

The Global Approach to Migration and Mobility

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Abstract

Since the Treaty of Amsterdam, the EU has developed several instruments delineating cooperation with third countries in the management of migration, borders and asylum in the so-called Global Approach to Migration and Mobility (GAMM). Under the 'more for more' mechanism, the EU tries to persuade third countries to strengthen their border controls, restrict their visa policy and readmit irregular migrants with incentives such as trade benefits, visa facilitation or financial support. In its Partnership Framework of 2016, the Commission announced a more pro-active approach by shifting its emphasis from the 'more for more' to the 'less for less' mechanism, including leverages and tools of all other policy areas. This article analyses the overall objectives of the GAMM (which are promoting fundamental rights and achieving an equal partnership) and the content of its four pillars. While elaborating on the potential impact on the policies in third countries and the human rights of migrants, it concludes that due to the paradoxical objectives, the cooperation has the potential to create counterproductive effects and an incoherent foreign policy. The absence of criteria on human rights for the selection of partner countries as well as the lack of a mechanism on monitoring or suspension of such cooperation lowers the chance of an adequate response in case of human rights violations. With these considerations in mind, the article explores the content and impact of the EU-Turkey deal and answers the question if it serves as a blueprint for a new generation of readmission agreements with other countries. The author concludes that due to the lack of mutual benefits and the differences in human rights standards and practices, transferring the responsibility of refugees to third countries will not prove effective and compliant with EU standards.

Introduction

During the last decades, the EU and its Member States have been struggling to 'reap the benefits and address the challenges deriving from migration', leading to a parallel development of internal and external migration policies.¹ Apart from developing common EU standards on admission and residence of third country nationals, the EU established the Global Approach to Migration and Mobility in an attempt to create a comprehensive approach to migration by involving third countries and other policy areas. However, the increasing number of arrivals of refugees in 2015 has fuelled the discussion on the effectiveness of the fight against irregular migration and the role of

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¹ European Union, European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A European Agenda on Migration*, 13 May 2015, COM (2015) 240, at <ec.europa.eu/anti-trafficking/sites/antitrafficking/files/communication_on_the_european_agenda_on_migration_en.pdf> (accessed 19 November 2017).

third countries as an indispensable link in the chain. This rethinking has led to the ‘New Partnership Framework with Third countries’, in addition to the GAMM framework.² This article sheds light on the evolution and impact of the external dimension and how it contributes to a coherent and comprehensive EU migration policy. Based on experiences with the GAMM framework, it analyses whether the cooperation with third countries on migration benefits the EU, partner countries and migrants alike.

I. Towards a Common European Asylum System

The abolition of internal border controls reinforced the need for EU Member States to create a common policy on asylum and migration. With the Treaty of Amsterdam, the EU has gained competence on establishing binding rules on border controls and the entry of third country nationals, as well as their residence rights and return.³ The most visible strategy is the development of a European Common Asylum System, which includes standards on all stages of the asylum process: the asylum procedure, criteria for defining who is entitled to international protection, and which (social) rights are associated with the protection status. This harmonisation process was meant to prevent the need for secondary movements of asylum seekers within the EU, better known as ‘asylum shopping’. The previously concluded Dublin Convention, which determined that an asylum application is only examined by one Member State, proved not to be effective as long as the chances for asylum remained so different in each country.⁴ The EU standards go beyond the Member States’ international obligations towards asylum seekers and refugees. In particular, the very precise and detailed procedural guarantees for asylum seekers, such as an interview, legal aid, and well-trained staff, were not laid down before in Conventions or other binding instruments. The reception conditions offer an additional important safeguard for migrants and asylum seekers alike. The added value of the Qualification Directive when compared to the Refugee Convention and the European Convention on Human Rights is that beneficiaries of international protection are entitled to a residence permit and a (almost) uniform package of rights. Although the Common European Asylum System is relatively young (the first Directive was adopted in 2004), the need for gradual harmonisation has already led to many revisions. Mid-2016, the Commission proposed to replace the Procedures Directive and the Qualification Directive by regulations COM (2016)467 and COM(2016)466. The current political climate around refugees and migrants, however, makes it hard for EU Member States to agree on a uniform policy and practice as well as on internal rules on solidarity. Since the sudden increase in the number of refugees in 2015, the prevention and combat of irregular migration to the EU is one of the scarce areas where Member States find a common ground rather easily. This may have contributed to the increasing attention on ways to avoid that refugees and irregular migrants manage to cross the EU external borders.

Parallel to the development of EU safeguards for asylum seekers and refugees, the

² European Union, European Commission, *Communication from the Commission to the European Parliament, the European Council, the Council and the European Investment on establishing a new Partnership Framework with third countries under the European Agenda on Migration*, 7 June 2016, COM (2016) 385, at <eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016DC0385> (accessed 19 November 2017).

³ Article 62 and 63, European Union, *Consolidated version of the Treaty on the Functioning of the European Union* (2012), C326/01.

⁴ The Dublin Convention was concluded outside the EU framework and entered into force in 1997 (Pb C 254, 19 August 1997). The first Dublin Regulation under the EU framework was Regulation 343/2003, the current one is Regulation 604/2013, but an amendment proposal is under negotiation.

EU also strengthened its policies in combating and preventing irregular migration. With that aim, it established a strict visa policy and a limited set of conditions for crossing the external borders of the EU and promoted the enforcement of this common border policy by strengthening the powers and means of Frontex. The EU has also involved private actors by sanctioning carriers for bringing in undocumented migrants into the EU and obliging Member States to sanction smuggling and supporting irregular residence.⁵ As the EU legislators have not recognised asylum as a ground for issuing a visa, the combination of all these measures has made it difficult if not impossible for refugees to travel to the European territory in a safe and regular way. As a result, their movements to a safe haven in Europe have become longer, more perilous and expensive, bearing in mind that fortressing has pushed up the price of smuggling. This parallel development leads to the cynical conclusion that the protection standards in the EU have reached a top level, but that they only apply to refugees who first had to risk their lives to reach and enter the territory of the EU. A main reason for this is that the EU standards do not apply at the embassies of the Member States, or anywhere outside the EU.⁶

II. The Shaping of the External Migration Policy

Besides these new legal instruments and enforcement strategies to reduce the number of irregular migrants, the EU is developing strategies to persuade countries outside the EU to cooperate in curbing irregular migration to the EU. If neighbouring countries could be convinced to strengthen their border controls with the EU, it would prevent refugees from invoking the rights they have on EU territory. This is why the cooperation with third countries initially had its focus on border controls and readmission agreements.

A. Return to Home Countries

The external dimension of migration policy is not an invention of the EU: since the nineties, a comprehensive cooperation has been developed by individual EU Member States with countries of transit and origin.⁷ They started negotiating readmission agreements with Central and Eastern European countries with a view to decreasing the immigration movements emerging at that time to the wider European region.⁸ Readmission agreements set out that, upon application by the requesting state, without any further formalities than those specified in the agreement, the requested state must readmit any person who does not or no longer fulfils the entry or residence conditions applicable in the territory of the requesting state, on the condition that it can be proved or indicated by *prima facie* evidence that the person concerned is a national of the requested state. This implies that the sending state has first established the absence of a residence

⁵ Directive 2001/51/EC of the Council of the European Union of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985, OJ L187; Directive 2002/90/EC of the Council of the European Union of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, OJ L328; See European Parliament, policy department C: Citizens' Rights and Constitutional Affairs, *Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants*, 28 January 2016, at < [europarl.europa.eu/RegData/etudes/STUD/2016/536490/IPOL_STU\(2016\)536490_EN.pdf](http://europarl.europa.eu/RegData/etudes/STUD/2016/536490/IPOL_STU(2016)536490_EN.pdf)> (accessed 21 November 2017).

⁶ Article 3(2) of the Procedures Directive 2013/32 excludes the application on asylum requests made on representations of the EU Member States, Article 3 (1) of the Dublin Regulation only obliges Member States to examine asylum requests made at the border or in their territory.

⁷ Roig, A and Huddleston, T, "EC readmission agreements: A Re-evaluation of the Political Impasse" 9(3) *European Journal of Migration and Law* (2007) 363-387.

⁸ Lavenex, S, *Safe third countries: extending the EU asylum and immigration policies to Central and Eastern Europe* (Central European University Press 1999), 76-82, 89.

right, thereby respecting its obligations deriving from international law, notably the Refugee Convention and the European Convention on Human Rights (ECHR), but also from EU law. Expulsion is therefore only admissible after the person has had the possibility to exercise his right to appeal, in accordance with articles 13 ECHR and 47 of the Charter on Fundamental Rights.⁹

Although countries have an obligation under international law to readmit their own citizens, it frequently occurs that a country of origin does not honour this obligation.¹⁰ A readmission agreement aims to facilitate and expedite this return and, although the agreements themselves are silent on compensation, they are often accompanied by incentives for countries of origin to sign and cooperate. These incentives can be related to other migration areas, such as visas (for study and business), but also to other policy fields, such as development aid or trade preferences. With the Europeanisation of migration policies, the Justice and Home Affairs Council started to explore the possibility for the EU to use beneficial agreements in fields under EU competition and to extract cooperation from third countries on controlling migration and readmitting migrants.¹¹ Already before the EU had gained a formal competence on readmission with the Amsterdam Treaty (1999)¹², the Council linked objectives in the field of asylum and migration to other policy fields by incorporating readmission clauses into Community and mixed agreements.¹³ Since 2000, partnership and cooperation agreements between the European Union and third countries, notably article 13 of the Cotonou Agreement, contain clauses, which demand that the parties readmit their own citizens.¹⁴ The Treaty of Lisbon allows the EU to integrate Justice and Home Affairs issues more systematically into its foreign policy.¹⁵ Readmission agreements negotiated under this Treaty have to be ratified by the European Parliament (Article 216). As they are not so-called 'mixed agreements', they consequently do not require separate ratification by member states' governments or parliaments. However, after the conclusion, the readmission agreements are put at the disposal of and implemented by Member States.¹⁶

While attributing the necessary competences in this field to the European level (shifting up), the Member States aimed to perform more powerfully in 'shifting out':

⁹ ECtHR, *Gebremedhin v France*, 25389/05, 26 April 2007.

¹⁰ See Article 12.4 of the UN International Covenant on Civil and Political Rights and Protocol No. 4 to the ECHR, Article 3, para 2.

¹¹ Council of the European Union, PRES/93/202, 25 November 1993 and European Commission, *Communication from the Commission to the Council and the European Parliament on Immigration and Asylum Policies*. COM (94) 23 final, 23 February 1994, para 114.

¹² This competence was derived from the term 'repatriation' in Article 63(3)(b) TEC, see Coleman (2009), 74.

¹³ Coleman, N, *European Readmission Policy. Third Country Interests and Refugee Rights* (Martinus Nijhoff Publishers 2009) 22; Council Doc. 12509/95, 8 December 1995 and 4272/96, 22 January 1996.

¹⁴ The Cotonou Agreement between the European Union and ACP (African, Caribbean and Pacific) countries was signed in 2000. Its Article 13 contains a standard readmission clause, which provides that every state party 'shall accept the return of and readmission of any of its nationals who are illegally present on the territory' of another state party 'at that State's request and without further formalities'. This text also makes provision for the possibility of adopting 'if deemed necessary by any of the Parties, arrangements for the readmission of third-country nationals and stateless persons'.

¹⁵ The TFEU contains more explicit competences: Article 78(2)(g) provides a basis for concluding partnership and cooperation with third countries on asylum, Article 79(3) confers powers on the Union to conclude mobility partnerships and readmission agreements, taking shape in bilateral as well as multilateral cooperation. Article 8 TEU provides a general mandate to the EU to 'develop a special relationship with neighbouring countries'.

¹⁶ Article 63(3)(b), European Union, Consolidated version of the Treaty of the European Union (2002) 12002E/TXT.

through a ‘pooling of sovereignty’, the EU has a stronger negotiating leverage than the individual Member States.¹⁷ It allowed the Member States to make use of the Community’s external powers in fields such as trade and development and their substantial accompanying budgets to serve their interests in the field of readmission.¹⁸ Under the ‘more for more’ principle, negotiations with third countries on migration control include various positive incentives for transit countries (for example, trade benefits, visa liberalisation and direct financial support) to let them strengthen their border controls, restrict their visa policy and readmit irregular migrants.¹⁹ Regarding countries of origin, the EU offers incentives not only to ensure actual returns, but also a decrease in the number of irregular departures to the EU through a variety of measures, such as improving the labour market or combatting smuggling and trafficking.

B. Return to Transit Countries

The most problematic issues deriving from the cooperation on readmission, however, do not concern the return of migrants to their home country; rather, they focus on readmission through a transit country which extended beyond the narrow meaning of repatriation as meant in Article 63(3)(b) of the Treaty of Amsterdam. EU Member States have increasingly shifted their focus to transit countries, especially to those sharing their borders with EU territory. The EU thus envisages creating a ‘buffer zone’ around its territory by committing its neighbouring countries to readmit migrants who have passed through them on their way to the European Union. Unlike countries of origin, a transit country does not have any legal obligation to readmit migrants simply because they have transited its territory, with or without permission. This is why the need for adequate compensation has gained importance. Not only the negotiations, but also the consequences of readmission agreements with transit countries turn out to be complicated. Considering that countries normally wish to readmit as few migrants as possible, the likely result is that those transit countries restrict their incoming and outgoing migration from neighbouring countries and to the European Union. This policy, which appears to be aimed at the prevention of applying a readmission agreement, is perhaps the actual result that finds most favour among the Member States. However, such implications also lead to at least three human rights concerns related to readmission agreements.

Firstly, although the agreements will reduce the chances for migrants to invoke human rights in the EU, readmission agreements do not include any guarantee that the transit country has a sufficient protection regime in place for asylum seekers. EU Member States invest gradually more in the asylum systems of their neighbouring countries, but readmission itself does not depend on their performances in this area. EU officials are rather reluctant to negotiate with third countries on human rights in the context of readmission agreements since the EU is the requesting party. They prefer to introduce the issue of human rights in connection with negotiations on visa rules or other instruments, whereby the EU offers incentives for which they can claim human rights

¹⁷ Lahav, G, and Guiraudon, V, “Comparative perspectives on border control: away from the border and outside the state” in Andreas, P and Snyders, T, eds, *The Wall around the West: State Borders and Immigration Controls in North America and Europe*. Lanham (Rowman and Littlefield Publishers 2000), 55-79.

¹⁸ Coleman, N, *European Readmission Policy. Third Country Interests and Refugee Rights* (Martinus Nijhoff Publishers 2009), 55; Noll, G, *Negotiating Asylum: the EU Acquis, Extraterritorial Protection and the Common Market of Deflection*, (Martinus Nijhoff Publishers 2000), 206.

¹⁹ See eg. the prominent references on migration and border controls “Implementation of the European Neighbourhood Policy Partnership for Democracy and Shared Prosperity with the Southern Mediterranean Partners Report”, European Commission, doc. SWD (2015) 75 final, 25/03/15.

protection.²⁰ Safeguarding human rights could therefore be facilitated by negotiations on different topics at the same time, including readmission.

The second human rights implication relates to curtailing migration into transit countries from non-EU neighbouring states. This indirect effect of a readmission agreement may lead to migrants becoming stranded in a transit country with possibly fewer protection guarantees than offered by the partner country itself. With such countries, the EU may not have established any arrangement about access to an asylum system or rights of refugees. As an ultimate consequence, migrants may face obstacles in fleeing persecution or violence in their own country. Apart from protection concerns, this concern also shows that the chain effect can severely harm migrants' and asylum seekers' mobility opportunities, especially those from less wealthy countries.

Third, a readmission agreement obliges a transit country to readmit an undocumented migrant from the EU. However, it does not grant the means to satisfy basic needs, such as the right to housing, health care, primary education, work or social welfare. Partner countries of the EU tend to conclude readmission agreements themselves with other transit countries with a view to immediately transfer the responsibility for migrants readmitted from the EU.²¹ This potential chain of transit poses a threat to the principle of human dignity as enshrined in international law, in particular if the migrant is unable to return to his home country.²² The latter is likely to be the case: if there were no obstacles to reach the country of origin, why would the EU Member State then have returned the migrant to a transit country? When I presented my report on readmission agreements to high officials of the Member States of the Council of Europe, the countries from the receiving side expressed their dissatisfaction with the readmission obligations and clarified that their country would not offer any rights or services to the readmitted migrants.²³ This response reveals that the negotiators did not discuss or take into account the interests of the migrants subject to this cooperation since they did not coincide with the national interests the treaty parties defended in the first place. Bearing in mind the risk of a (legal) limbo situation occurring for the returnee in a transit country, the European Commission urged Member States to always give priority to returning undocumented migrants to their country of origin.²⁴ It is not clear to what extent the Member States comply with this principle. They at least did not follow up the

²⁰ Council of Europe, Committee on Migration, Refugees and Population, Strik, T, REPORT: *Readmission agreements: a neutral mechanism or a threat to irregular migrants?*, Doc. 12168, 16 March 2010, at <refworld.org/pdfid/4bdadc1c3.pdf> (accessed 19 November 2017).

²¹ Centre for European Policy Studies, Balzacq, T, REPORT: *The External Dimension of EU Justice and Home Affairs: Tools, Processes, Outcomes*. Doc. 303, September 2008, at <citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.504.4430&rep=rep1&type=pdf> (accessed 19 November 2017); Coleman, N, *European Readmission Policy. Third Country Interests and Refugee Rights* (Martinus Nijhoff Publishers 2009), paragraph 3.2.3.. For this reason, many readmission agreements include a clause that the obligations regarding non-citizens are only applicable after a number of years after the conclusion of the agreement. See Article 24 (3) of the readmission agreement between the EU and Turkey, OJ L 134/3, 7 May 2014.

²² McCrudden, C, "Human dignity and judicial interpretation of human rights" 19(4) *The European Journal of International Law* (2008) 655-724. See the UDHR, preamble and Article 1, but more concretely related to social rights Article 22 and 23.

²³ Council of Europe, Committee on Migration, Refugees and Population, Strik, T, REPORT: *Readmission agreements: a neutral mechanism or a threat to irregular migrants?*, Doc. 12168, 16 March 2010, at <refworld.org/pdfid/4bdadc1c3.pdf> (accessed 19 November 2017).

²⁴ European Union, European Commission, *Communication from the Commission to the European Parliament and the Council, Evaluation of EU Readmission Agreements*, COM (2011)76, 23 February 2011, recommendation no. 8: "(...). In those cases (of readmission of third country nationals, TS) the EU should also explicitly state that, as a matter of principle, it will always first try to readmit a person to his/her country of origin. The EU should also focus more its readmission strategy towards important countries of origin."

Commission's advice to be reticent to include third country nationals in readmission agreements, given that the need for more incentives would complicate the negotiations substantially.²⁵

III. Global Approach to Migration and Mobility

Statistics on the number of returns enforced with the help of readmission agreements are hard to obtain because to the extent that states assemble and publish statistics, the number of returns is not broken down by the number of those enforced under the readmission agreements. However, the available evaluations show that the actual use of readmission agreements remains rather scarce, related to arduous and time-consuming implementation (for instance, lack of evidence is perceived as an obstacle), apart from lack of willingness of the contracting parties or individual migrants.²⁶ Their mere existence, however, seems to serve as a catalyst for informal readmission practices, especially at the border.²⁷ Despite this limited success, Member States perpetuate their approach of concluding readmission agreements as a main instrument of migration management and find an explanation for this practice in their preventive effects. The complications surrounding readmission agreements have fuelled Member States' ambition to have more migration policy instruments at their disposal and offer incentives from other policy areas to gain actual cooperation from third countries. Numerous policy, legal and financial instruments have been developed, delineating cooperation with third countries in the management of migration, borders and asylum under the umbrella of a so-called 'Global Approach to Migration and Mobility' (GAMM). Apart from readmission agreements, these instruments include visa facilitation agreements, mobility partnerships and common agendas on migration and mobility, high level dialogues, joint declarations and several financial frameworks.²⁸ The Global Approach to Migration (GAM), established in 2005, aimed to address the root causes of migration and prioritise the rights of migrants instead of the security concerns of the Member States. In 2011, the EU inserted the term 'Mobility'. GAMM serves as a framework for dialogue and cooperation with third countries in the field of migration and development. Its structure, meant to safeguard a coherent internal and external migration policy, is characterised by four pillars, which the Commission considers to be 'equally important'.²⁹ These pillars are: 1) Better organizing legal migration and fostering well-managed mobility, 2) Preventing and combating irregular migration, 3) Maximising the development impact of migration and 4) Promoting international protection and enhancing the external

²⁵ European Union, European Commission, *Communication from the Commission to the European Parliament and the Council, Evaluation of EU Readmission Agreements*, COM (2011)76, 23 February 2011, recommendation no. 8: "The current approach should be revised. As a rule, future negotiating directives should not cover third country nationals, hence there would not be a need for important incentives. Only in cases where the country concerned, due to its geographical position relative to the EU (direct neighbours, some Mediterranean countries) and where exists a big potential risk of irregular migration transiting its territory to the EU, the TCN clause should be included and only when appropriate incentives are offered. (...)".

²⁶ Coleman (2009) para 3.2.1; Strik (2010) para 24-26; Carrera (2016) chapter 4; European Union, European Commission, *Communication from the Commission to the European Parliament and the Council, Evaluation of EU Readmission Agreements*, COM (2011)76, 23 February 2011, para 2.

²⁷ Coleman, N, *European Readmission Policy. Third Country Interests and Refugee Rights* (Martinus Nijhoff Publishers 2009), 60, 319.

²⁸ CEPS, Carrera, S *et al*, *The EU's response to the refugee crisis. Taking stock and setting policy priorities*, 16 December 2015, CEPS Essay No. 20, at <ceps.eu/publications/eu's-response-refugee-crisis-taking-stock-and-setting-policy-priorities> (accessed 19 November 2017).

²⁹ European Union, European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, The Global Approach to Migration and Mobility*, COM (2011)743, 18 November 2011.

dimension of asylum. The pillars intersect on the following two principles: first, the notion of a mutual beneficial partnership with non-EU partner countries based on equality and, second, the principle that the GAMM should be migrant-centred, since ‘the migrant is at the core of the analysis and all action and that he must be empowered to gain access to safe mobility’. From this perspective, the human rights of migrants are marked as a cross-cutting issue, with the aim to strengthen ‘respect for fundamental rights and the human rights of migrants in source, transit and destination countries alike’.³⁰ These two principles emphasise the overall aim of the GAMM to create a win-win-win situation, with benefits for EU member states, partner countries, and migrants.

One may question whether the notion of equality reflects the reality of the negotiating parties. On the one hand, the EU leverage represents a lot of power, which may lead to countries with a weaker bargaining position being ‘exploited’ by the returning countries. On the other hand, the Member States are the requesting party and are dependent on the cooperation of third parties, which creates opportunities for third countries to demand benefits. Their economic situation is one of determinants for their autonomy towards the EU. In any case, it is clear that the negotiating parties have different interests, which are not always easy to reconcile. In particular, the conditionality angle has raised the question of whether the dialogues truly offer ‘genuine and equal partnerships’.³¹ Where both negotiating parties at least have to find an agreement, the migrant as a third party is not present at the negotiation table. Their fate and rights depend on the responsibilities that the parties take. How does the EU manage to prevent or resolve tensions between those interests? The answer differs for each pillar.

V. Organising and Facilitating Legal Migration and Mobility

The M of ‘Mobility’ was added to connect the GAM with the EU visa policy for short stays and national policies concerning long stays.³² The aim of this pillar is to cover all forms of mobility and to ensure conditionality between visa facilitation (or exemption) and labour migration, on the one hand, and the partner country’s performance on asylum, border management and irregular migration, on the other hand. The functioning of visa facilitation as an incentive for third countries to cooperate in combatting irregular migration contradicts with its initial aim to regulate migration. It requires that Member States voluntarily give up their discretion on admission policies, since the issuance of short-term visas to migrants such as researchers, business people or students remains a matter of national sovereignty. The EU leverage, therefore, strongly depends on the ‘levers’ or ‘carrots’ that Member States are prepared to offer to the countries concerned. However, most of them apply a restrictive visa policy and practice shows that they are not ready to subordinate their discretion to achieving effective EU agreements. As far as Member States show commitments, they are vaguely formulated or based on pre-existing programmes and initiatives. European Commission officials, therefore, complain that the success of Mobility Partnerships is severely constrained by the unwillingness of the

³⁰ Strik, T. “The external dimension of EU migration policy and the functioning of the conditionality mechanism in partner countries” *Revista del Ministerio de Empleo y Seguridad Social* 130 (2017) 45-71.

³¹ Carrera, S, Den Hertog, L and Parkin, J, “The Peculiar Nature of EU Home Affairs Agencies in Migration Control: Beyond Accountability versus Autonomy?” 15(4) *European Journal of Migration and Law* (2013) 23.

³² European Union, European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, dialogue for migration, mobility and security with the southern Mediterranean countries*, COM (2011) 292 final, 24 May 2011.

Member States.³³ If they do not perform, third countries cannot be expected to offer their loyal cooperation. Thus, the ‘shifting up’ strategy of the GAMM remains a theoretical exercise, as in reality the states retain their sovereignty and are far from keen to widen legal channels.

Another constraining factor is that the EU mobility and migration policy primarily aims at meeting the evolving needs of the EU labour market. Legal migration opportunities are limited to highly skilled labour migrants,³⁴ mostly in the context of temporary or circular migration. Cholewinski concludes that this Eurocentric utilitarian approach to migration management creates a contradiction between ‘rights’ and ‘numbers’, where more open admission policies seem to inevitably result in fewer rights being protected.³⁵ This tendency once again questions the intended equality between countries and also reveals the absence of a coherent approach to integration and migrants’ rights.

VI. Preventing and Reducing Irregular Migration and trafficking in Human Beings

The EU policy on fighting irregular immigration, strengthening border controls and ensuring readmission is the most developed pillar of the GAMM. As described before, a number of instruments of the Common European Asylum System, including carrier sanctions, Frontex (replaced in 2016 by the European Border and Coast Guard) and the digitalisation of border controls have resulted in a shifting European external border and exclusion mechanisms at several stages of immigration: from pre-departure to post-arrival.³⁶ The growing perception of irregular immigration as a security risk³⁷ is reflected by the expanding access to migration-related data bases for the purpose of crime control and security. This development can further be observed in the increasing role of surveillance technologies and private security companies in European border policies, thus, contributing to the externalisation of EU border management. The most important factor, however, is the EU’s support of neighbouring countries in their border control and the fight against smuggling. Many scholars question the effectiveness of this enhanced border control, pointing to the risk that this creates new markets for smuggling. While perceiving migrants merely as a security risk, their agency, interests and rights tend to be overlooked. As migrants will try other avenues to reach their destination, smuggle trajectories will shift and, in many cases, become longer, more dangerous, and more expensive. Outsourcing enforcement on trafficking to Libya raises the danger of abuses of

³³ Hampshire, J. (2013), Speaking with one voice? The European Union’s global approach to migration and mobility and the limits of international migration cooperation, *Journal of Ethnic and Migration Studies*, volume 42, 4, 571-586.

³⁴ European Parliament, Policy Department C: Citizens’ Rights and Constitutional Affairs, García Andrade, P, Martín, I, Mananashvili, S, STUDY: ‘EU Cooperation with Third Countries in the Field of Migration’, October 2015, PE 536.469, at <heuparl.europa.eu/RegData/etudes/STUD/2015/536469/IPOL_STU(2015)536469_EN.pdf> (accessed 19 November 2017).

³⁵ Cholewinski, R, “Labour Migration, Temporariness and Rights”, in Carrera, S, Guild, E and Eisele, K, eds, *Rethinking the Attractiveness of EU Labour Immigration Policies. Comparative Perspectives on the EU, the US, Canada and beyond* (Centre for European Policy Studies 2014), 22-28.

³⁶ Den Heijer, M, “Europe beyond its borders: refugee and human rights protection”, in Ryan, B and Mitsilegas, V, eds, *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhof Publishers 2010), 163-194.

³⁷ Carling, J and Hernández-Carretero, M, “Protecting Europe and protecting migrants? Strategies for managing unauthorized migration from Africa” 13(1) *British Journal of Politics and International Relations* (2011) 42-58; Léonard, S, EU Border Security and Migration into the European Union: FRONTEX and Securitisation through Practices. 19(2) *European Security* (2010) 231.

migrants: in past years, international agencies and rights groups have documented the horrific treatment of migrants in detention in Libya, including torture, sexual abuse, and outright enslavement. Signals that Italy pays Libyan militias that were first engaged in smuggling and trafficking themselves to stop irregular migration will increase the risk that migrants end up in the hands of criminals. Furthermore, it empowers and enriches them, enabling the militia to buy more weapons and, more so, to undermine the fragile but internationally recognised authorities in Libya. Such business inevitably turns out to be counterproductive since it makes the EU vulnerable to blackmail and, thus, to pay an endless stream of money to prevent the smugglers from taking up their activities again. This is not the first time that Italy and Europe are engaged in doubtful arrangements to prevent smuggling: until his death, Colonel Gaddafi struck deals with the Europeans for funding to crack down on trafficking. The migrant flow has, thus, long been a way for Libya to ensure aid and legitimacy from Europe.

VII. Promoting International Protection and Enhancing the External Dimension of Asylum Policy

This pillar is based on the assumption that enhanced protection in the region will reduce the (need for) forced migration to the EU. A comprehensive approach requires that investments in border control and sustainable protection are made simultaneously. After all, measures on border controls can have an immediate impact, while improvement of protection standards need long-term measures, such as capacity building, asylum legislation, and safeguards that refugees are not denied entrance. Paradoxically, evaluators conclude that human rights and reception are improved and supported on an *ad hoc* basis, whilst cooperation and funding of border controls is a structural matter.³⁸ The international community, including the EU and its Member States, is notorious for underperforming when it comes to funding the reception of refugees in their home regions. Organisations like the UNHCR assert that only a fraction of total funds required have ever been received and that humanitarian operations in the region are chronically underfunded.³⁹ As long as the countries in the region are incapable of absorbing the overwhelming bulk of the refugee population (like Jordan and Lebanon in the case of Syrian refugees), asylum seekers will continue taking great risks to reach Europe.

An absence of any issue-linkage would mean that migrants, including refugees, are stranded in a transit country without being able to turn to protecting authorities. Amnesty International reported that ‘the demands being placed on third countries to prevent irregular departures to Europe put refugees, asylum-seekers and migrants in those countries at risk of prolonged and arbitrary detention, *refoulement*, and ill-treatment’.⁴⁰ The focus on border controls in third countries may also impede the inflow of refugees coming from neighbouring countries who need temporary protection against suddenly escalating violence at home. The end to these life-saving short-term border crossings due to more rigid boundary regimes may be unintended; nevertheless, this undermines the

³⁸ European Parliament, Policy Department C: Citizens' Rights and Constitutional Affairs, García Andrade, P, Martin, I and Mananashvili, S, STUDY: ‘EU Cooperation with Third Countries in the Field of Migration’, October 2015, PE 536.469, at <heuroparl.europa.eu/RegData/etudes/STUD/2015/536469/IPOL_STU(2015)536469_EN.pdf> (accessed 19 November 2017).

³⁹ UNHCR, UNDP, *Lack of funding putting help for Syrian refugees and hosts at risk, as Brussels Syria Conference set to open*, 4 April 2017, at <unhcr.org/news/press/2017/4/58e340324/lack-funding-help-syrian-refugees-hosts-risk-brussels-syria-conference.html> (accessed 19 November 2017).

⁴⁰ Amnesty International, *The human cost of Fortress Europe. Human Rights violations against migrants and refugees at Europe's borders*, 9 July 2014, at <amnesty.org/en/documents/EUR05/001/2014/en/> (accessed 19 November 2017).

aimed enhancement of asylum protection. Without integrating the fight against irregular migration with enhancing regional protection, the GAMM itself may even contribute to protracted refugee situations.⁴¹

This raises questions about the norms applied by the EU in its foreign policy concerning protection and human rights. One would expect that after having agreed on internal common standards, the EU would use these as a reference in their external negotiations on migration as well. However, their impact is far from clear. The majority of countries the European Union is pursuing partnerships with does not (yet) have systems for handling migrants and asylum seekers or even have a notorious human rights track record.⁴² Criteria for entering into cooperation on migration regarding protection standards are absent and so are human rights standards that a partner country is required to apply towards refugees and other migrants.⁴³ This lack of standards also complicates the employment of independent and objective evaluation systems on questions of lawfulness and the guarantee of effective access to remedies in cases of alleged violations of fundamental rights.⁴⁴ Furthermore, a suspension mechanism is lacking for situations where a transit country would fall short of crucial standards. Apart from the lack of conditionality on this issue, any other policy or strategy on how to sustainably strengthen human rights through cooperation on migration and how to reconcile a conflict of interests between human rights and border controls is failing.

The United Nations Special Rapporteur on the human rights of migrants has criticised GAMM for:

'lack[ing] transparency and clarity in the substantive contents of its multiple and complex elements. Additionally, many agreements reached in the framework of the Approach have weak standing within international law and generally lack monitoring and accountability measures, which allow for power imbalances between countries and for the politics of the day to determine implementation. Nonetheless, the European Union has continued to use the Approach to promote greater 'security'. There are few signs that mobility partnerships have resulted in additional human rights or development benefits, as projects have unclear specifications and outcomes. The overall focus on security and the lack of policy coherence within the Approach as a whole creates a risk that any benefits arising from human rights and development projects will be overshadowed by the secondary effects of more security-focused policies.'⁴⁵

⁴¹ Institute for Public Policy Research, Cherti, M and Grant, P, *The myth of transit: Sub-Saharan migration in Morocco*, 14 June 2013, at <ippr.org/publications/the-myth-of-transit-sub-saharan-migration-in-morocco> (accessed 19 November 2017).

⁴² Roig, A and Huddleston, T, "EC readmission agreements: A Re-evaluation of the Political Impasse" 9(3) *European Journal of Migration and Law* (2007) 363-387.

⁴³ Trauner, F and Carrapiço, H, "The External Dimension of EU Justice and Home Affairs after the Lisbon Treaty: Analysing the Dynamics of Expansion and Diversification" 17(2) *European Foreign Affairs Review* (2012) 1-18.

⁴⁴ CEPS, Carrera, S, *The EU's Dialogue on Migration, Mobility and Security with the Southern Mediterranean: Filling the Gaps in the Global Approach to Migration*, 16 June 2011, at <ceps.eu/system/files/book/2011/06/No%2041%20Carrera%20on%20EU%20Dialogue%20with%20SoMed%20edited%20final.pdf> (accessed 19 November 2017); Cassarino, J, *Unbalanced Reciprocities: Cooperation on Readmission in the Euro-Mediterranean Area* (Middle East Institute 2010); European Parliament, Policy Department C: Citizens' Rights and Constitutional Affairs, Garcia Andrade, P, Martín, I and Mananashvili, S, STUDY: 'EU Cooperation with Third Countries in the Field of Migration', October 2015, PE 536.469, at <heuroparl.europa.eu/RegData/etudes/STUD/2015/536469/IPOL_STU(2015)536469_EN.pdf> (accessed 19 November 2017).

⁴⁵ UN Human Rights Council, *Report of the Special Rapporteur on the human rights of migrants: Banking on*

VIII. Maximising the Development Impact of Migration and Mobility

This pillar has the primary focus on the interests of partner countries and aims to ensure that countries of origin, rather than losing brains and capacities, will benefit from their citizens' emigration. It would have offered an opportunity to compensate the partner countries and to create a genuine equal partnership, but the pillar includes the least binding measures, whose implementation is left to the Member States or respective EU funds. The permissive stance the EU takes in this regard reveals that it fails to truly recognise that only mutual beneficial agreements will prove effective. There are different perceptions of the manner in which emigration affects the economy of the countries of origin. Scholars and politicians mainly regard migration as a powerful motor for development, referring to migrants' remittances to the home communities that outweigh the budget of development aid (often estimated as three times higher),⁴⁶ diaspora's involvement in the development of their countries of origin, and migrants' return movements. Governments of developing countries, however, express their concerns about the persistent risk of 'brain drain', implicating that highly skilled people of a domestic economy are moving abroad.⁴⁷ Achieving the objectives formulated under this pillar needs at minimum a common understanding of the current and aimed impact of migration, as well as a common sense of urgency. To grow mature, the pillar needs a binding and sustainable policy and a firm linkage with the first pillar on enhancing legal migration and mobility.

IX. The GAMM: a Truly Comprehensive Approach?

This brief analysis shows that in order to avoid incoherencies between the different GAMM objectives and programmes, their implementation needs a comprehensive approach. One of the advantages would be that it forces the EU to ensure coherence with its values and principles and, therefore, to address the human rights concerns as mentioned before. Apart from the right to asylum (Article 18) and the prohibition of non-refoulement (Article 19), the EU Charter on Fundamental Rights also covers the right to human dignity in Article 1.

There is, however, a broad consensus that the policy falls short of comprehensiveness. Scholars argue that the actual policy implementation of GAMM has been clearly biased in favour of the fight against irregular migration and ensuring of return migration by means of readmission agreements.⁴⁸ The European Commission also acknowledges that 'more work needs to be done to make sure that the Migration Partnerships 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'.⁴⁹ Theoretically, frameworks such as Mobility Partnerships are perfectly shaped to safeguard such a balance, including commitments by

mobility over a generation: follow-up to the regional study on the management of the external borders of the European Union and its impact on the human rights of migrants, 8 May 2015, A/HRC/29/36, at <refworld.org/docid/5576e3ba4.html> (accessed 21 November 2017).

⁴⁶ Eigen-Zucchi, C, Ratha, D and Plaza, S, *Migration and Remittances Fact book 2016: Third Edition*, (World Bank Publications 2016), page v.

⁴⁷ Adepoju, A, Van Naerssen, T, and Zoomers, A, eds, *International Migration and National Development in Sub-Saharan Africa. Viewpoints and Policy Initiatives in the Countries of Origin* (Brill 2008).

⁴⁸ Parkes, R. (2009). EU mobility partnerships: A Model of Policy Coordination?, *European Journal of Migration and Law*, 11(4), 327-345.

⁴⁹ European Union, European Commission, *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Report on the implementation of the GAMM 2012-2013*, COM (2014) 96, 21 February 2014.

all actors involved. As these commitments are rather abstract, the real balance depends on implementation. During my fieldwork for the Council of Europe, European officials admitted the current imbalance, clarifying that the EU is hesitant to impose conditions on human rights safeguards since it lacks the leverage to do so, even in multifaceted instruments. This can be explained by the EU's adherent priority to border controls and readmission, on the one hand, and, on the other hand, Member States' reluctance to offer incentives in areas of their competences, such as visas.⁵⁰ In these circumstances, the EU remains cautious in demanding certain human rights improvements, but also in criticising partner countries for alleged human rights violations, in order to sustain their cooperative attitude. Expressing severe criticism on human rights violations by partner countries would further expose the EU to allegations that it deliberately puts migrants at risk by continuing its cooperation. At the same time, we may conclude that hesitations by partner countries to agree on human rights safeguards actually confirm the need to negotiate with them.

This broadly recognised imbalance in the current GAMM implementation poses a threat to the claim that partnerships on migration will produce win-win-win situations that will benefit the EU, partner states and the migrants themselves.⁵¹ The notion of a migrant-centred approach may easily be subject to divergent interpretation since it has not been clearly defined in the policy documents. There is already a considerable difference between the understanding of NGOs and the Commission. Where the Commission states that 'a migrant-centred approach is about empowering migrants and ensuring their access to all relevant information about the opportunities provided by legal migration channels and the risks of irregular migration', migrant and development NGOs stress the importance of incorporating the protection of migrants' rights and their active participation in debates and decision-making.

X. Partnership Agreements: Towards Less for Less

Although these experiences create plenty of reasons for concerns and further analyses, the EU seems determined to continue the path of externalisation without thorough evaluation. The 'European Agenda on Migration' (EAM), formulated in light of Europe's migration crisis in 2015, confirms the strengthening of the outward, external emphasis of the EU's migration policy but is still based on the GAMM.⁵² The Commission seems to increasingly focus on the lack of cooperation by partner countries, having launched proposals to enhance their willingness to cooperate. This rather one-sided approach contrasts with its evaluation of the readmission agreements of 2011, where it urged the Member States to review their policies and priorities.⁵³

The perception of partner countries as the 'black sheep' of the external dimension is reflected in the most recent initiative of the previously mentioned 'New Partnership

⁵⁰ Council of Europe, Committee on Migration, Refugees and Population, Strik, T, REPORT: *Readmission agreements: a neutral mechanism or a threat to irregular migrants?*, Doc. 12168, 16 March 2010, at <refworld.org/pdfid/4bdadc1c3.pdf> (accessed 19 November 2017); Strik, T, *supra* nt 30.

⁵¹ CEPS, Carrera, *supra* nt 44; Lavenex, S and Kunz, R, "The Migration-Development Nexus in EU External Relations" 30(3) *Journal of European Integration* (2008) 439-457; Lavenex, S and Uçara, EM, "The External Dimension of Europeanization: The Case of Immigration Policies" 39(4) *Cooperation and Conflict* (2004) 417- 443.

⁵² European Union, European Commission, *Communication from the Commission to the Council, the European Economic and Social Committee and the Committee of the Regions, A European agenda on migration*, COM (2015) 240, 13 May 2015.

⁵³ European Union, European Commission, *Communication from the Commission to the European Parliament and the Council, Evaluation of EU Readmission Agreements*, COM (2011)76, 23 February 2011.

Framework' with third countries.⁵⁴ This framework aims to adopt tailor-made 'compacts' with priority partner countries in which all instruments, tools and leverage are put together 'to better manage migration in full respect of our humanitarian and human rights obligations'. Here, the principle of conditionality has been put at the centre of the policy, implying that the economic support for third countries depends on their performance on readmission and border control. The Commission considered a more proactive approach to third-country cooperation with a view to 'stemming the flow of irregular migrants' by not only offering a positive incentive for behaviour, but also by applying negative incentives. The 'more for more' principle would therefore be complemented with the 'less for less' principle and strengthened by the use of all EU policy areas, with the exception of humanitarian aid.⁵⁵ The EU has put this approach to the test while negotiating with 16 priority countries on a country package.⁵⁶ This framework is also built on the GAMM pillars; however, expressing that 'a solution to the irregular and uncontrolled movement of people is a priority for the Union as a whole'. This explicit prioritisation is likely to further increase the potential tensions with the claimed equality of the four pillars, but also with the aim of a coherent and effective EU foreign policy if it leads to a subordination of all other policy objectives. The EU's foreign policy has to serve a whole range of objectives, such as the promotion of peace and stability, economic growth, social upward mobility, and other development goals, such as combating poverty, illiteracy, and good governance, including human rights and the rule of law. Furthermore, the EU aims to foster its cooperation with third countries on other areas like trade, energy and environment. In the end, all these objectives serve the mutual interest of peace and welfare at the global level. They may not always be supportive to the objectives of EU's migration policy, but have their own value and targets. Some of these objectives may even contradict the EU migration agenda, as development may initially lead to more mobility instead of stemming migration. On the other hand, withholding aid funding as a sanction on non-cooperation on border control will affect the poorest people and therefore the aim of combating poverty. Will the EU manage to combine the prioritisation to migration with safeguarding a coherent foreign policy, with regard to its divergent objectives as well as the impact of its external actions? And if not, at what cost will the EU push its migration objectives?

XI. The EU-Turkey Deal: Blueprint for a New Generation of Readmission Agreements?

Despite numerous developments and policies on external migration policy, the traditional readmission agreement still serves as a core instrument of the external dimension of EU migration policy. Through the years, the agreement has kept up with the times by changing character when it extended the target group from 'own nationals' to 'third country nationals' (from countries of origin to transit countries) and when the EU gained the competence to conclude agreements. The most recent development is the shift in the stage of readmission: instead of status determination prior to expulsion and only rejected asylum seekers and irregular migrants being expelled, states now aim to shift out protection seekers to a transit country as early as possible in the procedure on

⁵⁴ European Union, European Commission, *Communication from the Commission to the European Parliament, the European Council, the Council and the European Investment on establishing a new Partnership Framework with third countries under the European Agenda on Migration*, COM (2016) 385, 7 June 2016, para 2-3.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.* These selected countries are Ethiopia, Eritrea, Mali, Niger, Nigeria, Senegal, Somalia, Sudan, Ghana, Ivory Coast, Algeria, Morocco, Tunisia, Afghanistan, Bangladesh and Pakistan.

the basis of a 'safe third country' concept.⁵⁷ With this move, EU Member States hand over the responsibility for determining the need for protection and (if needed) the granting of it. If this concept is applied, the asylum claim is only examined on its (in)admissibility, not on the substance by a Member State.

The EU-Turkey statement of March 2016 is the first instrument, which has explicitly laid down this transfer, despite the many doubts if Turkey can be labelled as a safe third country due to its application of the geographical limitation of the Refugee Convention to Europe, its deficiencies in the asylum procedure, and the limited rights of recognised refugees.⁵⁸ By taking away the guarantee that the person to be readmitted is not in need of protection, this shift has significantly raised the human rights concerns. The EU-Turkey statement nevertheless does not impose explicit requirements to improve its protection system, to grant the returnee access to an asylum procedure in accordance with international law, and to grant refugees all the rights enshrined in the Refugee Convention. The Statement promises that the returns of migrants from Greece to Turkey '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.'⁵⁹ That the Turkish authorities do not necessarily share the interpretation of international standards by the EU was confirmed by judgments of the European Court of Human Rights, convicting Turkey of violating Article 3 ECHR as well as many reports from authoritative human rights organisations.

The 'safe third country' concept is laid down as an option in the EU Asylum Procedures Directive, but in the draft Asylum Procedures Regulation, which is currently under negotiation, the Commission has proposed it as an obligation for Member States.⁶⁰ At the same time, the proposal includes more flexible criteria for the definition of a safe third country and, for the conclusion, that the refugee has a genuine link with the third country.⁶¹ Although the Greek judges have showed their hesitance to apply the safe third country concept to Turkey (many asylum claims are examined on the merits and returns are postponed until the Greek Supreme Court has taken a final decision), the EU considers the EU-Turkey statement to be a success as it has stopped the mass arrivals on EU territory. It is telling that the EU is not motivated to seriously monitor the situation of asylum seekers and refugees in Turkey. Once again, the preventive effects seem more relevant than the actual returns.

Since the number of departures from Libya has increased in previous years, the Member States are keen to adopt the same formula as agreed with Turkey in its relations with North African countries. Libya is known as a transit route for human trafficking and

⁵⁷ Coleman, N, *European Readmission Policy. Third Country Interests and Refugee Rights* (Martinus Nijhoff Publishers 2009), 18.

⁵⁸ Zoetewij, MH and Turhan, O, "Turkey's Role in EU Migration Law and Policy: Turkey's voting for Christmas" in Grütters, C, Mantu, S, and Minderhoud, P, eds, *Migration on the Move* (Brill 2017). Council of Europe, EU-Turkey Statement of 18 March 2016, Press release of the General Secretariat of the Council, no. 144/16 of 18 March 2016; Peers, S, "The final EU/Turkey refugee deal: a legal assessment", EU Law Analysis, 18 March 2016, at <eulawanalysis.blogspot.nl/2016/03/the-final-euturkey-refugee-deal-legal.html> (accessed 5 September 2017).

⁵⁹ Council of Europe, EU-Turkey Statement of 18 March 2016, Press release of the General Secretariat of the Council no. 144/16 of 18 March 2016, at <www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/> (accessed 19 November 2017).

⁶⁰ Article 38 of Directive 2013/32, and Article 45 of the draft Regulation, COM (2016) 467.

⁶¹ The Commission proposes to lift the requirement of ratification of the relevant international conventions by the third country, and to establish a genuine link if the refugee has travelled through the third country or if this country is located near the country of origin. At the moment this is not sufficient, as a certain period of residence is required.

contraband, but is also captured by complex political, territorial, social and tribal divisions. The EU has recently invested in capacity building and training of Libyan Coast Guards in order to prevent irregular departures from the Libyan territory to the European Union.⁶² The absence of a functioning legal framework or effective institutions makes cooperation and migration management considerably challenging and exposes migrants to great peril. It is widely recognised that migrants in Libya are currently extremely vulnerable to arbitrary detention, ill-treatment, and even slavery and that they suffer from a lack of access to medical care and legal aid.⁶³ As a clear distinction between the authorities and the persecutors is failing, migrants intercepted at sea by the Libyan coastguard are not necessarily safe simply because of the risk of being returned to the ill treatment they managed to escape.

The constraints on formal cooperation with Libya due to its poor human rights record have put pressure on its neighbouring countries. The Tunisian government, however, is reluctant to sign a readmission agreement as it perceives the acceptance of large numbers of third country nationals as a threat to its fragile democracy, which is already challenged by terrorism and poor economic prospects. The EU seems prepared to link its support for Tunisia's fight against terrorism to a deal on migration control and readmission, thereby subordinating anti-terrorism and seriously disregarding the Tunisian government's legitimate fears.⁶⁴ In response to the Mobility Partnership with Tunisia, NGOs pointed at the lack of effective asylum legislation and adequate reception capacity, concluding that Tunisia does not qualify as 'safe'.⁶⁵ This conclusion applies in general to all North African countries. Notwithstanding the persistent human rights concerns towards refugees in Turkey, this country is still bound by more and higher standards in comparison to North African countries. As a member of the Council of Europe, it has to comply with the obligations of the European Convention on Human Rights, including Articles 3 (prohibition of torture and refoulement) and 13 (the right to an effective remedy). In the realm of the EU accession process, Turkey has agreed to align its legislation with the Common European Asylum System. Where Turkey already

⁶² Council Decision (CFSP) 2016/993 of 20 June 2016 amending Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED operation SOPHIA), OJ L 162/18, 21 June 2016. See also the European Union, "Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route", press release no. 43/17, 3 February 2017, at <reliefweb.int/report/libya/malta-declaration-members-european-council-external-aspects-migration-addressing> (accessed 19 November 2017).

⁶³ See UNHCR, "Libya: Refugees and migrants held captive by smugglers in deplorable conditions", 17 October 2017, at <<http://www.unhcr.org/news/briefing/2017/10/59e5c7a24/libya-refugees-migrants-held-captive-smugglers-deplorable-conditions.html>>; High Commissioner for Refugees Calls Slavery, Other Abuses in Libya 'Abomination' That Can No Longer Be Ignored, while Briefing Security Council", 28 November 2017, at <<https://www.un.org/press/en/2017/sc13094.doc.htm>>; UN Supported Mission in Libya and UN Human Rights Office of the High Commissioner, *Detained and Dehumanised? Report on human rights abuses against migrants in Libya*, 13 December 2016, at <ohchr.org/Documents/Countries/LY/DetainedAndDehumanised_en.pdf> (accessed 19 November 2017); Médecins sans Frontiers, *MSF Warns of Inhumane Detention Conditions in Libya as EU Discusses Migration*, 2 February 2017, at <doctorswithoutborders.org/article/msf-warns-inhumane-detention-conditions-libya-eu-discusses-migration> (accessed 19 November 2017).

⁶⁴ In its renewed action plan on a more effective return policy, the European Commission has identified Tunisia as a priority country to conclude a readmission agreement, see European Union, European Commission, *Communication from the Commission to the European Parliament and the Council on a more effective return policy in the European Union – a renewed action plan*, COM(2017)200, 2 March 2017.

⁶⁵ FIDH *et al*, *Tunisia-EU Mobility Partnership: marching towards the externalisation of borders*, 17 March 2014, at <<https://www.fidh.org/en/region/north-africa-middle-east/tunisia/14960-tunisia-eu-mobility-partnership-marching-towards-the-externalisation-of>> (accessed 19 November 2017).

has an asylum system in place, despite its deficiencies, Tunisia and Egypt have to build such a system from scratch, which is obviously not their top priority. Similarly, in its analysis of the EU–Morocco mobility partnership, the Euro-Mediterranean Human Rights Network (EMHRN) expressed its ‘fears that actions to combat irregular migration immigration will be prioritised and implemented at the expense of other themes included in the Partnership and, more worryingly, at the expense of the rights of migrants and refugees’.⁶⁶ In a confidential European External Action Service (EEAS) document released by Statewatch, the service recognised that the situation of migrants and refugees (estimated to be one million) remains highly vulnerable and even pointed to the risk of more Egyptians being forced to migrate.⁶⁷ EEAS further expressed that ‘important concerns about ensuring protection, livelihoods and access to services for refugees and migrants in Egypt, as well as ensuring the creation of fully-fledged asylum and migration management systems compliant with international conventions and human rights’ continue to persist.

The experiences with the GAMM teaches that cooperation on migration tends to focus primarily on border controls, refugees may become stranded in transit countries without being able to find protection and safety there. Compliance with the European Convention and the Refugee Convention as well as sufficient support from the EU to uphold these standards should therefore be the minimal precondition for entering into cooperation on border controls. As third countries may also lack the willingness to comply with these standards in an attempt to avoid becoming responsible for more migrants, the EU should establish ways to monitor the human rights in place.

Apart from these human rights concerns, enforcement of combatting irregular migration cannot be taken for granted in case of a lacking compensation policy. It is therefore crucial for the EU to take into account the enormous benefits from remittances sent home, following from legal but also irregular migration which can not easily be compensated with funding or trade benefits alone. Thus, in the absence of serious offers to create legal migration channels and as long as there is a market for irregular labour migrants, automatic compliance with the enforcement of combatting irregular migration cannot be taken for granted. Some governments, street-level bureaucrats or local authorities even draw direct benefits from organised irregular migration, especially if they are susceptible to corruption.⁶⁸ A general prevalence of corruption and a lack of political will to control it often go hand in hand.⁶⁹ These circumstances may discourage governments to cooperate on migration with the EU or otherwise encourage them towards non-compliance with agreed partnerships. Anti-corruption policy and a resilient rule of law system are necessary conditions also in avoiding the potential use of irregular migration as an incentive to ensure that the money keeps coming.

⁶⁶ EMHRN, *Analysis of the Mobility Partnership signed between the Kingdom of Morocco, the European Union and nine Member States on 7 June 2013*, February 2014.

⁶⁷ Statewatch, *European External Action Service "non-paper": how can we stop migration from Egypt?* 30 December 2016, at <statewatch.org/news/2016/dec/eu-eeas-egypt.htm> (accessed 21 November 2017).

⁶⁸ OECD, *Corruption and the smuggle of refugees*, October 2015, at <oecd.org/corruption/Corruption-and-the-smuggling-of-refugees.pdf> (accessed 21 November 2017).

⁶⁹ UNODC, *Corruption and the smuggling of migrants*, Vienna 2013, at <unodc.org/documents/human-trafficking/2013/The_Role_Of_Corruption_in_the_Smuggling_of_Migrants_Issue_Paper_UNODC_2013.pdf> (accessed 21 November 2017).

Conclusion

The external dimension of EU migration policy is characterised by many ambiguities. The aim to embed policy in a comprehensive foreign policy does not match with the EU's actual appreciation of migration as a top priority. In particular, the conditionality principle and the less-for-less regime impede the development of an independent balancing of the different interests at play. Within such a one-sided approach, other objectives of EU external policy such as regional stability and cooperation, rule of law, peace and security, and economic growth risk not coming into the picture. If programmes in these policy fields are made dependent on the fight against irregular migration, the EU also undermines the effectiveness of its own common foreign policy.⁷⁰ The principle of equality and the aim to conclude mutually beneficial agreements also suffer from an emphasis on irregular migration. This relates to the weaknesses in the multi-level structure of the GAMM since the underperformance by the EU in the realm of positive incentives is due to its dependence on national decision-making. Considering that Member States have shifted competences to the EU in order to enhance their leverage, they should realise that such a transfer does not dismiss them from offering benefits in exchange for cooperation. After all, the external dimension is still a matter of mixed competences. Despite official commitments in agreements and partnerships, most of the implementation decisions depend on the national policy priorities and the national will regarding the level of funding or deploying personnel. If most Member States prefer to support return programmes instead of protection programmes, it is difficult to fully compensate this imbalance at the EU level. National politicians may be caught between a rock and a hard place: between the need to conclude effective deals and the pressure from the political arena not to give in on more legal migration. However, at both the EU and the national level, awareness is lacking of the fact that the external dimension can only become effective if all interests of the partner countries are taken seriously, including the reasons for their hesitation or reluctance. Furthermore, concluding deals with fragile and non-resilient states carries the risk of abuse or non-compliance since irregular migration to Europe may serve as part of a survival strategy.

Even more difficult than concluding and implementing mutually beneficial agreements is to ensure that the interests of migrants are served as well. Their interests are obviously not prioritised by either of the negotiating parties, which is visible in their implementation practices. This is at odds with the principle of a migrants-centred GAMM, the equality of the four GAMM pillars and a coherent EU (human rights) policy. Even so, disregarding the interests of migrants also implies underestimating their agency, which is fatal for achieving an effective policy. If their rights and needs are not served, they will vote with their feet and find another way. Reducing irregular migration cannot be achieved by simply raising the pressure on transit countries. Even if they fund capacity building in these countries, Member States should be prepared to resettle a fair share of the number of stranded refugees. The current political deadlock on resettlement and relocation in Europe is far from promising. Instead, the development towards an obligatory application of safe third country concepts is likely to further narrow access to protection in Europe and to set the goals so high for the partner countries that they are bound to fail.

⁷⁰ These aims are: - to safeguard the EU's values, fundamental interests, security, independence and integrity; -to consolidate and support democracy, the rule of law, human rights and the principles of international law; -to preserve peace, prevent conflicts and strengthen international security; -to assist populations, countries and regions confronting natural or man-made disasters.

The present experiences with the GAMM system call for a serious reflection on how to avoid unintended or even opposite effects and how to better reach coherency and comprehensiveness as well as equality and compliance with human rights. As the principles attached to the policy have proven to be preconditions for its effectiveness, it is puzzling that the externalisation just charges ahead like a runaway train without seriously evaluating how to meet these principles in practice. The EU has no choice when it comes to taking due regard of the interests of all parties, even if it only were to pursue its own interests.

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