist and influence one another, being the two processes fluid and intertwined.

6.3. Informalisation of cooperation on readmission at the bilateral level

After an in-depth analysis of the informalisation of cooperation on readmission at the European level, this section analyses informalisation at the bilateral level. The importance of analysing this aspect is due to two main reasons. Firstly, bilateral cooperation on readmission (both formal and informal) is still predominant (Cassarino 2010c, 22), despite the gradual consolidation of a common return and readmission policy and the multiplication of European instruments of cooperation, if only because of its role in the implementation of the latter (as discussed in section 6.2.2 above). Secondly, as mentioned above in section 6.1, informalisation started at the bilateral level, with what Cassarino called the 'emergence of informal patterns of bilateral cooperation on readmission' (2007, 185); the Member States' experience of informal cooperation with third countries was then taken as an example and expanded at the European level.

This section discusses the peculiar features of informal instruments of bilateral cooperation and the reasons why States make an extensive use of these instruments as an alternative to, or in addition to already established, formal readmission agreements, focusing on the Mediterranean area. Also based on the empirical evidence provided by the three case studies analysed in Chapter 5, three common fundamental features are identified and discussed: (a) their flexibility, immediate operability and rapidity in the adoption; (b) their lack of transparency and accountability; (c) the role non-state actors

and international organisations may play.

6.3.1. The increasing use of informal bilateral agreements linked to readmission

As anticipated above in section 6.1 and section 5.1, over the last decade cooperation on readmission between EU Member States and third countries in the Mediterranean area has made large use of informal tools, such as MoUs, exchanges of letters, administrative arrangements, operational protocols, etc., as an alternative to formal readmission agreements, or in order to complement and operationalise them. Cassarino (2010b; 2010c) calls these instruments 'non-standard agreements linked to readmission' distinguishing them from 'standard readmission agreements'. Based on empirical information on known bilateral readmission agreements between EU Member States and third countries, the scholar argues that since the late 1990s-early 2000s France, Greece, Italy and Spain have been at the forefront of a new wave of informal agreements linked to readmission with third countries on the southern shore of the Mediterranean and in Africa (Cassarino 2010b, 9-14; 2007, 186-188).

For reasons of geographical proximity and migration salience, these Mediterranean EU Member States have tried to establish cooperation on migration management, border control and readmission mainly with third countries in the Southern and Eastern Mediterranean. However, differently from countries in Eastern Europe and the Western Balkans, Mediterranean and African third countries have shown a certain reluctance towards the conclusion and/or actual implementation of formal readmission agreements, due to a number of reasons (discussed below in this section) among which the lack of incentives comparable to those offered by the EU to its Eastern neighbours (prospective EU accession, visa facilitation and liberalisation, etc.). Therefore, faced with these difficulties, some Member States have started to devise a broader framework for bilateral cooperation based on a variety of informal agreements rather than on formal RAs, 'arguing that these new forms of "compromise"

foster cooperation on readmission' (Cassarino 2007, 179-180)[55].

There are several reasons why States may prefer to ground bilateral cooperation on readmission on informal instruments rather than, or in addition to, formal readmission agreements. Many of these reasons are closely related to the fundamental features of informal agreements, which will be further analysed in the next sub-section. First of all, compared to formal RAs, informal arrangements are more flexible and may be easily adapted to changing circumstances, reducing the risk of defection and allowing for a more effective and long-lasting cooperation. Due to the uncertainties surrounding the concrete implementation of a cooperation agreement over time and given the highly sensitive nature of migration matters, both EU Member States and third countries may want to include in their bilateral cooperation on readmission the proper amount of flexibility. According to Cassarino (2010b, 8-9), this is the main rationale for the adoption of non-standard agreements.

Secondly, compared to formal RAs, informal arrangements are less visible to the public. This is a crucial element in particular for North African countries, whose governments often refuse or resist the conclusion of formal readmission agreements because they fear the potentially negative impact such instruments may have on their domestic economy, social stability and political support to the government[56]. The economies of certain third countries still depend to a large extent on remittances; moreover, cooperation on readmission is politically unpopular among the citizens of these countries (including their diasporas in Europe), who clearly oppose any commitment taken on by their national government to accept the forced return of their fellow citizens. In addition, the signature of formal readmission agreements may affect negatively these countries' external relations with their African neighbours. For this set of motives, Southern Mediterranean countries have traditionally proved more keen to cooperate on migration management and readmission with their European counterparts

[55] In fact, data collected by Cassarino demonstrate that the growth of informal agreements linked to readmission is concentrated in the Mediterranean area, whereas the increase of formal readmission agreements recorded approximately in the same period concerns countries like Germany, Denmark and Switzerland, which have negotiated formal readmission agreements mainly with countries in Eastern Europe and the Western Balkans (Cassarino 2010b, 9-14).

[56] This is true both for bilateral readmission agreements and EURAs, as discussed above in Chapter 3; it applies for instance to the case of the EURA with Morocco (see section 3.5.1).

on the basis of informal quasi-legal instruments, operational protocols and administrative arrangements, rather than formal RAs.

A third element supporting the use of informal cooperation is the unbalanced costs/benefits ratio that formal RAs impose on third countries compared to EU Member States. Indeed, besides financial, institutional and organisational costs (partly covered by their European counterpart), as mentioned above, North African countries are asked to bear the social and political costs of an agreement that is unpopular at both domestic and neighbourhood level, without receiving adequate incentives or compensations in return (Cassarino 2010b, 6). Indeed, incentives offered by European States may not always induce third countries to conclude formal RAs, or even if they do, they may not be able to ensure the implementation of the agreements over time. Even though bilateral RAs set out reciprocal obligations for the parties, in practice such obligations are unequal and tend to penalise third countries. In order for the full implementation of a readmission agreement to be ensured, both parties would need to perceive a balance between its costs and benefits (Cassarino 2007, 181-184).

For this reason, readmission is often embedded into a broader cooperation framework, including other strategic, and perhaps more crucial, policy areas (e.g. energy security, fight against international terrorism, trade concessions, police cooperation, development aid) or involving 'high politics' issues (e.g. reconciliation processes, strategic alliances, search for international legitimacy). As affirmed by Cassarino, 'it is this whole bilateral cooperative framework which secures a minimum operability in the cooperation on readmission more than the "reciprocal" and binding obligations contained in a standard readmission agreement' (2010b, 7). In fact, the benefits coming to third countries from informal bilateral cooperation in other relevant policy areas may compensate for the unbalanced costs of a formal readmission agreement[57].

The case of cooperation between Italy and North African countries analysed by

[57] According to Cassarino, the more two States interact and negotiate within a broad cooperation framework, the more they know their counterpart's priorities and capacities, and the more they will be ready to jointly adapt their cooperation in response to changing circumstances and to the changing balance of costs and benefits; this dynamic favours informal flexible modalities of cooperation over formal legal instruments (2007, 185).

Cuttitta (2008; 2010) is illustrative of this phenomenon. In order to convince Morocco, Tunisia, Libya, Egypt and Algeria to cooperate on readmission, either on the basis or in the absence of a formal bilateral RA, Italy has offered those countries a variety of incentives including legal migration opportunities in the form of annual entry quotas, conditional development aid, financial and technical assistance, trade partnerships and international political support[58]. Cuttitta argues that in most cases North African countries have been able to gain relevant and highly visible financial, technical and political benefits in exchange for their cooperation on readmission; this is most evident in the case of Libya (see also Paoletti 2010; 2011a[59]). Such benefits were perceived by those countries as sufficient to counterbalance the costs of cooperating in the area of migration management and readmission and to present to their national constituencies cooperation with Italy as overall beneficial for the country.

If on the one hand this outcome was undoubtedly welcome by Italy, on the other hand Cuttitta highlights that 'in most cases it would be difficult to tell who has gained more at the bargaining table' (2008, 13). On the same note, Cassarino (2005) and Paoletti (2011b) emphasise more generally the ability of Southern Mediterranean countries to capitalise on the interconnectedness characterising such a broad cooperation framework with European countries, using their cooperation on migration management,

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[58] In analysing Italian migration policies and relations with third countries in North Africa, Paoletti (2011a, 74-77) emphasises in particular the combination of readmission agreements and annual entry quotas as a powerful negotiation tool in the hands of Italy. Throughout the years 2000s, Italy has made large use of its annual entry quota system to either reward or punish Southern Mediterranean countries for their conduct in the areas of migration control and cooperation on readmission, by increasing or cutting down their reserved shares of migrant workers. Indeed, by giving these countries the opportunity to increase their annual share of migrant workers admitted to Italy, Italy has been able to exert pressure on them and obtain their commitment to collaborate in controlling migration flows and accepting the readmission of irregular migrants (see also Favilli 2005, 157).

[59] Paoletti (2010) argues that in the case of Italian-Libyan cooperation on readmission, and more precisely with regards to repatriations carried out through charter flights between October 2004 and March 2006, Italy bore the highest financial and reputational costs, with limited benefits in terms of effective reduction of migration flows. Conversely, Libya obtained important benefits in terms of international credibility and regime legitimacy, as well as financial and material resources received from Italy. In negotiating cooperation on readmission in this particular case, Libya has been the strongest player (the one that had to be induced to cooperate) while Italy had 'little choice but to cooperate with Libya' and was ready 'to talk at any cost'. Paoletti concludes that 'the Italian-Libyan non-standard agreements linked to readmission can be defined as relations among unequals, with Italy being in the weaker position' (2010, 74), thus configuring an overturning in north-south power relations as they are traditionally conceived.

border control and readmission as a bargaining chip to exert more leverage on EU Member States and obtain important benefits in other policy areas (foreign policy, trade, development aid), in line with their interests and priorities.

Finally, in relation to this last element, Cassarino identifies as a further relevant factor leading to the growth of informal cooperation on readmission also the empowerment of Mediterranean third countries, resulting from their proactive involvement in joint border control at the EU southern borders, which produced a change in power relations between countries on the two sides of the Mediterranean. Indeed, the bilateral police cooperation initiatives developed since the early 2000s allowed certain North African countries to gain international credibility and regime legitimacy; as a consequence, they acquired a strategic position in migration talks with the EU and its Member States (Cassarino 2010b, 16; 2007, 191-192). Having become stronger interlocutors, Mediterranean third countries can now act as 'equal players', expressing their own views and making pressures on EU Member States to address or reconfigure cooperation in a way that they consider to be more advantageous for them.

Therefore, these new power relations resulting from the empowerment of third countries have contributed to downgrade formal readmission agreements while increasing the relevance of informal instruments of cooperation (Cassarino 2010b, 16-18). As summarised by Cassarino, 'the objective remains unchanged, but in relations with Southern Mediterranean countries, the emphasis has been placed more on pragmatic steps than on the conclusion of formal agreements' (Cassarino 2007, 192).

6.3.2. The main features of informal bilateral agreements linked to readmission

As mentioned in the previous section, the main characteristics of informal agreements linked to readmission represent also some of the most relevant reasons why Mediterranean countries have engaged in informal cooperation. According to Cassarino (2007, 190), indeed, these features 'are sufficient to explain the gradual proliferation of informal patterns of cooperation on readmission in the Mediterranean region and beyond' and they are key to understand why some Mediterranean third countries

accepted to cooperate on readmission with some Member States on an informal basis, while remaining reluctant towards the signature of formal RAs.

However, it should be noted that these very features are not uncontroversial: what makes informal arrangements strong in terms of effectiveness of cooperation, may at the same time represent a weakness in terms of respect for democratic decision-making and human rights. Some of the most controversial aspects of these instruments were analysed under Chapter 5 and are discussed in this section, whereas a detailed examination of how informal bilateral instruments of cooperation may impact on the human rights of migrants and asylum seekers follows in Chapter 7.

Building upon the works of Cassarino (2007; 2010b), Lipson (1991) and Pauwelyn, Wessel and Wouters (2012a) (see section 6.1 above), I have identified the following three main characteristics of informal readmission agreements: a) their flexibility, immediate operability and rapidity in the adoption; b) their lack of visibility, transparency and accountability; c) the role non-state actors and international organisations may play in their negotiation and implementation.

The flexibility and immediate operability of informal readmission agreements

As mentioned in section 6.3.1, informal arrangements linked to readmission such as MoUs, exchanges of letters, administrative arrangements, oral processes and operational protocols are highly flexible in their content and structure, and may be easily adapted to changing contingencies.

The negotiation and adoption of these instruments may be quite rapid: these are usually conducted at the executive or ministerial level and may involve different actors, including heads of government, interior ministers or other officials (like heads of police), but the national parliaments of the countries concerned are generally excluded from the entire process. Since these arrangements are not considered international law agreements, they do not need to be authorised or ratified; hence, they usually avoid parliamentary scrutiny and lengthy ratification procedures. Moreover, informal arrangements are immediately applicable, as there are no time gaps between their signature and their entry into force; this ensures the instant operability of these instruments – an element that is deemed of crucial importance by both parties.

The fact that these instruments may be rapidly and easily adopted is also a guarantee of their adaptability to changing circumstances. Indeed, the terms of an informal agreement may be easily renegotiated by the parties in order to respond to new contingencies; such renegotiation would occur at the executive or administrative level, avoiding any formality and excluding any parliamentary debate. Since the parties' interests and priorities may change over time, the possibility to adapt their bilateral cooperation arrangements accordingly, represents an added value and contributes to limit defections.

Arguably, this is also the most relevant difference compared to formal readmission agreements. Being international treaties, the latter are rather rigid in their content, structure and adoption procedure. Their conclusion usually requires a lengthy negotiation process, because the parties are keen to define in details the commitments they undertake (which are legally binding and publicly visible). Moreover, once concluded, formal agreements need to be ratified by the national parliaments of both countries concerned and published in official journals before they can enter into force and become operational; this process tends to be rather slow. The features of flexibility and operability, thus, seem to be the main rationale for the adoption of informal arrangements in the area of readmission.

The lack of transparency and accountability

As mentioned above in section 6.3.1, informal instruments of bilateral cooperation on readmission tend to be less visible to the public compared to formal RAs. Indeed, instruments like MoUs, exchanges of letters, oral agreements, administrative arrangements and operational protocols are generally not published in the official journals of the countries concerned. Sometimes they are not even recorded in official documents, nor made public in any alternative way, e.g. through a press release, media coverage, publication on institutional web sites or a government communication to the parliament. Informal agreements may actually remain (temporarily or permanently) hidden or secret. Their limited visibility may make it difficult to detect and uncover them; however, in some cases informal arrangements linked to readmission may be traced in that they are part of a broader framework of bilateral cooperation on migration

and other issues (Cassarino 2007, 185-186).

This is for instance the case of Italy and Libya, which have cooperated on the readmission or rejection of third country nationals from Italy (or from territorial and international waters) to Libya in different periods starting from 2004, most probably on the basis of several (written and oral) informal deals and operational protocols, which have not been made public. However, the existence of such informal arrangements on readmission may be inferred from the fact that Italy and Libya have been cooperating intensely on the joint management of migration since 1998, in particular through a series of agreements, operational protocols and MoUs in the area of police cooperation, which have been made public or whose existence has been admitted by the Italian government (but content not disclosed). Actually, cooperation between Italy and Libya has not been limited to migration, but has included a number of issues (colonial-era compensations, energy, trade relations, fight against international terrorism), culminating in the Treaty of Friendship, Partnership and Cooperation signed in August 2008; it is within this broad cooperation framework that informal agreements on readmission should be framed (Favilli 2005, 161-165; Cuttitta 2010, 34-36; Paoletti 2010; 2011a; see above section 5.2).

Besides their limited publicity and visibility, informal readmission agreements suffer also from a lack of democratic oversight and accountability, due to the fact that they are not subject to the regular procedure required for the conclusion of international agreements. For instance, in Italy Article 11(4) of Legislative Decree 286/1998 establishes that the Ministry of Foreign Affairs and the Ministry of Interior have the power to conclude cooperation arrangements (*'intese di collaborazione'*) with third countries aimed at accelerating and improving the procedures for the readmission of irregular migrants, and at fighting irregular migration; the conclusion of this kind of informal agreements does not require the prior authorisation of the Italian Parliament[60].

[60] The provision establishing that these cooperation arrangements can be concluded without the authorisation of the Parliament is based on the idea that the nature of these agreements is not political but merely technical (see art. 80 of the Italian Constitution). Favilli (2005) questions this interpretation: she argues that international agreements in the field of migration do have a political nature and therefore their conclusion should be always authorised by the Parliament (of the same opinion is: Pastore 1998, 974). Moreover, Favilli (2005) argues that the adoption of any kind of agreements in this area, including informal and 'technical' ones, should foresee the participation of the Parliament, based on art. 10(2) of the

Actually, not only informal readmission arrangements are usually neither authorised *ex ante* nor ratified *ex post* by national parliaments, but in most cases they are not even discussed at parliamentary level. In some cases, a parliamentary inquiry may be raised towards the government or its ministers to obtain information on the content of an informal agreement, but this usually happens only after the agreement has already been concluded and its existence has been uncovered[61].

With regards to the Italian-Libyan case study, Favilli (2005) is especially critical towards two practices carried out by the Italian government: that of keeping cooperation agreements in the area of readmission secret, and that of excluding the Italian Parliament from their adoption process. According to the scholar, both practices violate Article 10(2) of the Italian Constitution, which establishes that the legal status of foreigners (including their removal in case of irregular entry or stay) should be regulated exclusively by law; this constitutional provision requires full transparency over norms in the area of migration, precisely in order to avoid that this delicate matter is subject to the discretionary power of the executive. Favilli argues that this provision rules out both the possibility to conclude secret agreements in the field of migration and the possibility to exclude the Parliament from their adoption.

The low level of transparency and public accountability of informal readmission agreements raises serious concerns over the extent to which their implementation can actually be monitored; it seems extremely difficult to ensure and enforce their full compliance with EU and international law, with regards in particular to the fundamental rights of migrants and asylum seekers who are to be readmitted (Cassarino 2007, 193). As long as removals are carried out on the basis of informal deals concluded at the executive level without any parliamentary scrutiny and whose content (or even existence) are kept secret, the risk of human rights violations will be extremely high.

Italian Constitution (which establishes that the legal status of migrants should be regulated by law).

[61] This has occurred on various occasions in Italy since the years 2000s, with regards to the informal cooperation agreements signed by the Italian executive with countries in North Africa, and in particular with Libya (Favilli 2005; Paoletti 2010; Cassarino 2007, 193-194).

The role of non-state actors and international organisations

In Chapters 3 and 4 the role of non-state actors and international organisations has been analysed with regards to the negotiation and implementation of European readmission agreements (section 3.4.3) and Mobility Partnerships (section 4.4.3). Most of what has been said concerning these two European-level instruments of cooperation on readmission holds true at the bilateral level. Actually, the increasing participation of non-state actors and international organisations in the implementation of external migration policies (and consequently also in the related decision-making processes and fora) is a phenomenon that has begun at the national/bilateral level and has rapidly developed to cover also European-level initiatives.

Since the years 2000s, private actors and international organisations have been increasingly involved in the implementation of Member States' policies in the area of migration and asylum, both inside and outside their national territory. More precisely, EU Member States have outsourced to private actors relevant tasks in the fields of migration control, border surveillance, migration detention and forced return. Moreover, international organisations such as the IOM and UNHCR have become global leaders in implementing, on behalf of European countries, Assisted Voluntary Return and Reintegration programmes targeting irregular migrants and rejected asylum seekers, as well as capacity-building initiatives in the area of migration management and asylum addressed to authorities in third countries[62].

States have, thus, gradually delegated private actors and international organisations to carry out typical State duties, in order to maximise the effectiveness, flexibility and operability of a wide range of cooperation initiatives in the area of migration management, including return and readmission, while minimising their costs

[62] For instance, upon initiative of the Italian government, in August 2005 Libya signed a cooperation agreement with the IOM. Following the signature of this agreement, the IOM opened an office in Tripoli and carried out a number of projects in collaboration with the Libyan government, funded by Italy and the EU (under the Aeneas Programme first and the Thematic Programme later on). The most relevant project was called TRIM ('Transit and Irregular Migration Management') and it was implemented between 2006 and 2009. The main activities of the project included capacity-building addressed to Libyan officials and assistance to migrants in Libya who wished to return to their countries of origin through a programme of Assisted Voluntary Return and Reintegration. The TRIM project focused in particular on AVR to Niger and Chad and was carried out with the supervision of the UNHCR (Paoletti 2011a, 160-162; Cuttitta 2008, 5-6).

and visibility. In addition, the more non-state actors and international organisations have become responsible for the operationalisation of Member States' migration policies, the more they have acquired the power to influence (and to some extent participate in) decision-making in this field (Cassarino 2010b, 26-28).

With particular regard to cooperation on readmission, informal instruments like MoUs, administrative arrangements, oral deals and operational protocols represent an optimal framework for the increased role of non-state actors and international organisations. The main features of these instruments – i.e. flexibility, limited visibility and prioritisation of the operability of cooperation over its formalisation – match perfectly with the involvement of international organisations and private actors in the implementation of cooperation on readmission and offer favourable conditions for a further expansion of their role.

6.4. How do the features of informal cooperation at bilateral level apply to the European level?

This section analyses if and how the features of informal bilateral arrangements linked to readmission characterise also the recent instances of informal cooperation on readmission developed at the European level, and described above in section 6.2.1, focusing on the examples of high-level dialogues on migration, Mobility Partnerships and other kinds of joint political declarations, the EU-Turkey Agreement and the EU-Afghanistan Joint Way Forward Agreement.

High-level dialogues on migration and readmission may facilitate negotiations with third countries, especially those unwilling to conclude a formal and publicly visible EURA. As mentioned above, third countries' authorities are often reluctant to openly cooperate with the EU on the readmission of their own nationals (especially on the basis of a EURA), as this decision would be highly unpopular among their domestic populations and diasporas in Europe. Therefore, they tend to prefer grounding cooperation with the EU on a political legally non-binding declaration, or even a restricted document, in order to keep the issue out of public scrutiny and domestic debate (Carrera 2016, 45-46).

The inclusion of an informal arrangement on readmission (preferably oriented to the procedural and operational aspects of readmission) within a broader political dialogue on migration allows not only to reduce its visibility, but also to increase its operability and flexibility. Being the result of a political deal and lacking the constraints of a legally binding instrument, such informal arrangement is immediately applicable and may be easily adapted over time to changing circumstances and interests, simply through a new high-level meeting between the parties. The combination of these features goes to the advantage of both the EU and its Member States and the third countries concerned; for this reason, since the Action Plan on Return of September 2015 the EU has been trying to proactively promote this new modality of cooperation with third countries and implement it in close collaboration with (and following the example of) Member States – e.g. through the new Partnership Framework (see above section 6.2.1).

However, Carrera (2016, 46-47) correctly notes that the informality of certain readmission agreements is not a guarantee of their effectiveness; on the contrary, their legally non-binding nature may even exacerbate practical implementation challenges. In fact, in the case of informal agreements it may be problematic to ensure that the parties are compliant with the terms of the agreement and that readmission is carried out in practice; actual cooperation is contingent in particular on the state of diplomatic relations between the EU (or its Member States) and the third country concerned[63].

However, it is also true that if one or both parties find that an informal deal does not work as it was expected to do, its flexible nature and the lack of legal constraints may allow for its relatively rapid renegotiation (and for the consequent immediate application of the newly renegotiated deal). This occurred, for instance, with the EU-Turkey Action Plan agreed in October 2015 and activated the following month, which was 'substituted' in March 2016 by the EU-Turkey Agreement, because the former had

[63] The EU-Turkey Agreement is illustrative of this dynamic. In the last months, both the EU and Turkey have demonstrated to be well-aware of the fact that the long-lasting effectiveness (or the survival) of their cooperation on migration management and readmission depend on their broader relations. Against this background, Turkey has repeatedly threatened the EU of breaking the pact due to the allegedly 'cold' European reactions to the Turkish failed coup of July 2016, whilst the EU has been extremely cautious in condemning the Turkish government harsh reaction to the coup.

not produced the expected results in terms of reduction of the migrant and refugee flow into Europe.

The EU-Turkey Agreement is a perfect example of how an informal agreement linked to readmission may be rapidly adopted and may become immediately operational. Ten days elapsed between the announcement of its basic principles on 7 March 2016 (European Council 2016a) and the adoption of the agreement on 18 March 2016 (European Council 2016c); moreover, the text of 18 March established that the agreement shall start being applied from the 20th of March, only two days after. The recent EU-Afghanistan Joint Way Forward Agreement is another informal deal linked to readmission that is meant to become immediately operational; its text says explicitly that 'cooperation will begin on the day this declaration is signed' and envisages it will last for 'an initial period of two years'.

Along with flexibility, operability and limited visibility, European instruments of informal cooperation share with the national ones also a lack of transparency and accountability. Carrera questions in particular their compatibility with the rule of law and the principle of legal certainty, with reference both to Mobility Partnerships (Carrera and Hernández i Sagrera 2011, 106-107; see also final paragraph of section 4.4.4) and to 'informal patterns of cooperation and non-legally binding instruments including a readmission angle' (Carrera 2016, 47).

Similarly to bilateral informal agreements, also European policy instruments and informal arrangements linked to readmission escape the democratic decision-making procedures envisaged by the Treaties, which require the prior authorisation of the European Parliament to the conclusion of international agreements in the area of migration, as well as the full participation of the Parliament in their negotiation process (Art. 218 TFEU). Since policy instruments like MPs, political declarations like the 'Joint Declaration on Ghana-EU Cooperation on Migration', and informal agreements like the 'EU-Turkey Statement' and the 'Joint Way Forward on migration issues between Afghanistan and the EU' are not considered international agreements, they do not fall within the scope of Art. 218 TFEU.

However, as analysed above in section 6.2.1.1, the legal nature of the EU-Turkey Agreement has been the object of an institutional controversy, with several Members of

the European Parliament claiming that the EU-Turkey Statement was meant by the parties as a binding agreement and therefore the EP had to be involved in its negotiation and conclusion, in accordance with Art. 218 TFEU procedure. NGOs raised the same claim also with regards to the subsequent EU-Afghanistan Joint Way Forward Agreement:

> This deal is essentially a readmission agreement, but by refusing to classify it as such, the Council and the European External Action Service (EEAS) are seeking to by-pass the normal procedure of adopting a formal agreement. Such an agreement would require the consent of the European Parliament which has the power to reject readmission agreements. This same method was used with the EU-Turkey deal (Amnesty International 2016f).

In addition to this democratic deficit, informal European policy or quasi-legal instruments of cooperation on readmission may also avoid the judicial oversight of national, European and international courts. In fact, it is unclear the extent to which these instruments, or the initiatives and actions stemming from them, may be subject to the jurisdiction of national courts, the CJEU or the ECtHR (Carrera and Hernández i Sagrera 2011, 106-107).

As concerns the role of non-state actors and international organisations, with regards to Mobility Partnerships, international organisations have been playing a major role at different levels, i.e. from the elaboration of the very concept of MP to the drafting, negotiation and concrete implementation of each MP; also private actors have been delegated tasks concerning the implementation of MP initiatives, generally in cooperation with international organisations (see section 4.4.3 above). These actors are carving out a role for themselves also in the context of other informal instruments and fora of cooperation on migration (and on readmission), both at the operational level (in the implementation phase) and in terms of consultancy and information provision (in the preliminary phase of elaboration or during the negotiations of these instruments).

An interesting case concerns the role played by the European Stability Initiative (ESI) in the adoption of the EU-Turkey Agreement. The ESI is a private think tank; in October 2015 it elaborated a policy proposal to counter the ‘Syrian refugee crisis’ called ‘the Merkel Plan’ (ESI 2015a) and during the following months it promoted this plan

across Europe (and in particular with the German and Dutch government). After the proposal obtained the endorsement of the Dutch government and became famous as the 'Samsom Plan' or 'Samsom-Merkel Plan' (ESI 2016), its fundamental principles were incorporated in what has become known as the EU-Turkey Agreement. Cassarino (2010b, 26) criticises the role of private think tanks, which may be 'subcontracted to deliver a technical expertise legitimising a "form" of top-down knowledge about international migration and, above all, uncritically consolidating States' hierarchy of priorities'; the scholar argues that 'the emergence of a private technical expertise has contributed to the production of a dominant scheme of interpretation about the current challenges linked to the movement of people by serving policy-makers' priorities without questioning their orientations'.

To conclude, the main features of bilateral informal agreements linked to readmission can be definitely observed also at the European level, where the recent development of new modalities of informal cooperation in the area of return and readmission has incorporated exactly the same fundamental principles and priorities first introduced by Member States in their relations (and practices) towards third countries. This proves that the informalisation of cooperation on readmission analysed in this study is actually a multilevel process. It remains now to be analysed how the very features of this process impact on the fundamental rights of migrants and asylum seekers.

CHAPTER 7
MULTI-LEVEL INFORMALISATION OF COOPERATION ON READMISSION AND ITS HUMAN RIGHTS IMPLICATIONS

7.1. The asylum-related human rights of (to be) readmitted migrants. The nature, content and limits of migrants' human rights

Having established that there has been a shift towards informalisation in cooperation on readmission in the Mediterranean area both at the European and bilateral level, and having identified the main features of European and bilateral instruments of informal cooperation, this chapter aims to analyse how the use of these informal instruments impacts on the protection of the human rights of migrants and asylum seekers who are subjected to readmission procedures.

As mentioned above in Chapter 1, in order to limit the scope of my analysis I decided to focus only on the fundamental rights of migrants who are to be readmitted and are therefore directly affected by the operationalisation of instruments of cooperation on readmission. Moreover, I chose to consider the legal entitlements of (to be) readmitted migrants as potential asylum seekers; hence, I have further circumscribed my analysis to the 'asylum-related' human rights of these migrants, namely: 1) the principle of *non-refoulement*; 2) the right to seek asylum; 3) the prohibition of collective expulsion; and 4) the right to an effective remedy. In this chapter I investigate how the scope of these rights may be limited by informal modalities of cooperation on readmission either at the bilateral or European level.

This section 7.1 introduces the four above-mentioned rights as they have been elaborated within the European legal framework, focusing on their nature, content and limits; it also reflects on the relationship between policies of cooperation on readmission and the protection of asylum-related human rights (especially the principle of *non-refoulement*); finally it discusses more generally the problems and limits of migrants' human rights, drawing upon the works of prominent critical scholars. Section 7.2 investigates how informal practices of cooperation on readmission carried out at the

bilateral level may infringe upon the above-mentioned four asylum-related rights; in order to do so, it makes reference to the three case studies of bilateral cooperation on readmission analysed above in Chapter 5 (i.e. Italy-Libya, Spain-Morocco and Greece-Turkey). Section 7.3 is dedicated to the human rights implications of informal cooperation on readmission at the European level; it focuses on the case study of the EU-Turkey Agreement of 18 March 2016 analysing how it impacts on the four above-mentioned asylum-related human rights. It emerges that the practical implementation of both bilateral and European informal agreements linked to readmission may hamper access to protection for migrants and asylum seekers who are subject to removal[1]. Parallel to a process of informalisation of cooperation on readmission, it is thus possible to identify a process of restriction of the fundamental rights of migrants and asylum seekers.

7.1.1. The four asylum-related human rights

7.1.1.1. The principle of non-refoulement

The principle of *non-refoulement* is a fundamental principle of international refugee law. Its main embodiment is in Article 33(1) of the 1951 UN Convention Relating to the Status of Refugees (1951 Refugee Convention or 1951 Geneva Convention), which establishes that a refugee or asylum seeker[2] cannot be expelled or returned – *refoulé(e)* – 'in any manner whatsoever' to a country where his or her life or freedom would be in danger, due to a risk of persecution based on one of the five

[1] Here, the term 'access to protection' should be intended in a broad sense, as covering the principle of *non-refoulement*, the prohibition of collective expulsion and the right to access asylum procedures and effective remedies.

[2] Art. 33(1) of the 1951 Refugee Convention refers to 'a refugee', but in fact the prohibition of *refoulement* is considered to apply irrespective of whether the person concerned has been formally recognised as a refugee; beneficiaries of the *non-refoulement* principle thus include asylum seekers whose status has not been determined yet (ExCom UNHCR 1977; Chimni 2005, 449). In this respect, the UNHCR argued in its 1997 *Note on the Principle of Non-Refoulement* that: 'Every refugee is, initially, also an asylum applicant; therefore, to protect refugees, asylum applicants must be treated on the assumption that they may be refugees until their status has been determined. Without such a rule, the principle of *non-refoulement* would not provide effective protection for refugees, because applicants might be rejected at the frontier or otherwise returned to persecution on the grounds that their claim had not been established' (UNHCR 1997, para C).

reasons identified by the same Convention under Article 1(A)(2) – i.e. his or her race, religion, nationality, membership of a particular social group or political opinion. In addition, international human rights law has recognised *non-refoulement* as a fundamental component of the absolute prohibition of torture and other cruel, unhuman or degrading treatment or punishment (ExCom UNHCR 2001, para 16). This is explicitly affirmed in Article 3(1) of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which establishes that 'no State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture'.

At the regional level, the 1950 European Convention on Human Rights (ECHR) does not include an explicit prohibition of *refoulement*, but the European Court of Human Rights (ECtHR) has interpreted the prohibition of torture enshrined in Article 3 ECHR as including also a prohibition of *refoulement*. In its landmark *Soering* case[3], the Court held that the expulsion (or extradition, as in the case in question) of a person may give rise to an issue under Article 3 ECHR, if there are substantial grounds for believing that the person concerned, if expelled, deported or extradite, would face a real risk of being subjected to torture or unhuman or degrading treatment or punishment in the country of destination (*Soering v. United Kingdom*, para 91).

In the framework of the European Union, the Charter of Fundamental Rights of the EU (CFR) contains an explicit prohibition of *refoulement*: Article 19(2) CFR affirms that 'no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment'. Therefore, in the European context the original scope of the *non-refoulement* principle has been gradually expanded to offer a wider protection compared to Article 33 of the Refugee Convention: European States cannot expel a person (any person, including refugees, asylum seekers and migrants in general) to a country where he or she would face not only a risk of being persecuted but also a risk of being subjected to death penalty, torture or unhuman or degrading

[3] ECtHR, *Soering v. United Kingdom*, Application No. 14038/88, Judgement of the Court (plenary), 07.07.1989.

treatment. The respect for the principle of *non-refoulement* is reaffirmed also in secondary EU legislation, in particular under Article 21 of the Qualification Directive and Article 5 of the Returns Directive.

In light of the fact that the principle of *non-refoulement* has found expression in various international instruments adopted at the universal and regional levels, as well as in the legislation and practice of several States, according to the UNHCR, it has come to be considered a norm of customary international law binding on all States, irrespective of whether they are party to the 1951 Refugee Convention (UNHCR 1997, para B; ExCom UNHCR 2001, para 16). Moreover, the UNHCR has interpreted the prohibition of *refoulement* as encompassing any measure attributable to a State – taking place both at the border and within the territory of a State (ExCom UNHCR 1977; see also: Chimni 2005, 450) – which could have the effect of returning a person to a country where his or her life or freedom would be in danger[4]. 'This includes rejection at the frontier, interception and indirect *refoulement*[5], whether of an individual seeking asylum or in situations of mass influx' (ExCom UNHCR 2001, para 16).

In the context of the 1951 Geneva Convention the prohibition of *refoulement* is not absolute; Article 33(2) provides, instead, for two exceptions to its application. The principle may not be claimed by a refugee or asylum seeker when: 1) there are reasonable grounds for considering him or her as a danger to the security of the country in which he or she is present; or 2) he or she, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country. However, in light of the serious consequences deriving from the removal of a person to a country where his or her life is in danger, the UNHCR and most commentators have

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[4] In its *Note on the Principle of Non-Refoulement* the UNHCR affirmed that: 'Measures of *refoulement* are various and include expulsion/deportation orders against refugees, return of refugees to countries of origin or unsafe third countries, electrified fences to prevent entry, non-admission of stowaway asylum-seekers and push-offs of boat arrivals or interdictions on the high seas. Whenever refugees - or asylum-seekers who may be refugees - are subjected, either directly or indirectly, to such measures of return, be it in the form of rejection, expulsion or otherwise, to territories where their life or freedom are threatened, the principle of *non-refoulement* has been violated. Furthermore, having regard to the nature and purpose of the principle, it also applies to extradition.' (UNHCR 1997, para D).

[5] 'Indirect *refoulement*' occurs when a person is expelled or removed to a country from where he or she risks to be subsequently deported to another country (either his/her country of origin or another country) where he or she would be at risk of persecution or torture. It is also referred to as 'chain *refoulement*'.

suggested that these exceptions are to be narrowly interpreted. This understanding is further supported by the fact that international human rights law (see Art. 3 CAT) and most regional refugee and human rights instruments (see Art. 2(3) of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa) provide for an absolute prohibition of *refoulement* and do not contemplate exceptions of any sort (UNHCR 1997, para F; Chimni 2005, 450-451).

In the European context as well, the ECtHR has interpreted Article 3 ECHR as absolutely prohibiting any return of an individual to a country where there are substantial grounds for believing that he or she would face a real risk of treatment contrary to that provision. The Court has held that Article 3 ECHR enshrines one of the most fundamental values of a democratic society and in absolute terms prohibits torture or inhuman or degrading treatment or punishment (*Salah Sheekh v. the Netherlands*, para 135[6]). Article 3 makes no provision for exceptions and ensures absolute protection against the treatment prohibited; therefore, there can be no derogation from the *non-refoulement* principle, irrespective of the victim's conduct, however undesirable or dangerous (*Saadi v. Italy*, paras 137-138[7]). Nevertheless, the very same exceptions to the prohibition of *refoulement* originally introduced by the Refugee Convention, are reaffirmed in the EU legal framework under Article 21(2) of the Qualification Directive, despite the non-derogable nature recognised to the *non-refoulement* principle under the ECHR.

7.1.1.2. The right to seek asylum

The 1948 Universal Declaration of Human Rights (UDHR) explicitly recognises 'the right to seek and to enjoy in other countries asylum from persecution' (Art. 14(1) UDHR)[8]; however, the UDHR is not *per se* a legally binding document. Neither the right to seek asylum, considered as a right to access asylum procedures, nor the right to

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[6] ECtHR, *Salah Sheekh v. the Netherlands*, Application No. 1948/04, Judgment of the Court, 11.01.2007.

[7] ECtHR, *Saadi v. Italy*, Application No. 37201/06, Judgment of the Grand Chamber, 28.02.2008.

[8] The UDHR also states that 'everyone has the right to leave any country, including his own, and to return to his country' (Art. 13(2) UDHR), thus providing a first influential recognition of the 'right to migrate' and the 'right to return'.

be granted asylum have been explicitly included in any international refugee law and human rights law instrument of universal scope; notably, the right to asylum is not explicitly recognised by the most relevant international refugee law instrument, i.e. the 1951 Refugee Convention. Nonetheless, it is enshrined in two human rights instruments of regional scope; Article 22(7) of the 1969 American Convention on Human Rights provides for 'the right to seek and be granted asylum in a foreign territory' and Article 12(3) of the 1981 African Charter on Human and Peoples' Rights establishes that 'every individual shall have the right, when persecuted, to seek and obtain asylum in other countries'. In contrast, in Europe the ECHR does not explicitly recognise the right to asylum in any form, neither as a right to seek nor as a right to be granted asylum.

With regards to the 1951 Refugee Convention, however, it has been argued that a requirement to guarantee access to asylum procedures may be derived from the principle of *non-refoulement*. According to Kälin, Caroni and Heim, the *non-refoulement* principle 'provides a basis for procedural rights to refugee status determination insofar as it obliges States to determine whether a person they want to send back to the country of origin is a refugee' (2011, 1395). According to Giuffré, 'depriving asylum seekers of an individual examination of their personal condition would expose them to the risk of *refoulement*, thereby undermining the object and purpose of the Convention' (2013a, 105). The prohibition of *refoulement* would thus entail a right for the asylum seeker to enter the territory of a State (and a 'duty of admission' for the State in question), because he or she cannot be *refoulé(e)* to the country he or she came from, a right to apply for asylum, and a right to stay until his or her application has been examined; in fact, the examination of the asylum claim represents the sole way for a State to ascertain whether that person is in need of protection or can be expelled without breaching the *non-refoulement* principle (Gammeltoft-Hansen and Hathaway 2015, 238-239; Hathaway 2005, 300-301). Under the 1951 Geneva Convention, however, the precise scope and content of this right to access asylum procedures remain unclear, meaning that Article 33 compensates only to a limited extent for the lack of an actual provision on the right to asylum in the text of the Refugee Convention (Kälin, Caroni and Heim 2011, 1395).

As concerns the ECHR, it has been argued that the European Convention does not

include a provision on the right to seek asylum because at the time of its drafting it was thought that the 1951 Refugee Convention would have fully covered the area of refugee rights (Cogolati, Verlinden and Schmitt 2015, 23). Nevertheless, the ECtHR case law has tried to compensate for this deficiency by deriving a right to seek asylum from the *non-refoulement* principle. Indeed, the Court has required in a number of cases (*inter alia*, *M.S.S. v. Belgium and Greece*, *Abdolkhani and Karimnia v. Turkey*[9], *Amuur v. France*[10], *Hirsi Jamaa and Others v. Italy*) that States ensure access to fair and effective asylum procedures before removing a person to a third country, thus recognising the existence of an implicit right to entry, to apply for asylum and to be granted a fair asylum procedure, related to the prohibition of *refoulement* deriving from Article 3 ECHR[11] (Giuffré 2013a, 106).

In contrast, within the EU legal framework, the right to asylum is expressly established by Article 18 of the Charter of Fundamental Rights, which reads:

> 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 Treaty on European Union and the Treaty on the Functioning of the European Union.

It should be noted that, compared to the above-mentioned formulations of the right to asylum, Article 18 CFR is rather vague and unclear. As observed by Gil-Bazo (2008), first of all, this provision lacks an explicit subject, as it does not specify who is entitled to the right to asylum[12]; it makes reference to the 1951 Refugee Convention and its 1967 Protocol as the standard to comply with, although these instruments do not mention the right to asylum among the rights to which refugees are entitled. Through an

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[9] ECtHR, *Abdolkhani and Karimnia v. Turkey*, Application No. 30471/08, Judgment of the Court, 22.09.2009.

[10] ECtHR, *Amuur v. France*, Application No. 19776/92, Judgment of the Court, 25.06.1996.

[11] For a review of the jurisprudence of the ECtHR concerning the right to access asylum procedures, see: Giuffré 2012.

[12] The 'right to asylum' may be a right of the States to grant asylum if they so wish in the exercise of their sovereign power (in accordance with the original international law concept of asylum) or a right of individuals to obtain asylum, if they meet the criteria established by the applicable law and international conventions (as recognised under regional human rights conventions in America and Africa) (Gil-Bazo 2008, 37-40).

analysis of the *travaux préparatoires* and in light of the object, purpose and general context of the Charter, Gil-Bazo comes to the conclusion that the drafters intended to establish the right to asylum as a subjective right of individuals, and not as a right of States. However, according to the scholar, the subject-less wording of the provision – a compromise solution between divergent positions among the drafters, advocating either for the explicit recognition of a right to asylum for everyone, or for the exclusion of EU nationals – represents an unfortunate choice. In fact, the power of Article 18 CFR as the first explicit recognition in a supranational European instrument of the right to asylum would be diminished by the lack of visibility of those that is seeks to protect; in contrast, both the American and African human rights conventions explicitly recognise 'every person' or 'every individual' as the beneficiary of the right to asylum (Gil-Bazo 2008, 37-45).

Secondly, the formulation of Article 18 CFR is unclear also with regards to the precise content of the 'right to asylum', as it does not specify whether it is a right to seek asylum (as enshrined in the UDHR and derived from the *non-refoulement* principle in the context of the Refugee Convention and the ECHR), or whether it also guarantees a right to be granted asylum (in line with the African and American regional human rights conventions). Based on an analysis of both the *travaux préparatoires* and the constitutional traditions common to the Member States, Gil-Bazo (2008, 45-48) comes to the conclusion that the right to asylum as established by Article 18 CFR has gone beyond the right to seek asylum, and is conceived as a subjective right of individuals to be granted asylum, when they meet the relevant criteria established by law, i.e. by EU law[13].

Therefore, the Charter of Fundamental Rights of the EU importantly provides for a wider protection regime compared to the European Convention of Human Rights. However, in the framework of this work and in the context of cooperation on

[13] Indeed, the *travaux préparatoires* show that the drafters considered and rejected a formulation restricting the scope of the provision to a 'right to seek asylum' and opted for the more encompassing wording 'right to asylum', proving that it was not their intention to limit the scope of the provision to a purely procedural right to apply for asylum. As concerns common constitutional traditions, it seems that the right to asylum enshrined in the constitutions of several Member States is conceived not only as a right to apply for asylum but as a subjective right to be granted asylum for individuals who meet the criteria established by national law (Gil-Bazo 2008, 46-47).

readmission, my attention is mainly focused on the right of every person to seek asylum (as it relates to the *non-refoulement* principle) and the parallel duty of States to guarantee that everyone can access fair asylum procedures.

7.1.1.3. The prohibition of collective expulsions

The prohibition of collective expulsion of aliens has been first recognised under Article 4 of Protocol No. 4 to the ECHR, which was adopted by the Council of Europe in 1963. Subsequently, a provision prohibiting collective expulsions has been included also in other regional human rights instruments, e.g. under Article 22(9) of the American Convention and Article 12(5) of the African Charter. In the EU legal framework, the prohibition of collective expulsions is also enshrined in Article 19(1) of the CFR.

The formulation of the prohibition of collective expulsion of aliens in the ECHR does not contain any further specifications[14]; therefore, the content and scope of this provision have been defined by the ECtHR case law. The ECtHR's well-established definition of 'collective expulsion' is 'any measure of the competent authorities compelling aliens as a group to leave the country, except where such a measure is taken after and on the basis of a reasonable and objective examination of the particular cases of each individual alien of the group' (ECtHR 2016a, para 3). With regards to the personal scope of the provision, its wording does not specify who are the 'aliens' it refers to; it thus applies to any foreigners, irrespective of their legal situation[15] and irrespective of whether they were residing in the territory of the State or were

[14] Art. 4 of Prot. No. 4 ECHR reads: 'Collective expulsion of aliens is prohibited'. A similar wording is used in the CFR of the EU and in the American Convention on Human Rights. Conversely, Art. 12(5) of the African Charter states: 'The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups'. This formulation links collective expulsion to discrimination/persecution for reasons of nationality, race, ethnicity or religion; it thus limits the scope of the prohibition, by applying it only to the expulsion of groups of aliens that can be identified as such (i.e. as a group) based on national, racial, ethnic or religious grounds. Under the ECHR the group of aliens is not qualified in any way; apparently, it may simply consist of two or more individual aliens.

[15] 'The aliens to whom the Article refers are not only those lawfully residing within the territory, but "all those who have no actual right to nationality in a State, whether they are merely passing through a country or reside or are domiciled in it, whether they are refugees or entered the country on their own initiative, or whether they are stateless or possess another nationality"' (Hirsi Jamaa and Others v. Italy, para 174, with reference to the *travaux préparatoires* of Prot. No. 4 ECHR).

intercepted while trying to crossing its borders (or even intercepted on the high seas by ships flying the flag of the respondent State, as in the *Hirsi* case) (ECtHR 2016a, paras 6-7).

The core purpose of Art. 4 Prot. No. 4 ECHR is to prevent States from being able to remove certain aliens without examining their personal circumstances and, consequently, without enabling them to put forward their arguments against the measure taken by the relevant authority (*Hirsi Jamaa*, para 177; *Sharifi and Others v. Italy and Greece*, para 210[16]). 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 consideration the specific situation of the individuals concerned (*Hirsi Jamaa*, para 183; *Khlaifia and Others v. Italy*, para 238[17]).

The Court has established that the fact that a number of aliens receive similar decisions does not in itself lead to the conclusion that there is a collective expulsion, if each person concerned has been given the opportunity to put arguments against his or her expulsion to the competent authorities on an individual basis (*Andric v. Sweden*[18]; *Sultani v. France*, para 81[19]). In addition, the Court has observed that there is no violation of Art. 4 Prot. No. 4 if the lack of an expulsion decision made on an individual basis is the consequence of an applicant's own culpable conduct (*Berisha and Haljiti v. the former Yugoslav Republic of Macedonia*[20] and *Dritsas v. Italy*[21]; see ECtHR 2016b, 6).

Furthermore, the Court held that Art. 4 Prot. No. 4 is not violated when the persons concerned have had an individual examination of their personal circumstances and particular facts of their case, even if they have been taken together to police

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[16] ECtHR, *Sharifi and Others v. Italy and Greece*, Application No. 16643/09, Judgment of the Court, 21.10.1014.

[17] ECtHR, *Khlaifia and Others v. Italy*, Application No. 16483/12, Judgment of the Grand Chamber, 15.12.2016.

[18] ECtHR, *Andric v. Sweden*, Application No. 45917/99, Decision, 23.02.1999.

[19] ECtHR, *Sultani v. France*, Application No. 45223/05, Judgement of the Court, 20.09.2007.

[20] ECtHR, *Berisha and Haljiti v. the former Yugoslav Republic of Macedonia*, Application No. 18670/03, Decision, 16.06.2005.

[21] ECtHR, *Dritsas v. Italy*, Application No. 2344/02, Decision, 01.02.2011.

headquarters, some have been deported in groups, or the deportation orders and the corresponding letters have been phrased in similar terms without specifically referring to the earlier stages of the asylum procedure (*M.A. v. Cyprus*, para 254[22]). The Court has recently specified that Art. 4 Prot. No. 4 does not guarantee the right to an individual interview in all circumstances; the requirements of this provision may be satisfied where each alien has a genuine and effective possibility of submitting arguments against his or her expulsion, and where those arguments are examined in an appropriate manner by the authorities of the respondent State (*Khlaifia and Others*, para 248)[23].

Finally, in the *Hirsi* case the Court examined for the first time whether the prohibition of collective expulsions applies when the removal of aliens is carried out by a State party outside from its national territory, namely on the high sea. As set out in Article 1 ECHR, the State parties shall secure 'to everyone within their jurisdiction' the rights and freedoms established by the Convention. The Court observed that neither the text nor the *travaux préparatoires* of the ECHR preclude the extraterritorial application of Art. 4 of Prot. No. 4 (*Hirsi Jamaa and Others*, paras 173-174). It held that, even though the notion of expulsion, like that of jurisdiction, is principally territorial, if a State has exceptionally exercised its jurisdiction outside its national territory, it can be accepted that such exercise of extraterritorial jurisdiction has taken the form of collective expulsion. The Court also reiterated that the special nature of the maritime environment does not make it an area outside the law, where individuals are covered by no legal system capable of affording them the enjoyment of the rights and guarantees protected by the Convention (*Hirsi Jamaa and Others*, para 178). Therefore, the Grand Chamber concluded that 'the removal of aliens carried out in the context of

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[22] ECtHR, *M.A. v. Cyprus*, Application No. 41872/10, Judgement of the Court, 23.07.2013.

[23] In *Khlaifia*, the Grand Chamber – reversing the previous judgment of the Chamber – concluded that the virtually simultaneous removal of the three applicants did not amount to a collective expulsion within the meaning of Art. 4 Prot. No. 4 ECHR, but may rather be explained as the outcome of a series of individual refusal-of-entry orders. The Court affirmed that even though such orders were drafted in comparable terms, only differing as to the personal data of each migrant, and even though a large number of Tunisian migrants were actually expelled at the same time, these two facts cannot in themselves be decisive. On the contrary, The Court held that having been identified on two occasions, and their nationality having been established, the applicants had a genuine and effective possibility of raising arguments against their expulsion and to have them examined by the competent authorities (*Khlaifia and Others*, paras 249-254).

interceptions on the high seas by the authorities of a State in the exercise of their sovereign authority, the effect of which is to prevent migrants from reaching the borders of the State or even to push them back to another State, constitutes an exercise of jurisdiction […] which engages the responsibility of the State in question under Article 4 of Protocol No. 4' (*Hirsi Jamaa and Others*, para 180)[24].

7.1.1.4. The right to an effective remedy

The right to an effective domestic remedy for human rights violations was first recognised by the 1948 Universal Declaration of Human Rights; Article 8 UDHR reads: 'Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law'. At a regional level, this right is affirmed in the European Convention on Human Rights (Article 13) and in the American Convention on Human Rights (Article 25); conversely, the African Charter does not contain a specific provision on the right to an effective remedy, but the latter has been developed through 'a somewhat rudimentary jurisprudence and practice' by the African Commission (Musila 2006). The issue of effective remedies appears to be crucial in international human rights law: indeed, the rights enshrined in universal and regional human rights conventions would have a merely theoretical meaning without the provision of mechanisms to put them in practice, including effective remedies to redress possible violations.

Article 13 ECHR states: 'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity'. According to the ECtHR case law, this provision requires the availability at national level of a remedy to enforce the substance of the Convention rights. The domestic remedy must be such as to allow the competent national authorities both to

[24] The jurisprudential development of the prohibition of collective expulsion, and in particular the case law on its extraterritorial application, are crucial for the analysis of the impact of informal bilateral practices of cooperation on readmission carried out in section 7.2.3 below.

deal with the substance of an 'arguable complaint' under the Convention[25], and to grant appropriate relief. The Court has held that the remedy must be 'effective' in practice as well as in law; a remedy would only be effective if it is available and sufficient; it must be sufficiently certain not only in theory but also in practice, and it must be rapid[26]. However, the effectiveness of a remedy does not depend on the certainty of a favourable outcome for the applicant (*Kudła v. Poland*, para 157[27]; *M.S.S.*, paras 288-292; *Hirsi Jamaa and Others*, para 197). Different requirements of effectiveness have been set out by the Court, depending on the nature of the applicant's complaint, i.e. which right violation is alleged. Hence, the content of Article 13 and the scope of the obligations it imposes upon States may vary based on the violation complained and the nature of the right at stake, as discussed below.

The ECHR formulation of the right to an effective remedy differs from the one of Article 8 UDHR and Article 25(1) of the American Convention with regards to the national authority competent to receive complaints of alleged violations: whilst the UDHR and the American Convention expressly require that the effective remedy is provided for by a judicial authority (a court or tribunal)[28], the ECHR makes general reference to 'a national authority', and the ECtHR confirmed that this does not need to be a judicial authority. The same difference can be noted in respect to the Charter of Fundamental Rights of the EU; here, the right to an effective remedy is affirmed in the first paragraph of Article 47, which reads: 'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a *tribunal* in compliance with the conditions laid down in this Article' [*emphasis*

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[25] The Court established that the claim of a rights violation must be an arguable one, but it did not provide for a general definition of 'arguability'; the question of whether the claim is arguable needs to be determined in the light of the particular facts and the nature of the legal issue raised (Council of Europe 2013, 12).

[26] In addition, when assessing effectiveness, account must be taken not only of formal remedies available, but also of the general legal and political context in which they operate as well as the personal circumstances of the applicant (Council of Europe 2013, 12).

[27] ECtHR, *Kudła v. Poland*, Application No. 30210/96, Judgment of the Court, 26.10.2000.

[28] Art. 25(1) of the American Convention on Human Rights affirms: 'Everyone has the right to simple and prompt recourse, or any other effective recourse, to *a competent court or tribunal* for protection against acts that violate his fundamental rights recognised by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties' [*emphasis added*].

added][29]. Thus, the ECHR is the only international human rights instrument not to require that rights violations are redressed exclusively by a judicial authority; however, the ECtHR case law has introduced additional safeguards by establishing that if the national authority is not a judicial one, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective (*Kudła*, para 157).

Within the framework of this study, Article 13 ECHR is relevant in that it is applied to cases of removal of aliens resulting from the application of readmission agreements and informal practices. Typically, in such cases Article 13 is considered in conjunction with Article 3 ECHR (right to an effective remedy against the violation of the principle of *non-refoulement*) and/or in conjunction with Article 4 of Protocol No. 4 ECHR (right to an effective remedy against the violation of the prohibition of collective expulsion). For such instances, the Court has elaborated a specific notion of 'effective remedy' and specific requirements of effectiveness[30].

The main feature of an effective remedy within the meaning of Article 13 taken together with Article 3 and with Article 4 of Protocol No. 4, is that it must have a suspensive effect[31] (*Jabari v. Turkey*, para 50[32]; *Čonka v. Belgium*, paras 79-83[33]; *M.S.S.*, para 293; *Hirsi Jamaa and Others*, paras 198-199). In light of the importance that the Court attaches to Article 3 ECHR[34] and the irreversible nature of the damage

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[29] The most relevant innovation of Art. 47 CFR is that it brings together the right to an effective remedy (first paragraph) with the right to a fair trial (second and third paragraphs), which in all other human rights instruments are dealt with in separate articles. In particular, in the ECHR they are covered by Article 13 and Article 6, respectively. However, Art. 6 ECHR guarantees the right to a fair hearing only in the determination of civil rights or obligations, or any criminal charge; this has precluded the application of Art. 6 ECHR to immigration and asylum cases (see *Maaouia v. France*). Article 47 CFR, instead, makes no such distinction; as a result, in the EU legal framework, the right to a fair trial and all the procedural safeguards it includes (fair and public hearing; reasonable time; independent and impartial tribunal established by law; defense rights; legal aid) apply to any recourse against violations of EU law-protected rights, including in immigration and asylum cases.

[30] Within the EU legal framework, a person who is subject to a removal procedure must be guaranteed an effective remedy to appeal against or ask the review of his or her return decision, in compliance with Article 13 of the Returns Directive.

[31] In contrast, a remedy with suspensive effect is not normally required when another right of the Convention is invoked in combination with Article 13.

[32] ECtHR, *Jabari v. Turkey*, Application No. 40035/98, Judgment of the Court, 11.07.2000.

[33] ECtHR, *Čonka v. Belgium*, Application No. 51564/99, Judgment of the Court, 05.02.2012.

[34] The Court recalls that Article 3 enshrines one of the most fundamental values of a democratic society and prohibits in absolute terms torture or inhuman or degrading treatment or punishment (*Jabari*, para

that may result if the risk of torture or ill-treatment materialises, the Court has established that the notion of an effective remedy under Art. 13 in combination with Art. 3 ECHR requires the possibility of suspending the implementation of the measure impugned (*Jabari*, para 50; *Shamayev and Others v. Georgia and Russia*, para 460[35]). Moreover, in the Court's view the notion of effective remedy under Art. 13 in combination with Art. 4 Prot. No. 4 ECHR also requires that the remedy prevents the execution of measures that are contrary to the Convention and whose effects are potentially irreversible (*Čonka*, para 79).

Based on the same grounds, the Court has held that when Article 13 is considered in combination with Article 3 or Article 4 of Protocol 4, the effectiveness of a remedy also requires: a close scrutiny by a national authority (*Shamayev and Others*, para 448); an independent and rigorous scrutiny of any claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 (*Jabari*, para 50); and a particularly prompt response (*Bati and Others v. Turkey*, para 136[36]). In addition, the Court has underlined the importance of guaranteeing to anyone subject to a removal measure, the consequences of which are potentially irreversible, the right to obtain sufficient information to enable them to have effective access to the procedures to be followed (*Hirsi Jamaa and Others*, para 204; *M.S.S.*, para 304).

Finally, in the *Hirsi* case, the Grand Chamber observed that the absence of any domestic procedure to enable potential asylum seekers to lodge their complaints under Article 3 and Article 4 of Protocol No. 4 with a competent authority, and to obtain a thorough and rigorous assessment of their requests before the enforcement of the removal, may also amount to a violation of Article 13 of the Convention (*Hirsi Jamaa and Others*, para 205). In *Sharifi*, the Court found that, in some circumstances, there is a clear link between the enforcement of collective expulsions and the fact that the persons concerned were effectively prevented from applying for asylum or from having access to any other domestic procedure which met the requirements of Article 13 (*Sharifi and*

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[35] ECtHR, *Shamayev and Others v. Georgia and Russia*, Application No. 36378/02, 12.04.2005.

[36] ECtHR, *Bati and Others v. Turkey*, Applications Nos. 33097/96 and 57834/00, Judgment of the Court, 03.06.2004.

Others, para 242).

To some up, based on the ECtHR case law, in order to meet the effectiveness requirements of Article 13 ECHR taken in conjunction with Article 3 and Article 4 of Protocol No. 4, a remedy must be available in law and in practice; it must be accessible to all possible claimants, who should receive sufficient information to this respect; it must consist of an independent and rigorous scrutiny by a competent national authority; it must be prompt; and it must have a suspensive effect.

7.1.2. Problematizing migrants' human rights

The next sections 7.2 and 7.3 analyse bilateral and European informal readmission policies and practices from a human rights perspective, by using the four asylum-related human rights introduced in the previous section as a benchmark to assess the impact of such policies and practices on the protection of the fundamental rights of migrants and asylum seekers. However, it is worth noting that migrants' human rights (as well as human rights in general, according to critical views) should not be taken as a given or considered as absolute. In fact, they are characterised by a number of limitations that are inherent to their nature; in addition, their enforceability and justiciability may be problematic and, as a result, their actual effectiveness may end up being very limited.

The purpose of this sub-section is, thus, to provide elements for a problematization of migrants' human rights, which considers not only the content of the four asylum-related human rights, but also the nature of the corresponding obligations of the EU and its Member States (Spijkerboer 2007; 2013). The reflection that follows points out, in particular, the problems and limits concerning the protection of the human rights of migrants in the European context, drawing upon Dembour's critical analysis of the case law of the European Court of Human Rights (2015). This reflection aims to warn the reader not to rely blindly on human rights as something absolute and neutral, and invites, on the contrary, to question their nature and function (Dembour 2006; Dembour and Kelly 2011; Perugini and Gordon 2015).

This section does not aspire in any way to offer an exhaustive overview of the vast and diversified critical scholarship on human rights (Dembour 2006; 2010); on the

contrary, it simply aims to recall the existence of inherent limits in human rights and to provide some elements allowing for a problematization of the issue and for a more conscious use of human rights, starting from the present analysis. It is not among the purposes of this work neither to dismiss the role of human rights in the context of migration and asylum, nor to diminish their relevance (e.g. when it comes to claim improvements in the legal and practical situation of migrants and asylum seekers). This study clearly recognises also the crucial role the ECtHR has played in the past and may play in the future (e.g. in cases like *Hirsi Jamaa and Others vs Italy* and *N.D. and N.T. vs Spain*), as proved by the evidence presented in Chapter 5. Despite this, the analysis carried out in this final chapter has largely benefited from a comparison with alternative views on human rights, whose convincing arguments have definitely enriched my own stance.

My reflection moves from a consideration of the relationship between policies of cooperation on readmission and the protection of asylum-related human rights, especially the principle of *non-refoulement* and the related right to seek asylum. As argued by Hathaway (2005), Gammeltoft-Hansen (2011; 2012; 2014; 2015 with Hathaway) and Feith Tan (2015), developed Western States have on the one hand formally accepted the prohibition of *refoulement* (and affirmed their commitment to refugee law), but on the other hand they have strenuously tried to avoid the obligations that come from it – namely, the duty to admit the asylum seekers who manage to get to their jurisdiction and the duty to guarantee their access to asylum procedures and their stay in the country until their asylum claim has been examined.

Since the 1980s, European and other Western countries (e.g. the United States and Australia) have adopted so-called '*non-entrée* policies' with the purpose to avoid that asylum seekers arrive to their territory or enter their jurisdiction[37]. Scholars have identified three types of 'traditional *non-entrée* policies', which have been pursued unilaterally by Western States and have included both territorial and extraterritorial

[37] The term '*non-entrée*' has been first coined by James Hathaway in 1992 to describe the 'array of legalised policies adopted by states to stymie access by refugees to their territories' (Hathaway 1992, 40; as cited in Hathaway 2005, 291, footnote no. 70).

measures[38]. These policies 'promised to insulate developed countries from *de facto* compliance with the duty of *non-refoulement* even as they left the duty itself intact' (Gammeltoft-Hansen and Hathaway 2015, 242); however, over the last two decades, these traditional *non-entrée* practices have proved vulnerable to both practical and legal challenges (Gammeltoft-Hansen and Hathaway 2015, 246-248).

As a consequence, States have resorted to an array of new 'cooperation-based *non-entrée* policies'. Differently from the previous set of measures, these new kind of migration control policies are not unilateral but are based on international cooperation, and are carried out in the territory and/or under the jurisdiction of a third country[39]. In this way, European and Western States have sought to avoid legal liability for any unlawful act related to refugee deterrence (and implying a breach of international refugee law), by relying on the fact that these *non-entrée* policies are implemented under the sovereign authority of third countries, although on behalf of Western States (Gammeltoft-Hansen and Hathaway 2015, 248-256; Gammeltoft-Hansen 2012; Feith Tan 2015). Gammeltoft-Hansen and Hathaway have described seven main forms of cooperation-based *non-entrée* policies[40]. Based on this analysis, one can conclude that both formal and informal modalities of cooperation on readmission are being used, together with other cooperation-based migration control policies, not only by EU Member States but by developed countries worldwide, in order to prevent asylum

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[38] These are: 1) the introduction of visa controls and carrier sanctions, aimed at preventing persons fleeing refugee-producing countries from reaching Western States, mainly by air; 2) the establishment of so-called 'international areas' in airports and harbours and the 'excision' of part of the national territory (coastlines and islands) for purposes of protection responsibilities, so that the arrival of refugees to such territories or areas would not imply the entry into the State's jurisdiction for asylum purposes; 3) the interdiction of migrant boats on the high seas (Gammeltoft-Hansen and Hathaway 2015, 244-245; Hathaway 2005, 291-300).

[39] Feith Tan (2015, 9-10) identifies three main features of this politics: cooperative *non-entrée* is extraterritorial in nature (from the viewpoint of Western countries) because it takes place either on the high seas or within the territory and jurisdiction of the cooperating State; it includes both bilateral and multilateral measures; and it encompasses both formal and informal readmission (or broader migration cooperation) agreements.

[40] These are: 1) diplomatic relations; 2) direct financial incentives to carry out migration control tasks; 3) direct provision of equipment and training to the authorities of the cooperating country; 4) deployment of immigration officials in the cooperating country to collaborate with its national authorities; 5) joint border patrolling operations; 6) exercise of a direct migration control role from within the territory of the cooperating country; 7) 'outsourcing' to international agencies (e.g. Frontex) the task to intercept migrants and asylum seekers while they are still under the jurisdiction of the countries of origin or transit (Gammeltoft-Hansen and Hathaway 2015, 250-256).

seekers from entering their territory and accessing asylum procedures there[41]. The recourse to cooperation-based *non-entrée* policies actually characterises both the three case studies of bilateral cooperation described above in Chapter 5, and the most recent European migration cooperation policies, especially the EU-Turkey Agreement of 18 March 2016.

One of the most grievous consequences of *non-entrée* policies is the death of thousands of migrants and asylum seekers, who die in the attempt to reach the territory of developed countries. Focusing on the Mediterranean context, Spijkerboer (2007) argues that increasing 'border deaths' are the foreseeable consequence of the strengthening of border control policies (designed by the EU and its Member States over the past decades and implemented in cooperation with third countries) which have made a safe and legal entry into the EU impossible. More precisely, the scholar asserts that the increase in border deaths is related to a fundamental shift in European border policies from border control to border management (Spijkerboer 2013, 215-218).

Taking the issue a step further, Spijkerboer investigates whether the EU Member States can be considered legally liable for migrant deaths at sea, even when such loss of life occur indirectly (i.e. without the direct and active involvement of State agents) and outside the territory and jurisdiction of European States. The author identifies two different approaches, which lead to two opposite answers. A 'conventional approach' would deny State responsibility for migrant deaths occurring outside the State's territory and without involving State agents, because in such case the State is not in control of the situation in any way. By contrast, based on a 'functional approach' (embraced by the scholar), EU Member States should be considered responsible for migrant deaths regardless of whether the latter occur within or beyond territorial waters and State's jurisdiction, because in both cases people drown as a consequence of the way in which border policies are carried out (Spijkerboer 2013, 226).

This reasoning leads to question also whether border deaths may amount to a violation of the right to life enshrined in Article 2 ECHR. Again, under a conventional

[41] In light of the fact that, as well-known, the developed world currently protects only a small part of world's refugees (around 20%), it seems that *non-entrée* policies have been highly effective in achieving their purpose.

approach one would argue that the link between European border policies and migrant deaths is too remote to conclude that there has been a violation of Art. 2 ECHR on the part of EU Member States. However, based on the ECtHR case law on the positive obligations of States under Art. 2 ECHR to safeguard the lives of persons who are within their jurisdiction, Spijkerboer argues that border deaths may at least give rise to three positive obligations on European States[42] (2013, 227-235).

The scholar concludes that it is possible to assert that the EU and its Member States do have a positive obligation to minimise the number of border deaths occurring as a consequence of their border policies (Spijkerboer 2013, 238; 2007, 138). Such an argument is grounded on the recognition that human rights law needs to somehow adapt its own concepts to policy changes, when such changes in State policies are aimed at sidestepping human rights norms – as pictured by Gammeltoft-Hansen and Adler-Nissen in their 'Introduction to Sovereignty Games' (2008, 1-17). Hence, considering that the externalisation of border control policies has produced the effect of 'externalising' also possible human rights violations, moving them away from the reach of the European legal and judicial systems, Spijkerboer suggests that also human rights law should adapt its fundamental principles (e.g. its notion of jurisdiction) to this shift (2013, 238-240).

While Spijkerboer still seems to attach a potentially relevant role to human rights as a source of protection for migrants and an instrument that, if properly used, is capable of improving their status, Dembour is more sceptical (or rather 'nihilist', as she defined herself) towards any concept of human rights that is not empirically grounded (2006, 1-18). With particular regard to the human rights of migrants, in an edited volume with Kelly (2011), she questions whether human rights are for migrants at all. Her critical stance on migrants' human rights is grounded on the recognition of the gaps still existing between the promise of human rights for all, irrespective of one's nationality and membership of a specific political community, and the reality of exclusion, discrimination and human rights violations routinely faced by many migrants. The

[42] These are: 1) the obligation to investigate into the number of migrant deaths at sea and collect relevant data; 2) the obligation to assess European border control policies in light of these data; 3) the obligation to establish the identity of the victims (Spijkerboer 2013, 234-235).

contributions gathered in this volume explore the reasons why migrants are often excluded from the scope of human rights, but also question whether one should actually resort to human rights in order to improve the situation of migrants (Dembour and Kelly 2011, 1-22).

According to some scholars, in fact, the difficulties migrants encounter in accessing human rights are not the result of faulty implementation, but are inherent to the very concept and nature of human rights. In the view of these critical scholars, far from being a language of protest and an instrument of emancipation and equality, human rights are a form of regulation (Douzinas 2000). They have been appropriated by States and have become a resource for the powerful rather than for the powerless; in fact, instead of limiting State power, human rights may actually strengthen it and legitimise dynamics of domination and exclusion (Perugini and Gordon 2015). According to this line of thought, human rights originate from the very same logic that creates the conditions for migrants' vulnerability and exclusion; therefore, human rights seem to be part of the problem, rather than the solution to the marginalisation and inequality faced by many migrants.

In her monograph 'When Humans Become Migrants', Dembour (2015) focuses specifically on the case law of the European Court of Human Rights, which exemplifies perfectly how generous human rights principles may be interpreted by courts in a way that serves to exclude many migrants from full protection. The author analyses how it has always been (and still continues to be) extremely difficult for migrants to have violations of Convention-protected human rights recognised by the ECtHR, whereas another regional human rights court, the Inter-American Court of Human Rights, seems to be more inclined to favour the recognition of migrants' rights. Dembour defines as 'Strasbourg reversal' the paradox whereby the ECtHR typically starts its reasoning in migrant cases by reiterating the principle that States have the prerogative to control the entry and residence of foreigners in their territory, instead of beginning its reasoning from the relevant provision of the Convention, as one would expect[43] (Dembour 2015,

[43] This expression is meant to 'stress the incongruous nature of a human rights reasoning which starts with a prerogative which neither serves to affirm human rights nor is inscribed in the text which the adjudicating court's task is to interpret and apply' (Dembour 2015, 4). As explained by Dembour, the

1-6).

The effect of the 'Strasbourg reversal', observes Dembour, is that the ECtHR 'consider[s] the migrant applicant first of all as an "alien" who is subject to the control of the State, rather than just as a human being' (2015, 5). Hence, according to the scholar, the European Court has a bias towards the State, meaning that in migration cases the ECtHR tends to favour the State over the migrant applicant. As specified by Dembour, this does not mean that States always win before the ECtHR, but that the European system is characterised by an overall positive attitude towards the State (2015, 8-9). Although in crucial cases like *Saadi v. Italy*, *M.S.S. v. Belgium and Greece*, or *Hirsi Jamaa and Others v. Italy* the Court has resolutely affirmed migrants' rights, there are many more cases where the Court's judgments have done nothing for (or have even been detrimental to) the development of migrants' human rights.

It seems useful to keep in mind Dembour's critical view on the ECtHR case law in migration and asylum cases, as well as the reflections of other critical scholars, when analysing the human rights impact of bilateral and European informal patterns of cooperation on readmission in the sections that follow.

7.2. How does bilateral informal cooperation on readmission affect asylum-related human rights?

Informal practices of bilateral cooperation on readmission can be very controversial from a human rights perspective, as it clearly emerged already from the analysis of the three case studies of bilateral cooperation on migration control and readmission carried out in Chapter 5. This section investigates more specifically how informal bilateral readmission arrangements and practices may infringe upon the four asylum-related human rights described in section 7.1.1 above – i.e. the prohibition of *refoulement*, the right to seek asylum, the prohibition of collective expulsion and the right to an effective remedy – to each of whom a sub-section is dedicated. With this purpose, I make reference to some specific practices (already introduced in Chapter 5)

Court presents the 'state control prerogative' as a well-established principle in international law; however Schotel (2012) has argued that such principle actually lacks legal foundation and that the Court is legally wrong to rely on it.

which are illustrative of the human rights issues that may arise from bilateral informal cooperation on readmission, with regards precisely to the four asylum-related rights relevant to this work.

As concerns the Italian-Libyan case study, I focus on two practices: the return flights to Libya organised and financed by Italy, and carried out between October 2004 and March 2006; and the push-back operations implemented by Italian authorities, with the cooperation of Libyan authorities, between May and November 2009 (see section 5.2). With regards to the Spanish-Moroccan case, the practice I focus my attention on is that of *devoluciones en caliente*, which may be considered as a form of 'legalised' push-backs carried out by Spanish authorities in cooperation with Moroccan authorities at the borders separating the Spanish enclaves of Ceuta and Melilla from Morocco (see section 5.3). As concerns the Greek-Turkish case study, I make reference to the alleged push-back practices implemented by Greek authorities in the Aegean Sea, which have been widely documented by several independent sources, but always denied by the Greek government (see section 5.4). The following sub-sections investigate how each of these informal readmission practices has restricted, or actually violated, each of the four above-mentioned asylum-related human rights (and in some cases still continues to do so), determining a situation where the migrants and asylum seekers concerned are not granted sufficient protection.

7.2.1. The principle of non-refoulement

Between October 2004 and March 2006 Italy organised and financed the removal via charter flights of more than 3,000 migrants (mainly, but not exclusively, of Egyptian nationality[44]) recently arrived from Libya. After being readmitted from Italy to Libya, most of them were immediately repatriated to their country of origin, always via charter flights organised and financed by Italy (Paoletti 2011a, 143-148; HRW 2006, 106-113). With regards to this practice, the UNHCR (2005), Amnesty International (2005), the

[44] According to the Italian government, the return flights to Libya involved a majority of Egyptians (a part of whom declared to be Palestinian) and some Moroccan and Bangladeshi nationals (CPT 2006a, paras 64-65). The 84 applicants in the *Hussun* case appeared to be for the most part Palestinians, but there were also some Iraqi, Algerian, Jordanian and Moroccan nationals and one Tunisian (*Hussun and Others*, para 10).

European Parliament (2005a), the Committee for the Prevention of Torture of the Council of Europe (2006a) and Human Rights Watch (2006) have all expressed serious concerns about a possible violation of the principle of *non-refoulement*. Allegedly, the Italian authorities failed to take all the necessary measures to ensure that it was not sending back anyone (directly or indirectly) to a country where they would risk to suffer from ill-treatment or persecution.

The situation of migrants and refugees in Libya was and still is extremely problematic. Libya has not ratified the 1951 Refugee Convention and its 1967 Protocol; despite having ratified the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, which provides for a legal basis for refugee protection and an obligation to cooperate with the UNHCR, Libya has not established neither a legal framework on asylum nor a national asylum procedure; in addition it does not allow the UNHCR to properly operate its protection mandate in the country. Therefore, Libya cannot be considered a safe country of asylum, refugees and asylum seekers can be returned to. Moreover, in Libya migrants and asylum seekers are arbitrary arrested, detained in deplorable conditions and often subjected to violence and ill-treatment by Libyan authorities. Sub-Saharan asylum seekers are routinely expelled in large groups to their countries of origin (i.e. often to refugee-producing countries like Eritrea, Somalia, Liberia, etc.), with no consideration being given to their individual situation and protection needs, sometimes even if their refugee status has been recognised by the UNHCR (Amnesty International 2005; HRW 2006; European Parliament 2005a).

Therefore, summary returns to Libya as the ones carried out by Italy in the years 2004-2006 entailed a serious risk of violating the prohibition of *refoulement*, both directly, due to the unhuman and degrading treatment returnees could suffer in Libya, and indirectly, due to the risk of being deported to a country where their life or freedom would be threatened (UNHCR 2005). In its report on the visit conducted in Italy in November 2004, the Committee for the Prevention of Torture of the Council of Europe (CPT) observed that no specific evaluation was carried out by Italian authorities on an individual basis to ensure that among the then 1,243 persons readmitted to Libya there was nobody who could possibly run the risk of being persecuted or tortured, either in Libya or in another State where the Libyan authorities could be led to send them, which

would have prohibited their expulsion from Italy (CPT 2006a, para 64).

Between May and November 2009 the Italian authorities carried out nine push-back operations in the Channel of Sicily resulting in the readmission of more than 800 migrants and asylum seekers to Libya. Such operations consisted of intercepting migrant boats in international waters, taking migrants on board of the Italian vessels, and either returning them directly to Libya or handing them over to Libyan patrol boats on the high seas. While no official data was made available by Italian authorities on the nationalities of the persons forcibly returned to Libya, the UNHCR collected relevant information proving that push-back operations mainly concerned people originating from Somalia and Eritrea[45]. The Italian government admitted that neither an identification process nor an interview were carried out on board the Italian vessels during push-back operations; thus, no specific inquiry or individual assessment was made in order to determine possible protection needs of the persons concerned before they were returned to Libya or handed over to Libyan authorities (UNHCR 2011, paras 2.1.2-2.1.6; CPT 2010a, paras 10-14).

The Italian government affirmed that during push-back operations no migrant has ever expressed the intention to apply for asylum and that, consequently, there was no need to identify them and establish their nationality (CPT 2010a, paras 14 and 31). Conversely, some of the persons directly involved in these push-backs, interviewed by the UNHCR, affirmed the opposite. In any event, as pointed out by the European Committee for the Prevention of Torture in response to the remarks of the Italian government, 'the absence of an explicit request for asylum does not necessarily absolve the Italian authorities of their *non-refoulement* obligations under Article 3 ECHR' (CPT 2010a, para 32). In fact, as observed by Tondini (2010, 24), Italian authorities could not be unaware of the consequences for migrants deriving from their handover to Libyan officials.

Having considered the modalities in which these push-back operations were

[45] In 2007 and 2008 Eritrean and Somali nationals were among the main groups of persons seeking asylum in Italy. The recognition rate for these nationalities is very high: in 2008 in Italy 90% of Eritrean asylum seekers and 96% of Somali asylum seekers were recognised international protection (either refugee status or subsidiary protection). Also at the EU level in 2008 recognition rates for both nationalities were among the highest (HRW 2011, footnote 13).

conducted, the overall situation of migrants, asylum seekers and UNHCR refugees in Libya as described above[46], and the Libyan common practice of arbitrary collective expulsions towards unsafe countries of origin (*inter alia* Eritrea and Somalia), Human Rights Watch (2009), the Committee for the Prevention of Torture of the Council of Europe (2010a) and the UNHCR (2011) argued that, by returning persons to Libya without assessing their protection needs, the Italian authorities have not sufficiently taken into account the existence of a potential risk of *refoulement*, in the form of both severe ill-treatment in Libya and onward expulsion to their countries of origin (indirect or chain *refoulement*).

In contrast to the Italian practice of return flights, where the alleged violation of the *non-refoulement* principle found no judicial confirmation before the ECtHR[47], with regards to these push-back operations, in its landmark judgement on the *Hirsi* case, the Grand Chamber found that there has been a double violation of Article 3 of the ECHR[48]. The Court held that, in forcibly returning the applicants to Libya without examining their case, Italy exposed them both to the risk of unhuman and degrading treatment in Libya (direct *refoulement*) and to the risk of arbitrary repatriation to Somalia or Eritrea, where they could be subjected to such treatment (indirect *refoulement*) (*Hirsi Jamaa and Others*, paras 137-138 and 158).

Since the events in question occurred outside the Italian territory (and territorial waters), i.e. on the high seas, the Court had to preliminary examine whether the relevant provisions of the Convention (and in particular the principle of *non-refoulement*) applied extraterritorially. This is only possible if the applicants are within the jurisdiction of the State (Art. 1 ECHR); the ECtHR case law has established that this is the case when a State exercises an 'effective control' over individuals or areas abroad.

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[46] Based on first-hand information, particular concern was expressed for: the conditions of detention in Libyan reception and detention centres; the lack of a national asylum system and a legal framework on refugee protection; the difficulties encountered by asylum seekers in accessing the UNHCR refugee determination procedure; the failure by Libyan authorities to recognise any form of protection to persons who are recognised as refugees under the UNHCR mandate; the collective expulsions routinely carried out by Libyan authorities (HRW, 47-91; UNHCR 2011, paras 3.2-3.7; CPT 2010a, paras 41-46)

[47] See: ECtHR, *Hussun and Others v. Italy*, Applications No. 10171/05, 10601/05, 11593/05 and 17165/05, Judgment of the Court (Struck out of the List), 19.01.2010.

[48] The application was filed by a group of 24 Somali and Eritrean migrants who were readmitted to Libya during the first push-back operation carried out on 6 May 2016.

Since the events took place entirely on board of Italian vessels, the crews of which consisted exclusively of Italian officials, the Court held that in the period between boarding the Italian ships and being handed over to the Libyan authorities, the applicants were under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities (*Hirsi Jamaa and Others*, para 81); therefore, the events in question fell within the Italian jurisdiction, and Italy had the duty to secure the respect of the rights and freedoms protected by the ECHR also in the circumstances of these push-back operations carried out in international waters.

When considering whether Italy had violated the prohibition of *refoulement* by pushing the applicants back to Libya, the Court made reference to various reports on the situation of migrants and asylum seekers in the country, and embraced the reasoning of the CPT (2010a) and Tondini (2010) mentioned above. Indeed, the Court found that, since the situation of migrants and asylum seekers in Libya was well-known and easy to verify on the basis of multiple sources, the Italian authorities knew or should have known that in Libya the applicants would be exposed to treatment contrary to the Convention and would not be offered any kind of protection (*Hirsi Jamaa and Others*, para 131). It also affirmed that the fact that the applicants had failed to expressly request asylum did not exempt Italy from fulfilling its obligations under Article 3 ECHR (*Hirsi Jamaa and Others*, para 133). The Court, thus, concluded that by transferring the applicants to Libya, Italian authorities, in full knowledge of the facts, exposed them to unhuman and degrading treatment (*Hirsi Jamaa and Others*, para 137).

When examining whether Italy had violated the prohibition of *refoulement* also indirectly, the Court first considered the situation in Somalia and Eritrea, coming to the conclusion that it continued to pose widespread serious problems of insecurity, and that, for this reason, the applicants could arguably claim that their repatriation would breach Article 3 ECHR (*Hirsi Jamaa and Others*, paras 149-152). Following the same line of reasoning applied to direct *refoulement*, the Court established that the Italian authorities knew or should have known that there were insufficient guarantees protecting the applicants from the risk of being arbitrarily returned to their countries of origin, with particular regard to the lack of any asylum procedure and the impossibility of making the Libyan authorities recognise the refugee status granted by the UNHCR (*Hirsi Jamaa*

and Others, para 156).

Since the early 2000s in the enclaves of Ceuta and Melilla the Spanish authorities have repeatedly performed a push-back practice known as *devoluciones en caliente*, consisting of the immediate expulsion to Morocco, through the direct handing over to Moroccan officials, of migrants and asylum seekers (mainly of Sub-Saharan origin) intercepted while trying to cross the border into the Spanish territory. This practice has intensified in the last three years, parallel to an increase in migrants' attempts to enter into the Spanish enclaves in large groups, mostly by climbing over the multiple barbed-wire fences surrounding the entire land border of the enclaves or, in the case of Ceuta, also by reaching its shores from the sea (by boat or swimming).

Based on reports of several NGOs and the Council of Europe Commissioner for Human Rights, the modalities by which these push-backs are carried out resemble in many ways those of Italian push-backs: allegedly, also in the case of *devoluciones en caliente* the Spanish authorities hand over migrants to Moroccan authorities immediately after their interception (in Melilla generally using the doors within the triple border fence), without identifying them or establishing their nationality, without conducting any interview or individual assessment of their possible protection needs, and preventing their access to the asylum procedure[49]. *Inter alia*, it has been claimed that these summary returns violate the *non-refoulement* principle, because they would put migrants and asylum seekers at risk of being subjected to violence and abuse by Moroccan authorities, potentially amounting to unhuman or degrading treatment (HRW 2014a, 42-44; Amnesty International 2015a, 30-36; Council of Europe Commissioner for Human Rights 2015b, para 20; 2016b).

[49] The main difference between Spanish and Italian push-backs is that the former are not carried out in international waters, but from within the Spanish territory or at the Spanish border. However, the Spanish government has tried on several occasions to redefine on a case-by-case basis where the territory of the State begins, in an attempt to avoid its international obligations. For instance, the Spanish government has repeatedly asserted that the area between the triple fence in Melilla's border is not Spanish territory, despite an affirmation by a Spanish court that the areas comprised between the three layers of fences are indeed Spanish territory (Amnesty International 2015a, 31). States' attempt to establish 'international zones' and designate part of the national territory as being outside the national territory with the hope of thereby avoiding protection responsibilities towards persons present therein, is one of the '*non-entrée* policies' described by Hathaway (2005, 298). However, regardless of whether these push-backs occur within or outside Spanish territory, Spain is to be considered responsible as long as it exerts an effective control over individuals or areas through the actions of its State agents, as established by the ECtHR case law and reaffirmed in *Hirsi* (para 81).

The question is whether the situation of migrants and asylum seekers in Morocco provides sufficient reasons for claiming a violation of the *non-refoulement* principle on the part of Spain: would the persons summarily returned to Morocco be at risk of ill-treatment in Morocco, as in the case of Italian push-backs to Libya? National and international NGOs have provided relevant and consistent first-hand evidence in this respect, reporting in particular: the violence suffered by migrants at the hands of Moroccan police and security forces (e.g. raids in migrants' informal settlements, excessive use of force at the borders with Spain, etc.); episodes of arbitrary arrest and detention; episodes of collective expulsions to the desert border with Algeria; gaps in the implementation of the legal framework on refugee protection and difficulties in the establishment of a national asylum system (MSF 2013; HRW 2014a; AI 2015a, 26-36 and 44-48; Migreurop et al. 2015).

Unfortunately, the decision of the ECtHR on the admissibility of the joined cases *N.D. v. Spain and N.T. v. Spain* issued on 7 July 2015 precludes any significant pronouncement of the Court on this question. Indeed, whilst the Court considered admissible the part of the application concerning the alleged violation of Article 4 of Protocol No. 4 ECHR and Article 13 ECHR (in conjunction with Art. 4 Prot. No. 4), it declared the applicants' complaints under Article 3 ECHR inadmissible, as being manifestly ill-founded.

The two applicants[50] claimed that the Spanish authorities had summarily removed them to Morocco, despite the existence of a serious risk they would be ill-treated upon their handing over to Moroccan officials. According to the applicants, the practice of ill-treatments by Moroccan authorities is described in the reports of several national and international NGOs, and is known or should be known by Spanish authorities in the context of their tight cooperation with Morocco in the area of migration (*N.D. and N.T. v. Spain*, para 11). However, the Court observed that in the present case the applicants, who were actually removed to Morocco, were not subjected to (and did not complain about) any treatment contrary to Article 3 ECHR upon their expulsion to that country.

[50] The two applicants N.D. and N.T. are, respectively, a Malian and an Ivorian nationals. They were part of a group of at least 65 Sub-Saharan migrants, who, on 13 August 2014, were summarily returned to Morocco by Spanish *Guardia Civil* officials immediately after having put down their feet on the Spanish territory, having succeeded in climbing over the triple fence at Melilla's border.

Therefore, the Court held that, without prejudice to the general situation of risk of ill-treatment for migrants in Morocco evoked by the applicants, in the specific circumstances of the case there were no elements that could possibly reveal a violation of Article 3 ECHR by the Spanish authorities. For this reason the Court rejected this part of the application as manifestly ill-founded (*N.D. and N.T. v. Spain*, para 15)[51].

With regards to push-backs carried out by Greece in the Aegean Sea, any consideration as to possible human rights violations can only be based on NGOs' reports; so far, no application has been submitted to the ECtHR against Greece claiming the violation of Convention-protected rights deriving from a push-back episode in the Aegean Sea. In addition, as mentioned above in section 5.4, the Greek government has always denied the existence of such push-back practices and defended the conduct of its Coast Guard officials. Nevertheless, the copious and consistent evidence, based on first-hand testimonies, gathered by several national and international NGOs during the last decade seems to incontestably prove that these informal push-back practices do take place (Pro Asyl 2007; 2013; HRW 2008; Amnesty International 2013; 2015a).

Irrespective of the different modalities and forms Greek push-backs may take (see section 5.4 above), migrants and asylum seekers are allegedly sent back to Turkey (or Turkish territorial waters) outside of any formal procedure. As in the case of Italian and Spanish push-backs, the persons involved are neither identified nor interviewed, and no individual assessment of their protection needs and personal situation is carried out; reportedly, even explicit requests of protection are not given adequate consideration (Pro Asyl 2013, 18-19). NGOs have argued that this practice may result, *inter alia*, in the violation of the *non-refoulement* principle, both directly and indirectly. Upon their return to Turkey, indeed, migrants and asylum seekers may face the risk of being arrested and detained in degrading detention conditions[52]; and some of them may also

[51] In the similar pending case of *Doumbe Nnabuchi v. Spain* (submitted in April 2015 and communicated to the Spanish government in December 2015) the applicant did not claim a violation of the principle of *non-refoulement* linked to his summary removal to Morocco, but he claimed *inter alia* a violation of Article 3 ECHR on account of the fact that he was subjected to a disproportionate use of violence by Spanish officials when he was crossing Melilla's border fences, which the applicant maintains amounted to unhuman and degrading treatment.

[52] Turkey has a record of treating asylum seekers harshly in detention: episodes of unhuman and degrading treatment have been reported by NGOs (Amnesty International 2009; 2015b) and condemned

face the risk of being deported to their country of origin without a proper assessment of their protection needs (Pro Asyl 2013, 19).

Numerous reports describe the problems faced, and human rights violations suffered, by migrants, asylum seekers and refugees in Turkey, which in some circumstances may amount to treatment contrary to Article 3 ECHR – and which, more generally, make Turkey an unsafe country for asylum seekers (Roman et al. 2016, 12-20). The situation of asylum seekers and refugees in Turkey has got even worse in the last years, due to the exacerbation of the conflict in Syria, the resulting increase in the number of refugees, and the strengthening of cooperation on migration control with the EU (HRW 2015b; 2016c; Amnesty International 2009; 2015b; 2016b; 2016e; see above section 6.2.1.1).

As concerns the risk of direct *refoulement*, besides the issue of detention conditions which may amount to unhuman and degrading treatment, asylum seekers and refugees face also a number of legal and practical barriers that hamper access to and enjoyment of protection in Turkey. The country has ratified the 1951 Geneva Convention and its 1967 Protocol, but maintains a geographical limitation, whereby it does not recognise refugee status to asylum seekers who come from outside Europe[53]. This results in restricted rights and limited access to health care, education and employment for a large majority of asylum seekers and refugees in Turkey. In addition, even though in 2013 Turkey adopted a new organic legislation on international protection[54], its implementation has progressed very slowly; thus Turkey is still far from having a well-functioning national asylum system, able to guarantee access to fair and effective asylum procedures.

With regards to the risk of indirect *refoulement*, it should be observed that Turkey has engaged in the deportation of migrants and asylum seekers to their countries of origin since the 1990s; this is particularly worrying because, as already noted in section

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by the ECtHR (see, *inter alia*: *Abdolkhani and Karimnia v. Turkey* and *S.A. v. Turkey*).

[53] Syrians, for instance, have been granted a form of 'temporary protection', but, like all other non-European asylum seekers (e.g. Afghans and Iraqis), they have no right to refugee protection in its full sense, as enshrined in the 1951 Refugee Convention.

[54] Law No. 6458 of 4 April 2013, 'Law on Foreigners and International Protection', Official Gazette No. 28615 of 11 April 2013.

5.4, a large part of migrants to Turkey come from 'refugee-producing countries'. Reportedly, Turkey has regularly expelled (and continues to expel) Iranian, Iraqi and Afghan asylum seekers without a proper assessment of possible risks of persecution, torture or ill-treatment in their countries of origin. Most recently, NGOs have repeatedly denounced episodes of summary removal, push-backs at the border and physical violence addressing Syrian refugees (HRW 2015b; 2016c; Amnesty International 2015b; 2016b).

From this account it clearly emerges that Greek push-back practices may expose the returnees to both the risk of being subjected to ill-treatment in Turkey and to the risk of being deported to their countries of origin without a proper assessment of their protection needs.

7.2.2. The right to seek asylum

With regards to the Italian practice of so-called 'return flights' to Libya carried out in the years 2004-2006, the UNHCR (2005), Amnesty International (2005), the European Parliament (2005a) and Human Rights Watch (2006) have expressed serious concerns about a possible violation of the right to seek asylum. As reported by the UNHCR (2005) and HRW (2006, 107), Italian officials used to sort out migrants by nationality upon their arrival in Lampedusa: Eritrean, Ethiopian and Somalian nationals were admitted to the asylum procedure, while migrants coming from other countries were to be sent back to Libya via charter flights (most of them being Egyptian nationals). However, this division was apparently done using 'rushed methods' (UNHCR 2005); 'according to the International Federation for Human Rights, the identification of nationality seemed to have been determined primarily by the intuition and snap judgments of two Arabic interpreters'[55] (HRW 2006, 107). As a consequence, individuals who might have had a valid protection claim may have been prevented from accessing the asylum procedure and from having their claim adequately examined. As mentioned above in section 7.1.1.2, the right to asylum is a subjective right of

[55] As explained by Italian authorities in their reply to a letter by the Council of Europe Committee for the Prevention of Torture, the main task of Arabic interpreters is to determine whether migrants who declare to be Palestinians are in fact Egyptians (CPT 2006a, para 65).

individuals; everyone has the right to seek protection from persecution, irrespective of his or her nationality or country of origin[56].

By deporting migrants, sorted out by nationality, to Libya without offering them the possibility to apply for asylum and without an individual assessment of their possible protection needs, Italy has allegedly failed to guarantee their right to seek asylum. However, it cannot be argued that this has occurred in all cases. In its decision on the *Hussun* case, the ECtHR observed that, with regards to the group of 14 applicants who were actually expelled to Libya, each of them had received an individual expulsion order, issued by a judge (*Giudice di Pace*) following a hearing held in the presence of a lawyer and an interpreter (*Hussun and Others*, para 45). Apparently, in the circumstances of the case and with regards to that group of individuals, Italian authorities applied the return procedure provided for by national law, including, at least formally, all due procedural guarantees.

The same cannot be held with regards to the Italian push-back operations carried out in 2009. In fact, as mentioned in section 7.2.1, Italian authorities have officially acknowledged that they did not proceed with the formal identification of migrants who were intercepted at sea during push-back operations; they did not inform them about their real destination; and they did not conduct any individual interview nor specific inquiry to determine possible protection needs of intercepted migrants (UNHCR 2011, para 2.1.4; CPT 2010a, para 13; *Hirsi Jamaa and Others*, para 11).

As reported by the Committee for the Prevention of Torture of the Council of Europe (2010a, para 14), the Italian government affirmed that during push-back operations no migrant has ever expressed the intention to apply for asylum and that, consequently, there was no need to identify them and establish their nationality. Even if this statement were to correspond to reality – which is doubtful, based on information gathered by the UNHCR from a number of pushed-back migrants (2011, para 2.1.6) – the absence of an explicit request for asylum does not in itself absolve Italy from its obligations (CPT 2010a, para 32; *Hirsi Jamaa and Others*, paras 133 and 157), including the duty of admission and the duty to guarantee access to an effective asylum

[56] Article 3 of the 1951 Geneva Convention establishes that the State parties 'shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin'.

procedure, which derive from the principle of *non-refoulement* (see above section 7.1.1.2).

Furthermore, it should be noted that even if a person were to request protection while aboard an Italian vessel, this would have hardly had any consequence. In fact, as reported by the CPT, the Italian Coast Guard and military personnel on board the vessels admitted that there was no procedure in place capable of referring that person to a protection mechanism. Officials aboard the ships were neither responsible, nor trained, nor instructed for the identification and screening of migrants, the provision of information on how to apply for asylum, and the processing of asylum requests. In addition, intercepted migrants did not have access to linguistic or legal assistance on board the intercepting vessels, in order to express their needs (CPT 2010a, para 14).

Therefore, Italian push-back operations did not only result in a direct and indirect violation of the *non-refoulement* principle (as established by the ECtHR in *Hirsi*), but they also deprived intercepted migrants and asylum seekers from their right to seek protection and to access asylum procedures, which derives from the prohibition of *refoulement* (and which is also explicitly protected by Article 18 CFR).

As noted in the previous section, both Spanish push-backs in Ceuta and Melilla and Greek push-backs in the Aegean Sea appear to be very similar to Italian push-backs, with regards to the modalities of their implementation. As reported by NGOs, Spanish authorities would hand over migrants directly to Moroccan officials immediately after having caught them in the border area of the enclaves, whereas in the case of Greek push-backs, migrants and asylum seekers would not be handed over to Turkish authorities, but would be simply returned or forced to return to Turkey (or Turkish territorial waters). In both cases, these summary removals would occur outside of any formal readmission procedure: based on reports of NGOs and the Council of Europe Commissioner for Human Rights, migrants and asylum seekers are neither identified nor interviewed, their nationality is not determined, and no individual assessment of their protection needs and personal situation is carried out, neither by Spanish nor by Greek authorities (Amnesty International 2013; 2015a; HRW 2008; 2014a; Migreurop et al. 2015; Pro Asyl 2007; 2013; Council of Europe Commissioner for Human Rights 2015b).

Of particular relevance to this section is the fact that, in both contexts, intercepted migrants would be prevented from accessing asylum procedures. Reportedly, even in cases when migrants have explicitly declared their protection needs and expressed to the authorities their intention to apply for asylum, their claims have been ignored (Pro Asyl 2013, 18). Therefore, based on information provided by NGOs and the Commissioner for Human Rights, it would seem that in the context of these informal push-back practices both Spain and Greece have not abided by their obligations to guarantee the right to seek asylum.

This is especially worrying in the Greek-Turkish context, in light of the fact that a large majority of those who cross the Aegean Sea come from 'refugee-producing countries'. In recent years most of them have arrived in particular from Syria, Afghanistan and Iraq (see section 6.2.1.1 above); these currently represent the top three main countries of nationality of asylum seekers in the EU; the same nationalities (together with the Eritreans) present the highest recognition rates across the EU, both at first and at higher instances (EASO 2016a, 9-11 and 19-27). Therefore, considering the significant presence of asylum seekers on the Eastern Mediterranean route, it seems crucial that Greece abstain from practices that may limit the right of every person to seek protection from war, persecution or ill-treatment.

In the Spanish-Moroccan context, as mentioned in section 5.3, push-backs target specifically Sub-Saharan migrants, while other nationalities (especially Syrians) are usually allowed to access the asylum procedure (once they manage to enter the enclaves). In fact, since 2014 an increasing number of Syrians have entered irregularly the Spanish enclaves (Melilla in particular) mainly passing through the official border crossing points with fraudulent documents, posing as Moroccan nationals (Frontex 2016, 21; Migreurop et al. 2015, 16). But this option is not available to all: its cost is high (between 500 and 2,000 euro according to Amnesty International) and in any case it does not work for Sub-Saharan Africans, whose physical appearance usually differs from that of most Moroccans; for this reason Sub-Saharan migrants and asylum seekers have always tried to enter the Spanish enclaves mainly by climbing over the fences (Amnesty International 2015a, 24-25).

Following the increase in arrivals of Syrian refugees, since the end of 2014 the

Spanish government has opened an asylum office at Melilla's main border check point and established an accelerated procedure, which allows for the swift transfer of asylum seekers to the Spanish mainland, before a decision on their asylum application is made. However, the Council of Europe Commissioner for Human Rights observed that this procedure applies only to persons who claim asylum at this facility, namely almost exclusively to Syrian nationals; Sub-Saharan migrants, instead, are unable to access the asylum office at the border check point and are left with the option of climbing the fence (2015b, paras 18 and 30).

However, as mentioned above in relation to the Italian practice of return flights, States have to guarantee to everyone the right to seek asylum, irrespective of his or her country of origin; therefore, Spain has an obligation not to discriminate asylum seekers based on their nationality and to allow access to the asylum procedure both to Syrian and to Sub-Saharan nationals. As underlined by the Commissioner for Human Rights in its third party intervention submitted to the ECtHR in the case *N.D. and N.T. v. Spain*, 'migrants climbing the fence may also have valid protection claims and […] they should not be obliged to take serious risks, including climbing over the six-metre high triple fence, to be able to have access to the asylum procedure' (2015b, para 32)[57]. The Commissioner thus concluded that Spain should strengthen the asylum system in Melilla 'to allow all persons in need of protection, irrespective of where they come from, to access the territory safely and to submit asylum claims' (2015b, para 32).

7.2.3. The prohibition of collective expulsions

With regards to the Italian practice of return flights to Libya, the European Parliament (2005a), the Council of Europe Committee for the Prevention of Torture (2006a), Amnesty International (2005) and Human Rights Watch (2006) have expressed serious concerns about a possible violation of the prohibition of collective expulsions. According to HRW, while the Italian government claimed that all migrants had the opportunity to seek asylum while in Lampedusa, in fact 'at times the authorities

[57] The Commissioner recalled also that the 'UNHCR has underlined that since 2013, a growing number of the migrants arriving in Melilla were likely to have protection needs as they came from war-torn countries' (2015b, para 15).

collectively expelled large groups without providing them an asylum review' (2006, 106). Likewise, Amnesty International asserted that 'the authorities appear to be rushing to deport people from Lampedusa, and are doing so without proper scrutiny of the individual cases' (2005, 3). Both the European Parliament and the CPT argued that the practice of return flights may actually amount to collective expulsion: although migrants were generally identified and their nationality established, no specific evaluation was made of the personal circumstances of each individual concerned in order to exclude any possible risk of *refoulement* in his or her particular case (EP 2005a, paras 1-2; CPT 2006a, paras 64 and 69).

As already described in previous sections, in the context of the 2009 push-back operations, Italian authorities failed to carry out any formal identification and nationality determination procedure, any individual interview or any other specific examination of the personal circumstances of each migrant intercepted at sea and brought aboard Italian vessels. For these reasons, according to Human Rights Watch (2009), the Council of Europe Committee for the Prevention of Torture (2010a) and the UNCHR (2011), Italian push-backs amounted to a collective expulsion of aliens. These allegations were confirmed by the ECtHR in its judgement on the *Hirsi* case, where it found that Italy had violated the prohibition of collective expulsion as set out by Article 4 of Protocol No. 4 ECHR.

More specifically – after having determined that the prohibition of collective expulsion applied also 'extra-territorially', i.e. to removals towards a third country carried out outside national territory[58] – the Court held that the transfer of the applicants to Libya was performed without any examination of each applicant's individual situation. Applicants were not subjected to any identification procedure by the Italian authorities, which restricted themselves to embarking all the intercepted migrants onto military ships and disembarking them on Libyan soil; moreover, the personnel aboard the military ships were not trained to conduct individual interviews and were not assisted by interpreters or legal advisers. Based on these considerations, the Court ruled out the existence of sufficient guarantees ensuring that the individual circumstances of

[58] See section 7.1.1.3 above.

each migrant concerned were the subject of a detailed examination, and it concluded that the removal of the applicants was of a collective nature (*Hirsi Jamaa and Others*, paras 185-186).

With regards to Spanish and Greek push-back practices, based on the reports of several NGOs (Amnesty International 2013; 2015a; HRW 2008; 2014a; Migreurop et al. 2015; Pro Asyl 2007; 2013) and the Commissioner for Human Rights of the Council of Europe (2015b), it seems plausible to argue that these summary removals are carried out with the same modalities of Italian push-backs. In particular, Spanish authorities in Ceuta and Melilla, as well as Greek authorities in the Aegean Sea, appear to routinely send back groups of migrants to Morocco and Turkey, respectively, without conducting any prior identification, any individual interview and any examination of the personal circumstances of each migrant in a group.

Therefore, one may conclude that such push-back practices could actually amount to collective expulsions (as defined by the ECtHR), similarly to the 2009 Italian push-back operations, which have already been condemned by the Court in the *Hirsi* case. It remains to be seen whether in the two cases pending before the Court concerning the Spanish practice of *devoluciones en caliente* (namely, *N.D. and N.T. v. Spain* and *Doumbe Nnabuchi v. Spain*) the ECtHR will confirm its reasoning in the *Hirsi* case, and condemn Spain for violating Article 4 of Protocol No. 4.

7.2.4. The right to an effective remedy

The Italian practice of push-backs at sea has been criticised also because it failed to provide intercepted migrants with the possibility to challenge the legality of their removal to Libya before a competent domestic authority[59]. In the *Hirsi* case, the applicants complained that, due to the fact that push-back operations were carried out outside of any legal framework and were not in accordance with the law, they were not afforded an effective remedy under Italian law to lodge their complaints under Article 3 ECHR and Article 4 of Protocol No. 4, as required by Article 13 ECHR. Considering

[59] As concerns the Italian practice of return flights, the issue of effective remedy has not been specifically raised by international bodies (CPT, UNHCR, EP) and NGOs (HRW, AI), which have nonetheless criticised the practice in other respects (see previous sections).

the modalities in which such push-backs were conducted, the ECtHR agreed with the applicants[60]. The Court emphasised in particular the fact that the Italian military personnel provided no information to the applicants as to their real destination (they actually led the applicants to believe they were being taken to Italy) and the procedure to be followed to avoid being returned to Libya. In this respect, the Court reiterated the importance of guaranteeing anyone subject to a removal measure the right to obtain sufficient information to enable them to gain effective access to the relevant procedures and to substantiate their complaints (*Hirsi Jamaa and Others*, paras 203-204).

The Court thus concluded that the applicants were deprived of any remedy which would have enabled them to lodge their complaints with a competent authority and to obtain a thorough and rigorous assessment of their requests before the removal measure was enforced (*Hirsi Jamaa and Others*, para 205). It further observed that the domestic remedy the applicants could have availed themselves of, according to the Italian government[61], even if it were accessible in practice, in fact could not be considered 'effective', as it did not satisfy the requirements of Article 13 taken together with Article 3 and Article 4 of Protocol No. 4 – namely the criterion of suspensive effect, which requires that the execution of the impugned measure is stayed until the competent authority has examined the applicant's complaints[62] (*Hirsi Jamaa and Others*, para 206).

Likewise, with regards to Spanish push-backs in Ceuta and Melilla, the Council of Europe Commissioner for Human Rights, in his third party intervention in the *N.D. and N.T.* case, argued that 'the practice of immediate expulsions to Morocco deprives migrants of any possibility to challenge the legality of the expulsion decision, or to complain about ill-treatment possibly inflicted during the expulsion, before a competent authority' (Council of Europe Commissioner for Human Rights 2015b, para 35). The

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[60] The Court reiterated that the applicants had no access to a procedure to identify them and to assess their personal circumstances before they were returned to Libya; in addition neither interpreters nor legal advisers were present aboard the Italian vessels (*Hirsi Jamaa and Others*, para 202).

[61] The Italian government argued that the applicants could have applied to the Italian courts upon their arrival in Libya bringing criminal proceedings against the Italian military personnel, in order to obtain recognition (and possibly compensation) for the alleged violations of the Convention (*Hirsi Jamaa and Others*, para 192).

[62] See above section 7.1.1.4.

persons subjected to a summary removal through the border fences of the enclaves do not receive any written, individualised and reasoned decision to appeal against; in addition, they are not provided with any information on how to challenge their forced return, how to avoid being deported, or how to complain for possible ill-treatments received at the hands of the authorities[63].

Based on NGOs' reports, the same may be argued also for Greek push-backs in the Aegean Sea, which are carried out with very similar modalities. Indeed, migrants and asylum seekers, whose boats and dinghies are intercepted by Greek authorities, are returned or forced to return to Turkey without any opportunity to challenge their expulsion or to complain about possible ill-treatments before a competent authority. Considering that these push-backs are an informal practice carried out outside of any legal framework and, what is more, that the Greek government has always denied their existence, it seems logical that, in the context of such a complete lack of transparency, Greek authorities preclude also the access to an effective remedy to the persons who are subjected to this practice.

7.3. How does European informal cooperation on migration and readmission affect asylum-related human rights? The case of the EU-Turkey Agreement

The analysis of European instruments of informal cooperation on readmission carried out in Chapter 6 has already revealed the existence of some controversial elements from a human rights perspective. For instance, the EU-Afghanistan Joint Way Forward Agreement seems to consciously neglect the deterioration of the security situation in Afghanistan, as it provides for the readmission of rejected asylum seekers, explicitly including also vulnerable persons (e.g. unaccompanied minors, single women, elderly and seriously sick people). For the same reason, also the EU-Turkey Action Plan adopted in November 2015 seems to overlook the risk of chain *refoulement* for certain

[63] Furthermore, as noted by the Commissioner, migrants' access to a domestic remedy is further hampered by the fact that Moroccan officials often transfer them to other regions of the country (e.g. to Fez in the cases of both *N.D. and N.T.* and *Doumbe Nnabuchi*). This would make it difficult for NGOs to keep contacts with returnees, a circumstance which would reduce the possibilities of bringing complaints of human rights violations before the Spanish courts (Council of Europe Commissioner for Human Rights 2015b, para 35).

rejected asylum seekers (e.g. Afghan nationals), who may be deported to unsafe countries upon their removal to Turkey.

As discussed above in section 6.2.1, these informal deals are part of a broader European strategy, which consists of making humanitarian and development aid, as well as trade agreements, investments and other concessions, conditional to a third country's effective cooperation on return and readmission. This approach to migration cooperation with third countries has found its most comprehensive elaboration in the so-called 'new Partnership Framework' and is currently being implemented (with mixed results) in relation to five African countries (Ethiopia, Mali, Niger, Nigeria and Senegal). However, the most controversial materialisation of this new approach is probably embodied by the EU-Turkey Agreement of 18 March 2016, as mentioned above in section 6.2.1.1[64].

Moving from these considerations, this section investigates specifically how informal cooperation on readmission at the European level may infringe upon the four asylum-related human rights described in section 7.1.1 – i.e. the principle of *non-refoulement*, the prohibition of collective expulsion, the right to seek asylum, and the right to an effective remedy – taking as a case study the EU-Turkey Agreement of March 2016. The following sub-sections are dedicated to the above-mentioned rights, and considers both how they are established in the text of the Agreement and how they are implemented in practice.

7.3.1. The principle of non-refoulement and the prohibition of collective expulsions

The EU-Turkey Agreement has been immediately criticised by international organisations (Commissioner for Human Rights of the Council of Europe 2016a; UNHCR 2016b; PACE 2016a), NGOs (Amnesty International 2016a; ECRE 2016b; HRW et al. 2016) and scholars (Carrera and Guild 2016; Peers 2016a) for entailing a

[64] Section 6.2.1.1. focuses on the content, fundamental principles and legal nature of the EU-Turkey Agreement; this section continues the investigation started above, by focusing more specifically on the most controversial elements of the agreement from a human rights perspective.

serious risk of collective expulsion and violation of the principle of *non-refoulement*.

The wording of the text of 7 March (the first version of the agreement) was indeed rather vague, as it merely mentioned the return of 'all new irregular migrants crossing from Turkey into the Greek islands with the costs covered by the EU'. For this reason, in its Communication on Next Operational Steps in EU-Turkey Cooperation in the Field of Migration of 16 March 2016, the Commission expressed explicit reassurances that every case will be treated individually and that the legal and procedural requirements set out by the Asylum Procedures Directive will be respected: 'there is no question of applying a "blanket" return policy' (European Commission 2016b, 3).

These reassurances were included in the text of 18 March (the final version of the agreement), which contains an explicit commitment to respect both prohibitions: it affirms that the implementation of the agreement 'will take place in full accordance with EU and international law, thus excluding any kind of collective expulsion. All migrants will be protected in accordance with the relevant international standards and in respect of the principle of *non-refoulement*' (European Council 2016c, para 1). In order to abide by the prohibition of collective expulsion and *refoulement*, before returning a group of persons to Turkey, the EU (or more specifically Greece) has to conduct a reasonable and objective examination of the particular case of each individual of the group, and has to verify, always on a case-by-case basis, that nobody face any risk of persecution, torture or ill-treatment upon his or her removal to Turkey.

However, it is important to verify whether the commitments the EU has taken on paper have so far been respected in practice. If on the one hand there have been no reports of apparent episodes of collective expulsion so far, on the other hand returnees seem to be at risk of direct *refoulement*, due to the degrading detention conditions they are reportedly subjected to upon their deportation to Turkey, which may amount to ill-treatment under Article 3 ECHR. NGOs have documented that in Turkish detention centres where returnees from Greece are detained, living and hygienic conditions are very poor; returnees face difficulties in accessing the asylum procedure and are denied access to information and to legal assistance, as lawyers and NGOs are not allowed to enter the centres (HRW 2016b; Mülteci-Der 2016; Mülteci-Der and Pro Asyl 2016; Amnesty International 2016e). These elements add to the already difficult situation that

migrants and asylum seekers in general live in Turkey (described in the final part of section 7.2.1 above). Moreover, returnees are also at risk of indirect *refoulement*, i.e. onward deportation towards their country of origin, where they may be subjected to treatment contrary to Article 3 ECHR (as extensively discussed in section 7.2.1 above)[65].

7.3.2. The right to seek asylum

Arguably, the EU-Turkey Agreement may affect the right to seek asylum in different ways. In this respect, it seems useful to consider in particular the implications of the so-called 'one-for-one' principle (whereby for every Syrian readmitted from Greece to Turkey, another Syrian will be resettled from Turkey to an EU Member State) and the applicability of the concepts of safe third country (STC) and safe country of origin (SCO) to Turkey[66]. Criticism on these aspects of the EU-Turkey Agreement has been raised by both international organisations (UNHCR 2016c) and NGOs (Amnesty International 2016a; ECRE 2016a; 2016b; HRW et al. 2016), as well as by the Parliamentary Assembly of the Council of Europe (2016a) and several scholars (Peers 2016b; Collet 2016; Pascouau 2016; Emmanouilidis 2016; Labayle and De Bruycker 2016; Favilli 2016).

Firstly, as mentioned above in section 6.2.1.1, the one-for-one principle foresees that in this new form of 'conditional resettlement' priority is given to Syrians who have not previously entered or tried to enter the EU irregularly. This mechanism appears to

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[65] It is worth noting that the implementation of the EU-Turkey Agreement may lead to a violation of Art. 3 ECHR on the part of Greece also in a third way, namely due to the degrading conditions of detention to which migrants and asylum seekers are reportedly subjected in the 'hotspots' on the Greek islands. As mentioned above in section 6.2.2, hotspots were created in September 2015 as open centres for the reception, identification and registration of asylum seekers, but with the EU-Turkey Agreement they were turned into closed detention facilities. Starting from 20 March 2016, everyone who arrives in Greece (including children, sole women, disabled people, etc.) is detained in these hotspots until Greek authorities have examined their case and determined whether they can have their asylum request processed in Greece and be transferred to the mainland, or whether they should be send back to Turkey. NGOs have denounced this practice of arbitrary deprivation of liberty, and have documented very critical detention conditions (e.g. overcrowding, lack of indoor sleeping places, low-quality and insufficient food, poor hygienic conditions, lacking healthcare, promiscuity, situation of insecurity, violence among detainees, etc.) (HRW 2016a; 2016d; Amnesty International 2016c; PACE 2016a, paras 4-12).

[66] See section 6.2.1.1 for a definition of the concepts of STC and FCA and a description of the 'one-for-one' mechanism.

be controversial first of all from an ethical point of view, as it essentially punishes a Syrian refugee because he has tried to seek safety in Europe, while rewarding another Syrian refugee because he has not made the attempt; a despicable distinction is thus established between 'good refugee' and 'bad refugee'. Moreover, this mechanism clearly contrasts with one of the fundamental principles of international refugee law: Article 31(1) of the 1951 Refugee Convention establishes that a refugee cannot be punished for illegal entry or presence in the country where he or she seeks refuge[67]; the right of an individual to seek protection cannot, in fact, be subordinated to the (legal or illegal) way he or she enters a country. Therefore, the right to seek asylum of Syrians may end up being restricted by the application of the one-for-one principle.

Secondly, in so far as the one-for-one mechanism applies to Syrians only, it represents a clear violation of the prohibition of discrimination based on the country of origin, as enshrined in Article 3 of the 1951 Refugee Convention[68]. Indeed, non-Syrian asylum seekers who are readmitted to Turkey in application of the first pillar of the EU-Turkey Agreement ('all new irregular migrants […] will be returned to Turkey') are forced to remain in Turkey, because the possibility of resettlement to Europe via the one-for-one mechanism is only foreseen for Syrian nationals.

This issue may have serious implications, if one considers that in 2016 the migration flow along the Eastern Mediterranean route consisted of, approximately, more than 50% Syrians, 26% Afghans and 17% Iraqis[69] – which represent the three main countries of nationality of asylum seekers in the EU, and are also among the nationalities with the highest recognition rates across the EU (EASO 2016a). Therefore, among the non-Syrian asylum seekers who would be returned to Turkey under the EU-Turkey Agreement there may be many persons with a valid protection claim, who

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[67] Art. 31(1) of the 1951 Geneva Convention reads: '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 in the sense of Article 1, 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'.

[68] Art. 3 of the 1951 Refugee Convention states: 'The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin'.

[69] Source: UNHCR Refugees/Migrants Emergency Response: Mediterranean, http://data.unhcr.org/mediterranean/country.php?id=83.

would be in many cases recognised either refugee status or subsidiary protection in the EU (if they managed to apply for asylum there). Conversely, in Turkey they have no right to apply neither for the refugee status (due to Turkey's geographical limitation to the 1951 Refugee Convention) nor for temporary protection (which applies to Syrians only)[70]. In addition, as described above under section 7.2.1, asylum seekers in Turkey generally face a number of substantial problems, including: inadequate asylum procedures, lack of reception facilities, insufficient protection standards, limited access to residence rights, healthcare, education and employment. Given this situation, the EU-Turkey Agreement may determine a large disparity between Syrian and non-Syrian asylum seekers, which may lead to a serious restriction of the latter's right to seek and to enjoy asylum.

Thirdly, the right to seek asylum of every person who enter Greece coming from Turkey may risk to be limited by the application of the concepts of safe third country (STC) and first country of asylum (FCA) to Turkey. As mentioned above in section 6.2.1.1, the Asylum Procedures Directive (APD) establishes that an asylum application may be deemed inadmissible if a third country can be considered as a STC or as a FCA for the applicant concerned (Art. 33(2) APD) and it sets out the criteria for a third country to be considered a STC (Art. 38(1) APD) or a FCA (Art. 35 APD)[71]. Member States authorities may apply the STC concept only to a third country where an asylum seeker: 1) would face no risk of persecution; 2) no risk of serious harm (consisting of death penalty; torture or inhuman or degrading treatment; or a serious and individual threat due to indiscriminate violence in a situation of conflict[72]); 3) no risk of *refoulement*; and 4) where he or she would have the possibility to request refugee status, and if found to be a refugee, to receive protection in accordance with the 1951 Geneva Convention. The relevant question here is whether Turkey can be considered a STC, as defined by Art. 38(1) APD.

The risk of serious harm in Turkey is increased by at least two factors: firstly, as mentioned above in section 7.2.1, asylum seekers may suffer from unhuman and

[70] See section 7.2.1 above.
[71] See footnotes 35 and 36, under section 6.2.1.1.
[72] The definition of 'serious harm' is set out by Art. 15 of the Qualification Directive.

degrading treatment inside Turkish immigration detention centres (*Abdolkhani and Karimnia v. Turkey*; *S.A. v. Turkey*); secondly, the intensification of the conflict between the Turkish government and the Kurdish rebels in the south-east of the country represents a serious threat for the life of many asylum seekers and refugees who live in that area. As concerns the risk of *refoulement*, even though Turkey is formally committed to abide by the principle (being part of several international human right conventions protecting it and having incorporated the principle into its national law[73]), serious episodes of violent push-backs at the border and summary removals of asylum seekers (especially Syrians) have been repeatedly reported by NGOs (HRW 2015b; 2016c; Amnesty International 2015b; 2016b).

Finally, as mentioned above in section 7.2.1, Turkey has ratified the 1951 Refugee Convention and its 1967 Protocol, but it maintains a geographical limitation for non-European asylum seekers, based on which it does not recognise refugee status, as defined by the Geneva Convention, to asylum seekers who come from outside Europe (i.e. from States that are not members of the Council of Europe). Non-European asylum seekers may only apply for a so-called 'conditional refugee' status or for subsidiary protection, as defined in the 2013 Turkish Law on Foreigners and International Protection; Syrian nationals, instead, may apply for a special regime of 'temporary protection', established by a government regulation in October 2014[74] (AIDA 2015).

The sum of these elements lead us to conclude that in most cases Turkey would not satisfy the requirements set by the Asylum Procedures Directive to be considered as a safe third country (Roman et al. 2016). This is especially true with regards to the last requirement (letter (e) of Art. 38(1) APD), since Turkish legal framework on asylum currently makes it impossible for a non-European asylum seeker to 'request refugee status', to be recognised as a refugee, and to 'receive protection in accordance with the Geneva Convention' (Peers and Roman 2016)[75].

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[73] Art. 4, Law on Foreigners and International Protection; Art. 6, Temporary Protection Regulation.

[74] Council of Ministers of the Republic of Turkey, Temporary Protection Regulation of 22 October 2014. For further information on the content and rights attached to these different forms of protection (including temporary protection for Syrians), see the AIDA Country Report on Turkey as updated in December 2015 (AIDA 2015).

[75] On this issue there is disagreement among legal scholars. The requirement at letter (e) of Art. 38(1)

As concerns the concept of first country of asylum, Article 35 APD establishes that this may only be applied to a third country where an asylum seeker: 1) has been recognised as a refugee and can still avail himself or herself of that protection; or 2) otherwise enjoys sufficient protection in that country, including benefiting from the principle of *non-refoulement*. Could thus Turkey be considered as a FCA, based on this definition? With regards to the first criterion, based on the same reasoning applied before, Turkey could not be considered as a FCA for non-European asylum seekers, as the latter cannot be recognised as refugees in that country, due to the geographical limitation to the 1951 Refugee Convention. Conversely, with regards to the second criterion, Turkey could be considered as a FCA because, as mentioned above, it does foresee alternative forms of protection for non-European asylum seekers (i.e. 'conditional refugee' status, subsidiary protection, and temporary protection for Syrians).

Nonetheless, it needs to be determined (always through an individual assessment of each applicant's case) whether the protection granted by Turkey qualifies as 'sufficient'. Article 35 APD does not provide a definition of 'sufficient protection'; it simply requires that the person concerned benefits from the principle of *non-refoulement* (which, as mentioned above, is not always respected by Turkey). In addition, Art. 35 APD states that 'in applying the concept of FCA to the particular circumstances of an applicant, Member States may take into account Article 38(1)'. The latter would provide for more stringent requirements, however, being a 'may clause', Member States are not obliged to apply the STC criteria to determine whether a country may be considered as a FCA[76].

APD, in fact, has not been univocally interpreted. According to Steve Peers (whose interpretation I share) this provision requires that the third country concerned has ratified and fully applies the 1951 Geneva Convention, otherwise it seems logically impossible that in that country a person can request refugee status, be recognised as a refugee and receive protection in accordance with the Geneva Convention. Conversely, according to Daniel Thym, this provision does not require that the third country concerned has ratified the 1951 Refugee Convention without any geographic limitation and fully applies it; it is sufficient that the third country offers a level of protection which is equivalent to the protection provided for by the Refugee Convention (Peers and Roman 2016; Thym 2016). On the same issue, see also the debate between Hathaway and Hailbronner on *Verfassungblog* (Hathaway 2016a; 2016b; Hailbronner 2016). On its part, the European Commission has explicitly embraced and promoted Thym's interpretation of this crucial requirement (European Commission 2016a, 18).

[76] According to the UNHCR, even though the APD does not define 'sufficient protection', it

Therefore, based on Art. 35 APD, national authorities of Member States (i.e. in this case Greek authorities) could apply the concept of FCA to Turkey, and thus declare an asylum application inadmissible, after having examined on an individual basis whether the asylum seeker concerned would enjoy sufficient protection in Turkey and would not be at risk of *refoulment*. However, it should be emphasised that a faulty, careless or hasty application of the concepts of STC and FCA in daily practice may actually limit, when not violate, the right of many asylum seekers and war refugees to seek and enjoy protection.

With regards to the practical implementation of the EU-Turkey Agreement, NGOs have reported several irregularities in the way asylum and return procedures have been carried out by Greek authorities. In particular, based on the returnees' testimonies, NGOs have complained that since the implementation of the Agreement has begun, not everyone has been granted the possibility to apply for asylum before being readmitted to Turkey. They have reported a confused situation on the Greek islands, rushed procedures and no access to information, which in some cases have prevented asylum seekers to register their asylum claim in Greece (Amnesty International 2016c; HRW 2016b; Mülteci-Der 2016). These allegations confirm that the practical implementation of the EU-Turkey Agreement entails the real risk of restricting the right to seek asylum, also due to procedural and operational faults.

7.3.3. The right to an effective remedy

Article 38(2) of the Asylum Procedures Directive provides for the procedural guarantees to be ensured when national authorities apply the concept of safe third country and declare an asylum application inadmissible. First of all, the safety of a third country must be always assessed on a case-by-case basis, in order to verify whether the

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follows from the text, context, object and purpose of Article 35 that 'sufficient protection' goes beyond protection from *refoulement*. The UNHCR suggests that, for protection to be 'sufficient', in the third country concerned there should be: no risk of persecution or serious harm; no risk of onward *refoulement*; compliance in law and practice with international standards, including adequate living standards, work rights, health care and education; access to a right of legal stay; assistance to persons with specific needs; and timely access to a durable solution. However, given the lack of a definition of 'sufficient protection' in the APD, the UNHCR encourages national (Greek) courts to make a reference for a preliminary ruling to the CJEU on the interpretation of Art. 35(b) APD (UNHCR 2016c, 3-4).

notion is applicable to the particular circumstances of the individual applicant concerned. Moreover, the applicant must be guaranteed the right to challenge the application of the STC concept to his or her case, on the grounds that that country may not be safe in his or her particular circumstances. Article 35 APD provides for the same safeguards in the application of the concept of first country of asylum.

As set out by the Procedures Directive, applicants shall be given the opportunity to consult in an effective manner a legal adviser or other counsellor at all stages of the procedure (Article 22(1) APD), including at first instance (Article 31(1) APD) or in border procedures, when deciding on the admissibility of an asylum application (Article 43(1) APD). Legal advisers and counsellors must have access to the applicant for the purpose of consultation, including in closed areas such as detention facilities (Article 23(2) APD). On appeal, Member States must ensure free legal assistance and representation on the request of the applicant (Article 20(1) APD).

In addition, Article 46 APD establishes that, if an asylum application is found inadmissible pursuant to Article 33(2) APD, the applicant has the right to an effective remedy before a national court or tribunal (Article 46(1)(a)(ii) APD). If the decision on the inadmissibility of the application is based on the FCA concept, the court has the power to rule whether or not the applicant may remain on the territory of the Member State pending the outcome of the remedy, either upon the applicant's request or acting *ex officio* (Article 46(6)(b) APD); conversely, if the decision on the inadmissibility of the application is based on the STC concept, the suspensive effect is automatic (Article 46(5) APD)[77].

Given the procedural safeguards provided for (on paper) by the Asylum Procedures Directive, the question is whether the accelerated procedures implied by the EU-Turkey Agreement – and promptly put in place by Greece – actually allow for a case-by-case examination of the personal circumstances of each asylum seeker (with all procedural safeguards being guaranteed), and whether they ensure the possibility for an

[77] However, it should be recalled that, based on Articles 3 and 13 ECHR, as interpreted by the ECtHR, the remedy against an inadmissibility decision must have automatic suspensive effect in law and in practice, if the applicant has an arguable claim of a risk of ill-treatment upon return or of a risk of onward deportation towards a country where he or she may be at risk of such treatment (see section 7.1.1.4 above).

applicant to appeal against an inadmissibility decision, by challenging the application of the STC or FCA concepts to his or her particular case. On the one hand, NGOs have reported cases where Greek authorities have allegedly failed to properly assess on an individual basis the personal circumstances of each applicant before readmitting him or her to Turkey, or where they have failed to provide access to information and legal assistance to asylum seekers in hotspots (PACE 2016a, para 25; HRW 2016b). However, on the other hand, Greek Appeal Committees – the national authority responsible for examining recourses against the negative first instance decisions of the Greek Asylum Service – have played a significant role in re-examining the cases of Syrian asylum seekers who have challenged their return to Turkey under the EU-Turkey Agreement.

Starting from a landmark ruling issued on 17 May 2016, the Greek Appeal Committees have begun to uphold the appeals of Syrian asylum seekers against the inadmissibility decision on their asylum application, based on the consideration that Turkey did not comply with some of the APD requirements to be considered a safe third country. More precisely, the Committees have found that Turkey did not comply with the *non-refoulement* principle and/or that the protection provided to Syrians in Turkey was substantially different and not in accordance with the 1951 Refugee Convention[78] (EDAL 2016; ECRE 2016c; Pro Asyl 2016).

The European Commission reported in its June 2016 Second Progress Report on the implementation of the EU-Turkey Agreement that, until that moment, the first instance inadmissibility decisions concerning the asylum applications of Syrian nationals had been overturned by the Appeal Committees in a large majority of cases – i.e. in 68 cases out of 70 (European Commission 2016g, 4). The two cases in which the Appeal Committees found, instead, that Turkey could be considered a STC for the applicants, concerned two Syrian adult men who had been living in Turkey for several years. In both cases the Committees argued that there was a sufficient connection between the applicants and the third country, on the basis of which it would be

[78] The Committees mentioned the fact that temporary protection is not defined as a form of international protection and that it does not provide for a residence permit in Turkey to conclude that the core elements of protection as enshrined in the 1951 Refugee Convention are not satisfied (EDAL 2016).

reasonable for that person to go to that country (i.e. Turkey), as required by Article 38(2) APD (EDAL 2016).

In one of these two cases, however, the applicant's legal representatives applied at the ECtHR for interim suspensive measures (under Rule 39 of the Court) in order to stop the applicant's deportation to Turkey[79]. This was one of the first cases related to the EU-Turkey Agreement to be brought before the ECtHR. Another application was submitted to the Court in April 2016 by three Afghan nationals who had arrived in Chios on 20 March 2016 – the day the EU-Turkey Agreement became operational – and were detained in a hotspot on the island; the applicants complain about their conditions of detention (alleged violation of Article 3 ECHR), the arbitrariness of their detention (alleged violation of Article 5(1) ECHR) and the lack of information on the reasons for their detention (alleged violation of Article 5(2) ECHR)[80].

In all these cases, including those brought before the Greek Appeal Committees and those brought before the ECtHR, the applicants were granted the right to an effective remedy. However, following the numerous Appeal Committees' decisions rebutting the STC presumption regarding Turkey, in June 2016 Greece amended its asylum law in order to modify the composition of the Appeal Committees[81]. The change consisted of increasing the number of state-appointed officials in these three-member Committees (two judges of the Administrative Courts instead of one), while reducing the number of asylum and human rights experts (one UNHCR representative instead of one UNHCR representative and one human rights expert from a list compiled by the National Commission on Human Rights) (AIDA 2016b). The purpose of this law amendment was clearly that of changing the orientation of the Appeal Committees towards a less strict interpretation of the APD requirements for a third country to be considered 'safe'. The National Commission of Human Rights questioned the constitutionality of the new composition of the Committees and the compliance of the

[79] The applicant complained that if returned to Turkey his life would be in danger because in Turkey he was sought by ISIS, which wanted him to go back to Syria to work for oil production in an ISIS-controlled area; in addition he would be at particular risk also because of his homosexuality (ECRE 2016c).

[80] ECtHR, *Raoufi and Others v. Greece*, Application No. 22696/16, Communicated Case, 26.05.2016.

[81] Law No. 4399/2016 of 22 June 2016, Journal of the Government of the Hellenic Republic, Sheet No. 117.

new law with the right to an effective remedy (AIDA 2016b).

The EU-Turkey Agreement was brought to the attention also of the Court of Justice of the EU. Between March and May 2016, three similar applications for annulment were lodged with the General Court of the CJEU (under Article 263 TFEU) requesting the annulment of the EU-Turkey Agreement[82] (Council of the EU 2016d). The applications were directed against the European Council and were brought on behalf of two Pakistani and one Afghan nationals. The applicants claim that the so-called 'EU-Turkey Statement' is an agreement that produces legal effects adversely affecting their rights and interests. In particular, they claim that the Agreement exposed them to the risk of *refoulement* to Turkey or 'chain *refoulement*' to Pakistan or Afghanistan, thereby obliging them to apply for asylum in Greece against their will. In support of their request for annulment, the applicants raised a number of arguments, including both procedural issues relating to the adoption of the EU-Turkey Agreement and more substantial issues relating to its compatibility with international and European human rights standards (Council of the EU 2016d, para 4).

Finally, in December 2016 the NGO Access Info Europe decided to lodge a complaint against the European Commission before the General Court of the CJEU, in order to obtain the Commission's legal analysis of the EU-Turkey Agreement. The lawsuit was launched after the Commission denied two access to information requests submitted by the NGO in March 2016, asking for 'copies of the Commission's own evaluation of the legality of what was agreed with Turkey'. The Commission justified its denial making reference to issues such as: protection of legal advice, protection of decision making and protection of international relations (Access Info Europe 2016a; 2016b).

The cases pending before the two European Courts prove the existence of different venues, at different levels, for individuals whose rights have been limited or violated by the EU-Turkey Agreement to challenge the legality of this instrument and seek redress. It will be interesting to follow the developments of this case law, in order

[82] CJEU, *N.F. v. European Council*, Case T-192/16; *N.G. v. European Council*, Case T-193/16; *N.M. v. European Council*, Case T-257/16; cases notified to the European Council on 31.05.2016 and 02.06.2016.

to verify whether it will uphold, limit the scope or completely dismiss the EU-Turkey Agreement.

CONCLUSION

INFORMALISATION OF COOPERATION ON READMISSION AND RESTRICTION OF MIGRANTS' HUMAN RIGHTS: TWO PARALLEL PROCESSES

In this work I analysed the external migration policy of the EU and its Member States in the Mediterranean area, focusing on policies, instruments and practices of cooperation on readmission. Firstly, I examined the development and main features of cooperation on readmission at the European level, focusing on its two main instruments – i.e. European readmission agreements and Mobility Partnerships (Chapters 2-4). Secondly, I investigated cooperation on readmission at the bilateral level, focusing on three case studies in the framework of Euro-Mediterranean relations – i.e. migration cooperation between Italy and Libya, Spain and Morocco, Greece and Turkey (Chapter 5). In both analyses I paid a specific attention to the use of both formal and informal instruments of cooperation on readmission. In Chapter 6 I defined the concept of multi-level informalisation of cooperation on readmission and explored this process and its main characteristics, focusing in particular on the recent shift at the EU level towards broader and more informal frameworks of cooperation, based on policy instruments and informal agreements. Finally, in Chapter 7 I considered how bilateral and European informal cooperation on readmission may impact on the asylum-related human rights of migrants, limiting their possibility to access protection.

My analysis into this topic moved from two research questions and six hypothesis to be investigated (and proved) throughout this study (see Chapter 1, section 1.2). The research questions were the following: 1) has there been a shift towards 'informalisation' in cooperation on readmission in the Mediterranean area, both at European and bilateral level?; 2) if so, what are the features of this 'informalisation' process and its implications on migrants' human rights?

With regards to the first research question, on the one hand, the investigation into how bilateral cooperation on readmission has evolved in the three case studies analysed

in Chapter 5 demonstrated that informal instruments and practices have been increasingly preferred to formal bilateral readmission agreements. On the other hand, the analysis carried out in Chapters 3, 4 and 6 showed that, along with formal European readmission agreements, the EU has also increasingly resorted to informal policy or quasi-legal instruments of cooperation (e.g. Mobility Partnerships, high-level dialogues, migration compacts, the EU-Turkey Agreement, the EU-Afghanistan Joint Way Forward Agreement, etc.), thus proving that the informalisation of cooperation on readmission has occurred also at the EU level, and that it is a multi-level process. This demonstrates my first and second hypotheses, and allows to respond affirmatively to the first research question.

However, two more issues were to be explored in the framework of this first research question. The analysis of the role played by Member States in the implementation of European formal and informal instruments of cooperation on readmission – conducted in sections 3.4.1, 4.4.1 and 6.2.2 with regards, respectively, to EURAs, MPs and other informal instruments – showed that the effectiveness of the latter (and especially of informal instruments) actually depends on how they are put in practice by Member States at the bilateral level; this confirms my third hypothesis. Moreover, under section 6.2.3 I examined two examples of a possible re-formalisation trend at the European level: the recent launch of negotiations for EURAs with Tunisia and Nigeria demonstrates, indeed, that informalisation is not a linear irreversible process; rather, in the framework of informal cooperation on readmission, instances of re-formalisation may emerge. This proves also my fourth hypothesis.

With regards to the second research question, the analysis carried out in sections 6.3 and 6.4 identified and described the main features of informal cooperation on readmission[1], showing that these are actually the same at the bilateral and European levels, and thus confirming my fifth hypothesis. Finally, the investigation conducted in Chapter 7 revealed the implications of informal cooperation on readmission on the protection of the asylum-related human rights of migrants. Drawing upon the three case

[1] These are: the flexibility and immediate operability of informal readmission agreements; their lack of transparency and accountability; the role played by non-state actors and international organisations in their adoption and implementation.

studies of bilateral cooperation (described in Chapter 5) and the case study of the EU-Turkey Agreement (introduced in Chapter 6, section 6.2.1.1), it emerged that both at the bilateral level (section 7.2) and at the European level (section 7.3) the principle of non-*refoulement*, the right to seek asylum, the prohibition of collective expulsions and the right to an effective remedy have been (or are at risk of being) restricted or violated by the recourse to informal readmission instruments and practices. This proves also my sixth hypothesis and provides a thorough and comprehensive answer to my second research question.

The increasingly widespread use of informal instruments of cooperation on readmission also at the European level is apparently aimed at fastening and easing the enforcement of returns from the Member States to third countries, thus improving the 'effectiveness' of the EU return and readmission policy – which, as mentioned above, is measured in exclusively quantitative terms. However, as noted by Carrera (2016, 52), this logic, i.e. 'the EU's current obsession with return rates', blurs one of the main reasons why people cannot be returned, namely the legal status of migrants and asylum seekers as holders of fundamental rights and procedural guarantees envisaged in international and EU law.

The recent EU policy shift towards informal readmission arrangements and quasi-legal or policy instruments serves the purpose of moving cooperation on readmission outside of existing formal agreements, which are subject to public scrutiny and democratic and judicial accountability. Indeed, the limited transparency, accountability and legal certainty of informal cooperation instruments raise serious concerns regarding the extent to which readmission procedures can be monitored to ensure their full compliance with international and EU law. For this exact reason, already in 2005 Amnesty International had called on the Council of the EU 'to refrain from developing flexible mechanisms of cooperation on illegal immigration which would include neither appropriate legal safeguards, nor proper parliamentary scrutiny' (2005, 4).

The recourse to informal instruments and practices of cooperation on migration control and readmission in the Mediterranean area has been typically justified by European States by the existence of a perceived 'migration crisis', 'humanitarian crisis', or 'emergency'. This happened, for instance, in the context of Italian-Libyan

cooperation to justify the 2009 push-backs at sea, while it is still happening in the context of Spanish-Moroccan cooperation, to legitimise the *devoluciones en caliente* which routinely take place in Ceuta and Melilla. More recently, also the EU-Turkey Action Plan and the subsequent EU-Turkey Agreement have been grounded on the need, from a European perspective, to stem the flow of migrants and asylum seekers heading towards Europe in the context of the so-called 'refugee crisis'.

In all these cases, the readmission not only of irregular migrants, but also of potential asylum seekers and refugees (often carried out in the form of collective summary removals) has been (or is still) implemented regardless of whether the transit country where migrants were (or are) to be readmitted had (or has) the capacity *de iure* and *de facto* to fully respect the fundamental human rights of returnees. However, as reaffirmed by the ECtHR in the *Hirsi* case, States cannot evade their responsibility under the ECHR (and other human rights conventions) on the basis of obligations or commitments arising from other agreements they may have entered into at a later stage (*Hirsi Jamaa and Others*, para 129).

Notwithstanding the above-mentioned problems and risks, in particular with regard to the respect for the rule of law and the protection of migrants' human rights, the EU has decisively turned to informal venues and informal instruments of cooperation on readmission. For instance, the new EU approach to migration cooperation with African countries based on the concept of 'Partnership Framework', is clearly informed by a logic of informalisation. The new Partnership Framework, indeed, aims to make use of policy tools and external relations instruments (e.g. high-level dialogues) as well as quasi-legal arrangements (e.g. informal readmission agreements, like the one recently proposed to Mali) in order to improve cooperation on migration management on the part of the third countries concerned and, more specifically, to increase the number and rate of returns and readmissions.

A further signal of this informalisation trend is represented by the fact that the EU-Turkey Agreement of March 2016 is increasingly referred to by European leaders as a model that could be replicated with countries in North Africa, in order to stem the mixed migration flow across the Central Mediterranean route. Proposals have emerged for negotiating a similar kind of deal for example with Libya or Tunisia, despite the

obvious difficulties and challenges that this would entail. Regardless of the actual chances that this proposal may be put in practice, what matters here is the impact that such a solution could have in terms of restricting, if not violating, the asylum-related human rights of a large number of migrants and asylum seekers, some of whom may have valid protection claims, including those who come from refugee-producing countries or regions in Sub-Saharan Africa and the Horn of Africa.

The analysis carried out in Chapter 7 demonstrates that the use of informal instruments and practices of cooperation on readmission (and the EU-Turkey Agreement is one of these instruments) entails the risk of serious human rights violations. For this reason, it is particularly worrying that the EU and its Member States are supporting the proliferation of informal instruments of cooperation on readmission, prioritising the effectiveness of returns whilst disregarding the obligation to ensure migrants the actual enjoyment of their rights. To conclude, the process of multi-level informalisation of cooperation on readmission goes hand in hand with the restriction of the fundamental rights of migrants, in particular those human rights and procedural guarantees related to their legal status as potential asylum seekers. Therefore, the EU and its Member States should avoid resorting to informal cooperation in the area of migration management and readmission, as long as its human rights implications for migrants and asylum seekers outweigh its advantages for States.

ANNEXES

Annex 1: List of Interviews

Int. No.	Interviewee	Date	Place
1	Migration scholar and expert on Italian-Libyan cooperation on migration management	08.10.2015	Amsterdam
2	Official at the Dutch Ministry of Security and Justice (and former official at the European Commission DG Home)	10.02.2016	The Hague
3	Human rights and migration lawyer from Turkey	19.02.2016	Amsterdam
4	Official at the European Commission DG Home (Dir. A – International Coordination)	10.03.2016	Brussels
5	Official at the European Commission DG Home (Dir. C – Irregular migration and return policy)	11.03.2016	Brussels
6	Official at the European Commission DG Home (Dir. A – International Coordination)	11.03.2016	Brussels
7	Jean-Pierre Cassarino – migration scholar and expert on cooperation on readmission and Euro-Mediterranean relations	21.07.2016	Skype interview

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