

Making an example of The Gambia?

A human rights assessment of the EU's
(informal) readmission policy

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Abstract

For decades, the EU has been prioritising returning migrants with an irregular status in its migration policy. One of the means to do so is by concluding readmission agreements with third countries. In the last years, the EU has been shifting its focus and efforts from concluding formal and legally binding readmission agreements (EURAs) to more informal and non-binding readmission arrangements.

This thesis researched what the human rights protections entail for the returning migrants under the informal readmission arrangements, compared to the formal readmission agreements. The result is rather disappointing. In practice, there are few human rights protections under the formal readmission agreements and even less under the informal readmission arrangements, as illustrated by the EU-The Gambia informal readmission arrangement. For example, only in a few readmission agreements or arrangements is a non-affectation clause included which guarantees respect for human rights, however, this clause is only declaratory and there are no consequences or remedies for human rights violations.

Moreover, the safeguards that are put into place by Frontex to protect the returning migrants under the readmission agreements and arrangements are ineffective due to its internal malfunctioning: the fundamental rights monitors do not report all abuses on the return flights, and the complaint mechanism is not effective nor independent.

To conclude, given the poor human rights protection and the fact that the readmission agreements and arrangements rarely increase the return rate in the long term (being the EU's main goal), one could wonder whether the EU should continue its efforts of negotiating new (informal) readmission arrangements and agreements, especially, since it now has the power to coerce third countries into cooperation on readmission through visa restrictions. It would be more beneficial to put this time, effort and resources into improving the human rights protection of the returnees.

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Acronyms

CAT	Convention Against Torture
CEAS	Common European Asylum System
CJEU	Court of Justice of the European Union
CoE	Council of Europe
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECRE	European Council on Refugees and Exiles
EMN	European Migration Network
EU	European Union
EURA	European Union's Readmission Agreement
FRA	European Union Agency for Fundamental Rights
FRO	Fundamental Rights Officer (Frontex)
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
IOM	International Organisation for Migration
IDTP	Inhuman or Degrading Treatment or Punishment
JRC	Joint Readmission Committee
JWG	Joint Working Groups
MEP	Member of the European Parliament
TFEU	Treaty of the Functioning of the European Union
UNHCR	United Nations High Commissioner for Refugees

1. Introduction

For decades, Europe has been a place of destination for migrants, with a peak in numbers in 2015 and 2016 when a little over a million people fled to Europe.¹ All these people have to apply for asylum to be able to legally stay in the European Union (EU),² or are denied entry into the EU at the borders.

Considering that in 2021 only 38,6% of the asylum applications got a positive result at first instance and that another 33% received positive final decisions based on appeal or review,³ many asylum seekers are required to leave the European Union.⁴ Thereafter, no legal recourse is possible anymore. They become migrants with irregular status⁵, along with other categories of migrants, such as third country nationals waiting for a return,⁶ persons who are in a legal limbo situation, and people who cannot be returned to their country of origin or country of transit for whatever reason, people with tolerated status,⁷ etc.

It is no secret that the EU wants these groups of people to leave. They are meant to return, voluntarily⁸ or forced⁹, to a safe country of transit or origin.¹⁰ Therefore, the EU has been increasing its efforts to return and remove migrants who are no longer in possession of a right to legally stay in the EU, with the main goal to increase the return rates.¹¹

One of these efforts is concluding readmission agreements with non-EU countries. Readmission is defined by the IOM as an “*act by a State accepting the re-entry of an individual (own*

¹ Eurostat. (2022). *Asylum statistics*. Retrieved June 24, 2022, from https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Annual_asylum_statistics .

² Article 2 (b) and 6 of EU Asylum Procedures Directive 2013/32/EU.

³ Eurostat. (2022). *First instance decisions on asylum applications*. Retrieved June 24, 2022 from https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Asylum_statistics#Decisions_on_asylum_applications

⁴ Article 3 of EU Return Directive 2008/115/EC.

⁵ IOM. (2019). *Glossary on Migration: migrant with irregular status*.

⁶ Article 3 of EU Return Directive 2008/115/EC.

⁷ Example: Article 60a of the German Asylum Act: Tolerated Stay Permit.; ECRE. (2022). *Country Report: Germany 2021*.

⁸ IOM. (2019). *Glossary on Migration*.: In a general sense, the act or process of going back or being taken back to the point of departure. This could be within the territorial boundaries of a country, as in the case of returning internally displaced persons (IDPs) and demobilized combatants; or between a country of destination or transit and a country of origin, as in the case of migrant workers, refugees or asylum seekers. In the context of international migration, the movement of persons returning to their country of origin after having moved away from their place of habitual residence and crossed an international border.

⁹ IOM. (2019). *Glossary on Migration*.: The assisted or independent return to the country of origin, transit or another country based on the voluntary decision of the returnee.

¹⁰ In this thesis, the terms ‘forced return’, ‘removal’, ‘expulsion’ and ‘deportation’ will be used interchangeably.

¹¹ Cassarino, Jean-Pierre. (2018). Informalizing EU Readmission Policy. In Servent, Ariadna Ripoll & Trauner, Florian. *The Routledge Handbook of Justice and Home Affairs Research*. Routledge. 84.

national, third-country national or stateless person)”¹² who has been found irregularly entering to, being present in, or residing in another State.¹³ These readmission agreements aim to smoothen the cooperation process between two countries regarding the return of a third country national to a specific state and for this state to readmit the person.¹⁴

There are different types of readmission agreements. Firstly, in the EU context, there are the readmission agreements of the EU and the readmission agreements the Member States conclude themselves. When the EU concludes a readmission agreement in name of all EU Member States with a third non-EU country, the Member States will just be empowered to negotiate with that third country implementing protocols of the EU agreement.¹⁵ But an individual EU Member State can also independently conclude a readmission agreement with a third country.¹⁶

Secondly, some readmission agreements are formal, whereas others are less formal. To clarify, in this thesis, the terms ‘formal’ and ‘legally binding’ will be used interchangeably, as well as the terms ‘informal’ and ‘legally non-binding’. The EU only uses ‘legally non-binding’ for the second category since it is still signed and in writing, but the doctrine seems to prefer ‘informal’.¹⁷ This preference in the doctrine will be followed in this thesis. To make the distinction even more clear, the term ‘agreements’ will be used to refer to formal readmission documents, and to refer to the informal readmission documents the term ‘arrangements’ will be used, following the EU’s distinction and Cassarino’s inventory.¹⁸

Some examples will clarify the different types readmission documents. The EU has made 17 formal (legally binding) readmission agreements in the last two decades, also called EURAs. The 18th one was concluded in 2020 with Belarus, however, this agreement has already been suspended by the Belarusian parliament in October 2021.¹⁹ The individual Member States have

¹² IOM. (2019). *Glossary on Migration*.

¹³ Giuffré, Mariagiulia. (2020). *The readmission of asylum seekers under international law*. Hart Publishing, an imprint of Bloomsbury Publishing Plc. 17.

¹⁴ Sundberg Diez, Olivia. (2019). *Diminishing safeguards, increasing returns: non-refoulement gaps in the EU return and readmission system*. European Policy Centre.

¹⁵ Art. 79(3) TFEU.; Giuffré, Mariagiulia. (2020). *The readmission of asylum seekers under international law*. Hart Publishing, an imprint of Bloomsbury Publishing Plc. 19.; Garcia Andrade, Paula. The Duty of Cooperation in the External Dimension of the EU Migration Policy. In Carrera, Sergio; den Hertog, Leonhard et. Al. (2019). *EU External Migration Policies in an Era of Global Mobilities: Intersecting Policy Universes*. Brill Nijhoff. 300.

¹⁶ Article 4.2.(j) TFEU.; Garcia Andrade, Paula. The Duty of Cooperation in the External Dimension of the EU Migration Policy. In Carrera, Sergio; den Hertog, Leonhard et. Al. (2019). *EU External Migration Policies in an Era of Global Mobilities: Intersecting Policy Universes*. Brill Nijhoff. 299.

¹⁷ Cassarino, Jean-Pierre. (2018). Informalizing EU Readmission Policy. In Servent, Ariadna Ripoll & Trauner, Florian. *The Routledge Handbook of Justice and Home Affairs Research*. Routledge. 84.

¹⁸ Cassarino Jean-Pierre. *Inventory of the bilateral agreements linked to readmission*.

¹⁹ Independent. (5 October 2021). *Belarus Parliament votes to suspend readmission of migrants*.

over 320 agreements linked to readmission with third countries.²⁰ For example, Italy has made many informal readmission arrangements, among which one with Tunisia: Italy provided technical and financial assistance in exchange for an accelerated readmission procedure for Tunisians without a residence permit.²¹ The infamous 2016 EU-Turkey Deal is also considered to be an informal readmission arrangement, since Turkey agreed to readmit all migrants arriving on Greek islands next to the Turkish coast.²² It is however not concluded by the EU, but by all the individual Member States of the EU with Turkey.²³

The latter is a prime illustration of the EU's externalisation of migration control.²⁴ The third countries that agree with the cooperation on readmission are practically used as a buffer for the EU.²⁵ The EU outsources the management of migratory flows to them: the third countries act both as a filter and as a dumping ground for the EU Member States to return migrants with an irregular status to.²⁶

To make this externalisation even easier for the EU, it has in the last decades made a shift from formal to informal readmission arrangements.²⁷ This shift has many reasons and consequences, some more and some less beneficial.²⁸ In short, the informal arrangements are not subjected to parliamentary and judicial oversight on the EU level and on the level of the third country.²⁹ Moreover, the texts of the documents are often confidential. Many questions arise about these

²⁰ Cassarino, Jean-Pierre & Marin, Luisa. (2022). *The Pact on Migration and Asylum: Turning the European Territory into a Non-territory?* European Journal of Migration and Law 2022 24. 19.

²¹ EuroMed Rights. (April 2021). Chapter 4: The Policy of Forced Returns Between Italy and Tunisia. In *Return Mania – Mapping policies and practices in the EuroMed Region*. 4-5.

²² European Council. (18 March 2016). *EU-Turkey statement 2016*.

²³ CJEU. (2017). *NF, NG and NM v European Council*. T-192/16, T-193/16 and T-257/16. §71.

²⁴ Terry, Kyilah. (8 April 2021). *The EU-Turkey Deal, Five Years On: A Frayed and Controversial but Enduring Blueprint*. Migration Policy Institute.; Vanheule, Dirk. (2020). *The EU-Turkey migration Deal and the externalisation of migration policy*. *Pencere - Yeditepe Üniversitesi Hukuk Fakültesi Öğrenci Dergisi* 35-37.; Crane, David. (2022). *The EU-Turkey Deal Breakdown: How Securitisation Narratives are reproduced through Externalisation*. Refugee Research Online.

²⁵ FitzGerald, David Scott. (2020). *Remote control of migration: theorising territoriality, shared coercion, and deterrence*. *Journal of Ethnic and Migration Studies*. 15-16.; Bendel, Petra. (2019). *Politics of International protection*. In Weinar, Agnieszka, Bonjour, Saskia & Zhyznomirska, Lyubov (Eds.). *The Routledge Handbook of the Politics of Migration in Europe*. Routledge. 295-296.

²⁶ Delcour, Laure. (2019). *The EU's visa liberalisation policy: what kind of transformative power in neighbouring regions?*. In Weinar, Agnieszka, Bonjour, Saskia & Zhyznomirska, Lyubov (Eds.). *The Routledge Handbook of the Politics of Migration in Europe*. Routledge. 413.

²⁷ European Commission. (2016). *Communication on establishing a new Partnership Framework with third countries under the European Agenda on Migration*. COM(2016) 385 final. 7.; Majcher, Izabella. (2019). *The European Union Returns Directive and Its Compatibility with International Human Rights Law*. Brill Nijhoff. 26.

²⁸ See Chapters 3 and 5.

²⁹ Cassarino, Jean-Pierre & Giuffré, Mariagiulia. (2017). *Finding Its Place In Africa: Why Has the EU Opted for Flexible Arrangements on Readmission?*, FMU Policy Brief No. 01/2017. University of Nottingham Human Rights Law Centre.; Carrera, Sergio. (2016). *Implementation of EU Readmission Agreements*. SpringerBriefs in Law. 45.

informal arrangements concerning the protection of the returned migrants. This thesis will explore what the human rights implications of this shift are for the returned migrants.

Therefore, the thesis' research question is as follows:

What are the human rights challenges with the conclusion and implementation of the EU's informal readmission agreements?

The EU-The Gambia arrangement of 2018³⁰ will be used as an illustrative case to analyse the human rights standards under an informal readmission arrangement.

The outline of this thesis is as follows. In Chapter 3 the EU's migration and return policy will be framed, as well as the role of the readmission policy therein. Next, the applicable human rights standards on these readmission agreements and arrangements will be analysed in Chapter 4. Further, a deeper dive into the readmission policy and the distinction between formal agreements and informal arrangements will be conducted in Chapter 5, followed by the case study of the EU-The Gambia readmission arrangement in Chapter 6. In the final chapter, conclusions and recommendations will be provided.

2. Methodology

To answer the research question, this thesis takes a socio-legal approach, where an analysis of the law is linked to the social situation to which the law applies,³¹ being the returned migrants under the EU's readmission agreements and arrangements in this case.

The research is conducted in two parts: desktop research and interviews with stakeholders and experts.

The desktop research entails three parts. The first part consists of a document analysis of the formal and informal readmission documents, to establish the content as well as the similarities and differences in the documents. It is also aimed to decide which informal readmission arrangement would be used as a case study for this thesis. Secondly, the literature on the EU's readmission policy and migration and return policy will be discussed. Thirdly, the relevant

³⁰ Council of the EU. (2018). *The EU-The Gambia Good Practices document on identification and return procedures*.

³¹ Creutzfeldt, Naomi, Mason, Mark & McConnachie, Kirsten (Eds.). (2019). *Routledge Handbook of Socio-Legal Theory and Methods*. Routledge. 25.

human rights of the migrants with irregular status are analysed through the works of academics, and case law of the CJEU and ECtHR and other human rights bodies.

The combination of these three elements allows for an analysis of the human rights challenges associated with the conclusion and implementation of informal readmission agreements. This would, however, be too extensive for the word limitations of this master's thesis. Therefore, the defined research question will be answered through focusing on the case study of the EU-The Gambia informal readmission agreement of 2018.

This readmission arrangement is selected because between 2014 and 2019, The Gambia was in the top ten countries of arriving migrants in the EU, while being the smallest country on the African mainland.³² The text of the document is confidential, however, I was not successful in getting hold of a copy of the document through official requests for information from the EU, and neither were the involved interviewees. Another relevant reason for selecting The Gambia, is the fact that in 2021 the EU has adopted for the first time ever a restriction on the issuing of short-stay visas to Gambian nationals, as a sanction for the lack of cooperation by The Gambia on readmission.³³ The impact of these newly possible sanctions in the Visa Code regarding third countries' cooperation on readmission will also be discussed, since the literature is limited on both decisive and understudied elements.

The second part of the research entails seven semi-structured interviews with anonymous experts, such as academics, policy practitioners in the EU and The Gambia, members of EU institutions, and civil society members from The Gambia.³⁴ Depending on their expertise, questions were asked about the EU's readmission and return policy, the EU-The Gambia relations and the Good Practices Document and its implications for the returning migrants.

The interviews were conducted in May and June of 2022 in-person and over online video calls in English and Dutch. Four of the interviewees agreed to being recorded during the interview. Every interviewee was guaranteed anonymity. No one was compensated for being interviewed.

The interviews and the literature analysis allow for a thorough analysis of the human rights obligations in the informal readmission arrangements which the EU concludes.

³² Faal, Gibril. (2020). *Civil Society Input to EU-Africa Cooperation on Migration: The Case of The Gambia*. ECRE. 2-3.

³³ Council of the EU. (2021). *Decision on the suspension of certain provisions of Regulation (EC) No 810/2009 of the European Parliament and of the Council with respect to The Gambia*.

³⁴ See Annex I.

3. The EU's migration and return policy

The EU's migration and return policy entail many instruments and policies, which are all interlinked to some degree. However, the return policy is part of the EU's migration policy and has become more of a priority over the years.

Since the EU decided to abolish the checks at the internal borders in the Schengen Area, the participating states needed a common policy for their external borders.³⁵ Among other elements, they needed a common approach to dealing with people entering the EU. This common approach is named the Common European Asylum System (CEAS), which is the main component of the EU Asylum Acquis.³⁶

3.1. EU Migration Policy

Through the CEAS, the EU and the Member States have attempted since 1999 to harmonise their legislation regarding asylum procedures and international protection procedures.³⁷ The CEAS's goal is to set out common (procedural) standards and cooperation to ensure that asylum seekers are treated equally in an open and fair system – wherever they apply for asylum.³⁸ It includes five important legislative documents: the (Recast) Qualification Directive,³⁹ the (Recast) Asylum Procedures Directive,⁴⁰ the (Recast) Reception Conditions Directive,⁴¹ the (Recast) Dublin Regulation⁴² and the EURODAC Regulation⁴³. The European Union Agency for Asylum (EUAA) – formerly the European Asylum Support Office (EASO) – is the appointed agency that is tasked with improving the functioning and implementation of the

³⁵ Den Heijer, Maarten; Rijpma, Jorrit & Spijkerboer, Thomas. (2016). *Coercion, prohibition, and great expectations: the continuing failure of the Common European Asylum System*. In *Common Market Law Review*. Volume 53, Issue 3. 615.

³⁶ EASO. (2016). *An Introduction to the Common European Asylum System for Courts and Tribunals – A Judicial Analysis*. 14.

³⁷ Chetail, Vincent. (2016). The Common European Asylum System: Bric-à-brac or System?. In Chetail, Vincent; De Bruycker, Philippe and Maiani, Francesco (Eds.). *Reforming the Common European Asylum System*. Brill Nijhoff. 3.

³⁸ *Ibid.* 11-17.

³⁹ EU Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast).

⁴⁰ EU Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).

⁴¹ EU Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection (recast).

⁴² Regulation (EU) No 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).

⁴³ Regulation (EU) No 603/2013 of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation.

CEAS, by encouraging cooperation among the Member States and supporting the Member States.⁴⁴ The Commission's 2020 New Pact on Migration and Asylum aims to improve the CEAS with a package of nine new proposed instruments.⁴⁵ They want to fill the existing gaps in the asylum system, through improved and faster procedures and balancing the principles of fair sharing of responsibility and solidarity.⁴⁶

This sharing of responsibility is also the rationale behind the resettlement schemes and the complementary pathways for migrants.⁴⁷ Moreover, the EU puts effort into preventing human smuggling and trafficking of migrants,⁴⁸ and into the integration of migrants once they are legally allowed to stay in the EU.⁴⁹ The EU facilitates family reunification⁵⁰ and labour migration⁵¹ as part of their migration policy.

To conclude and most pertinent for this thesis, the CEAS establishes who receives asylum and protection in the EU.⁵² All the migrants who do not receive asylum become migrants with an irregular status and will be ordered to leave the EU.⁵³ This return can be voluntary,⁵⁴ but all who do not leave voluntarily are removed or returned forcibly to a non-EU third country: either a country of transit or their country of origin.⁵⁵ These rules are established in the Return Directive.⁵⁶

⁴⁴ Website: <https://www.euaa.europa.eu/> .

⁴⁵ Criticism: De Bruycker, Philippe. (15 December 2020). *The New Pact on Migration and Asylum: What it is not and what it could have been*. EU Migration Blog. Retrieved from <https://eumigrationlawblog.eu/the-new-pact-on-migration-and-asylum-what-it-is-not-and-what-it-could-have-been/> .

⁴⁶ Brouwer, Evelien; Campesi, Giuseppe; Carrera, Sergio, et.al. (2021). *The European Commission's legislative proposals in the New Pact on Migration and Asylum*. 26.; European Commission. (23 September 2020). *New Pact on Migration and Asylum, setting out a fairer, more European approach*.

⁴⁷ European Commission. (2020). *Recommendation of 23.9.2020 on legal pathways to protection in the EU: promoting resettlement, humanitarian admission and other complementary pathways*. C(2020) 6467 final.

⁴⁸ EU. (5 April 2011). *Directive 2011/36 EU on preventing and combating trafficking in human beings and protecting its victims*.; EU. (2004). *Directive 2004/81/EC on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities*.

⁴⁹ Carrera, Sergio & Vankova, Zvezda. (2019) *Human Rights Aspects of Immigrant and Refugee Integration Policies: A comparative assessment in selected Council of Europe member states at the request of the Special Representative of the Secretary General on Migration and Refugees of the Council of Europe*.; Council. (25 November 2003). *EU Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents*.

⁵⁰ Council. (22 September 2003). *EU Directive 2003/86/EC on the right to family reunification*.; European Commission. (2014). *Communication on Guidance for application of Directive 2003/86/EC*. COM (2014) 210 final.

⁵¹ Keith, Lilana & LeVoy, Michele. (2021). *Designing labour migration policies to promote decent work*. PICUM.

⁵² EU Qualification Directive 2011/95/EU.

⁵³ Article 1 Qualification Directive (recast) 2011/95/EU.; Article 2 Return Directive 2008/115/EC.

⁵⁴ Article 7 Return Directive 2008/115/EC.

⁵⁵ Article 8 Return Directive 2008/115/EC.

⁵⁶ Return Directive 2008/115/EC.

3.2. Return policy with its toolbox and instruments

Due to the increase of asylum applications in the last ten years in Europe, the prevention, detention, expulsion and return of asylum seekers and refugees became at the forefront of the legislative and executive policy in the EU.⁵⁷ The EU has been focussing heavily on the return of migrants and on pushing them away, literally and figuratively. One can think of the illegal literal pushbacks at the outside borders of Europe, namely in Greece, Italy and Poland.⁵⁸ Further, the detention conditions while applying for asylum or after receiving a return decision are inhuman, nor ‘welcoming’ for refugees.⁵⁹

To fully understand the implications of the Readmission Arrangements, some instruments of the Return Policy will be clarified concisely.

3.2.1. Return Directive

The main instrument in this area is the Return Directive. Although the Directive is not included in the CEAS, they are closely interlinked, since the Return Directive applies to people whose asylum applications were unsuccessful.⁶⁰ Hence, this Return Directive is certainly part of the EU Migration and Asylum Acquis.⁶¹ Moreover, this Directive is part of the return policy and irregular migration policy of the EU, although it is not the only return instrument.⁶²

Firstly, the EU Return Directive lays out what and how the Member States must treat irregularly staying migrants when returning them.⁶³ This includes timeframes for return procedures, procedural safeguards, guidelines on voluntary departure, as well as indications and minimum standards on the use of detention or entry bans.⁶⁴ The EU and the Return Directive focus on the voluntary return of migrants with irregular status.⁶⁵ Only when they refuse this, do the Member States enforce the obligation to return them to their country of origin, country of transit or

⁵⁷ Sundberg Diez, Olivia. (2019). *Diminishing safeguards, increasing returns: non-refoulement gaps in the EU return and readmission system*. European Policy Centre. 6.

⁵⁸ Council of Europe Commissioner for Human Rights. (21 October, 2021). *European states must stand up against pushbacks and the attempt to legalise them*.

⁵⁹ ECRE. (4 June 2021). *Asylum in Greece: a Situation Beyond Judicial Control?*. 3.

⁶⁰ Majcher, Izabella. (2019). *The European Union Returns Directive and Its Compatibility with International Human Rights Law*. Brill Nijhoff. 30.

⁶¹ EASO. (2016). *An Introduction to the Common European Asylum System for Courts and Tribunals – A Judicial Analysis*. 57-61.

⁶² Majcher, Izabella. (2019). *The European Union Returns Directive and Its Compatibility with International Human Rights Law*. Brill Nijhoff. 28.

⁶³ Return Directive 2008/115/EC.

⁶⁴ Sundberg Diez, Olivia. (2019). *Diminishing safeguards, increasing returns: non-refoulement gaps in the EU return and readmission system*. European Policy Centre. 6.

⁶⁵ Article 7 of Return Directive 2008/115/EC.

another third country.⁶⁶ It must be done in accordance with fundamental rights found in the EU's Charter and the international human rights and refugee protection standards.⁶⁷

This Return Directive has been in the process of a Recast for years.⁶⁸ The challenges the recast wants to remedy are the decrease in the EU return rate, along with not successfully enforcing return decisions and the lack of cooperation of countries of origin.⁶⁹ The Commission proposed a recast aiming to 'reduce the length of return procedures, secure a better link between asylum and return procedures, and ensure a more effective use of measures to prevent absconding'.⁷⁰

The proposal could be expected heavy criticism.⁷¹ In general, the Commission has moved away from the emphasis and prioritisation of voluntary return, and wants to add more detention measures.⁷² Some proposed amendments to the proposal that are more pertinent to this thesis will follow.

Currently, the Return Directive is applicable to informal readmission arrangements.⁷³ However, some interviewees mentioned that groups of Members of the European Parliament (MEPs) are arguing to leave the informal readmission arrangements out of the scope of the Return Directive, because in this way, the Return Directive legitimises the informal arrangements, which the MEPs wish not to, although the Directive also includes procedural guarantees for the returning migrants.⁷⁴ The chances are expected to be low that this will happen.⁷⁵

Another initiative by some MEPs is to include in the Recast the obligation on every return flight to include an official to monitor the fundamental rights of the returning migrants, because now such a person is only sporadically present.⁷⁶ Although since the 2019 amendment of the Frontex

⁶⁶ Article 3 and 8 of Return Directive 2008/115/EC.

⁶⁷ Article 1 of Return Directive 2008/115/EC.; See Chapter 4.

⁶⁸ European Commission. (2018). *Proposal for a Directive on common standards and procedures in Member States for returning illegally staying third-country nationals (recast)*, COM/2018/634 final.

⁶⁹ European Parliament. (2021). *Briefing: Recasting the Return Directive.*; European Commission. (2018). *Proposal for a Directive on common standards and procedures in Member States for returning illegally staying third-country nationals (recast)*, COM/2018/634 final. 1.

⁷⁰ *Ibid.*

⁷¹ Majcher, Izabella & Strik, Tineke. (2021). *Legislating without Evidence: The Recast of the EU Return Directive*. European Journal of Migration and Law 23. 3.

⁷² Muir, Elise & Molinari, Caterina. (2019). *Targeted impact assessment study on the proposed Return Directive (recast): Legal Aspects*. European Parliamentary Research Service. 43.

⁷³ Article 3 (3)(b) Return Directive Directive 2008/115/EC.

⁷⁴ Interview #6 and #7, June 2022.

⁷⁵ Interview #6, June 2022.

⁷⁶ Interview #6 and #7, June 2022.

Regulation,⁷⁷ each return operation organised or coordinated by Frontex must be monitored by the forced-return monitor,⁷⁸ which not happening yet.⁷⁹ Moreover, they also want to add a post-return monitoring mechanism, to be able to evaluate how the period after the return.⁸⁰ For example, whether or not the returnees are prosecuted or even expelled to another third country, how the reintegration proceeds, etc.

Thus far, no consensus has been reached on the content of the Recast of the Return Directive.

The Return Directive has also been the subject of several cases before the CJEU in relation to the EU Charter of Fundamental Rights and other human rights instruments.⁸¹ For example, in *Z.Zh. and I.O.*, the CJEU emphasised that the principle of proportionality requires a case-by-case decision under the Return Directive, while taking into account the fundamental rights of the persons.⁸²

3.2.2. European Commission: Agenda on Migration (2015), Plan on Return (2015) and New Pact on Migration and Asylum (2020)

The European Commission has been focusing on increasing the number of returns of migrants and making it more effective for decennia, as it repeated in its Agenda on Migration and the EU Action Plan on Return.⁸³ This last one focused inter alia on the improvement of the cooperation with third countries on the subject of readmission and the need for a better implementation of the 2008 Return Directive at the national levels.⁸⁴ It was updated in 2017 to the Renewed Action Plan on Return,⁸⁵ which aimed to once again increase the return rate.⁸⁶

⁷⁷ EU Regulation 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard (Frontex). (2019).

⁷⁸ Article 50(5) Frontex Regulation 2019/1896.

⁷⁹ See Chapter 4.4.

⁸⁰ Interview#6 and #7, June 2022.

⁸¹ Majcher, Izabella. (2019). *The European Union Returns Directive and Its Compatibility with International Human Rights Law*. Brill Nijhoff. 51-53.

⁸² CJEU. (11 June 2015). *Z. Zh. v. Staatssecretaris Voor Veiligheid En Justitie and I. O. v. Staatssecretaris Voor Veiligheid En Justitie*. C-554/13. §49 and 69.

⁸³ European Commission. (2015). *Communication from the Commission to the EP, the Council, the European Economic and Social Committee and the Committee of the Regions – A European Agenda on Migration*. COM/2015/0240 final.; European Commission. (2015). *Communication from the Commission to the EP and to the Council – EU Action Plan on Return*. COM/2015/0453 final.

⁸⁴ Muir, Elise & Molinari, Caterina. (2019). *Targeted impact assessment study on the proposed Return Directive (recast): Legal Aspects*. European Parliamentary Research Service. 32.

⁸⁵ European Commission. (2017). *Communication from the Commission to the EP and the Council on a more effective return policy in the EU – a Renewed Action Plan*. COM/2017/0200 final.

⁸⁶ Muir, Elise & Molinari, Caterina. (2019). *Targeted impact assessment study on the proposed Return Directive (recast): Legal Aspects*. European Parliamentary Research Service. 32.

Moreover, the EU has on several occasions recently confirmed its (silent or not so silent) shift from supporting and aiding migrants in Europe to returning them as the focus of their migration policy, all in the name of their “fight against illegal immigration”.⁸⁷ Firstly, in the above mentioned 2020 New Pact on Migration and Asylum, the Commission again emphasised “an effective return policy and an EU-coordinated approach to returns” and proposed to improve the legislation and harmonise the existing return procedures.⁸⁸

In 2021, the European Commission released a Communication on Enhancing cooperation on return and readmission as part of a fair, effective and comprehensive EU migration policy.⁸⁹

3.2.3. EU Strategy on Voluntary Return and Reintegration

Also in 2021, the new EU Strategy on Voluntary Return and Reintegration was adopted by the European Commission, since it is a key objective under the 2020 New Pact on Migration and Asylum.⁹⁰ The Vice-President for Promoting our European Way of Life, Margaritis Schinas, said: “The EU is building a new ecosystem on returns – looking at increasing cooperation on readmission, improving the governance framework, equipping Frontex with a new operational mandate on returns and appointing an EU Return Coordinator.”⁹¹

3.2.4. EU’s Readmission policy

Next, the EU and its Member States need cooperation from non-EU third countries when returning irregular migrants outside of the EU, or readmitting them from the point of view of the non-EU countries. Here, the readmission agreements and arrangements have played a significant role. The EU makes these agreements with third countries to improve the cooperation between the several administrations when readmitting people who are residing irregularly in the EU.⁹² The EU readmission policy is an important part of the external

⁸⁷ Majcher, Izabella. (2019). *The European Union Returns Directive and Its Compatibility with International Human Rights Law*. Brill Nijhoff. 28.; European Commission. (2001). *Communication from the Commission to the Council and the European Parliament on a Common Policy on Illegal Immigration*. COM/2001/0672 final. 5.

⁸⁸ European Commission. *COM(2020) 609 final*. 3.; Brouwer, Evelien; Campesi, Giuseppe; Carrera, Sergio, et.al. (2021). *The European Commission’s legislative proposals in the New Pact on Migration and Asylum*. 44.; De Bruycker, Philippe. (15 December 2020). *The New Pact on Migration and Asylum: What it is not and what it could have been*. EU Migration Blog.

⁸⁹ European Commission. (10 February 2021). *Communication from the Commission to the European Parliament and the Council Enhancing cooperation on return and readmission as part of a fair, effective and comprehensive EU migration policy*. COM (2021) 56 final.

⁹⁰ European Commission. (2021). *Communication on the EU Strategy on Voluntary Return and Reintegration*. COM(2021) 120 final.

⁹¹ European Commission. (2021). *Press Release: Migration management: New EU Strategy on voluntary return and reintegration*. Retrieved from https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1931 .

⁹² Giuffrè, Mariagiulia. (2020). *The readmission of asylum seekers under international law*. Hart Publishing, an imprint of Bloomsbury Publishing Plc. 27.

dimension of the EU's migration policy.⁹³ The many different readmission agreements can be split up into two categories: formal (legally binding) agreements and informal (legally non-binding) arrangements.⁹⁴

The EU Member States also cooperate with each other to make the return of migrants as smooth and fast as possible through, for example, mutual recognition of a decision on expulsion⁹⁵ and implementation of guidelines on forced return.⁹⁶

The mandate to conclude Readmission Agreements is included in the European Commission's tasks.⁹⁷ The Commission negotiates with third countries, which then agree to readmit their own nationals or people who transited through its country after they got a return order in an EU Member State. However, there has been a trend since 2016 that the Commission and individual Member States conclude informal or legally non-binding readmission arrangements.⁹⁸ In 2019, Frontex (the European Border and Coast Guard Agency) even gained additional power to conclude informal readmission arrangements with third countries.⁹⁹

On May 19th of 2021, the European Parliament adopted (with a narrow majority) a report criticising the European Commission and some Member States “for overusing informal agreements on the return and readmission of irregular migrants”.¹⁰⁰ The European Parliament provides some recommendations on how to protect the migrants' human rights, since the informal arrangements are “concluded without due democratic scrutiny and parliamentary oversight and are not subject to judicial scrutiny”. It also highlights several worrying trends and the practical human rights implications stemming from such informal arrangements.¹⁰¹ Lastly, the European Parliament also requests the Commission to be more transparent regarding the

⁹³ Majcher, Izabella. (2019). *The European Union Returns Directive and Its Compatibility with International Human Rights Law*. Brill Nijhoff. 26.

⁹⁴ See Chapter 5 and 1. Introduction.

⁹⁵ Council. (2001). Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third country nationals.

⁹⁶ Council of Europe. (2005). *Twenty Guidelines on Forced Return*.

⁹⁷ Article 79(3) TFEU.

⁹⁸ Slagter, Jonathan. (2019). *An “Informal” Turn in the European Union's Migrant Returns Policy towards Sub-Saharan Africa*. Migration Policy Institute.

⁹⁹ Article 73(5) of Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard. OJ L 295/1.; Sundberg Diez, Olivia. (2019). *Diminishing safeguards, increasing returns: non-refoulement gaps in the EU return and readmission system*. European Policy Centre. 6.

¹⁰⁰ European Parliament. (19 May 2021). *Press Release: MEPs call for better protection of migrants from human rights violations*.

¹⁰¹ *Ibid.*

financial part of these actions: what EU funds go to third countries as part of migration deals.¹⁰² They ask for a complete and public overview of EU funding to third countries.¹⁰³

3.2.5. EU Instruments linked to the return policy

Finally, many other EU strategies and legislations interact closely or are instrumentalised for the return policy. For example, the Return Directive refers to the Schengen Borders Code, which regulates border control of people crossing the external border of the EU.¹⁰⁴

A second example is the incentives the EU offers to the third countries in exchange for concluding a readmission agreement, such as visa facilitation or other legal access options for their citizens, development cooperation, “as well as trade, energy, security, education, environmental or agricultural policy”.¹⁰⁵

The last example is the negative incentives the EU uses to pressure the third countries into abiding by the readmission agreement that was concluded. They can be found in the EU Visa Code. The Visa Code has been amended¹⁰⁶ to enable the EU to attempt to pressure third countries into cooperation on readmission by using the visa policy as leverage.¹⁰⁷ This idea of linking the visa code and the EU return policy was first introduced in the 2015 Agenda on Migration and is repeated in the proposal for the Return Directive (Recast).¹⁰⁸ However, the idea of linking cooperation on readmission with visa policy is not new.¹⁰⁹ Some Member States have been doing this for decades.¹¹⁰ Nonetheless, many acknowledge that “better cooperation

¹⁰² ANSA. (21 May 2021). *MEPs call for protecting migrants from rights violations*. INFO Migrants. Retrieved from <https://www.infomigrants.net/en/post/32429/meps-call-for-protecting-migrants-from-rights-violations>.

¹⁰³ European Parliament. (19 May 2021). *Press Release: MEPs call for better protection of migrants from human rights violations*.

¹⁰⁴ Majcher, Izabella. (2019). *The European Union Returns Directive and Its Compatibility with International Human Rights Law*. Brill Nijhoff. 30.

¹⁰⁵ Bendel, Petra. (2019). Politics of International protection. In Weinar, Agnieszka, Bonjour, Saskia and Zhyznomirska, Lyubov (Eds.). *The Routledge Handbook of the Politics of Migration in Europe*. Routledge. 295-296.

¹⁰⁶ *EU Regulation 2019/1155* of 20 June 2019 amending Regulation No 810/2009 establishing a Community Code on Visas (Visa Code).

¹⁰⁷ European Commission. (2018). *Remarks by Commissioner Avramopoulos following the Home Affairs Council of 6 December 2018*.; Sundberg Diez, Olivia. (2019). *Diminishing safeguards, increasing returns: non-refoulement gaps in the EU return and readmission system*. European Policy Centre. 6.

¹⁰⁸ Muir, Elise & Molinari, Caterina. (2019). *Targeted impact assessment study on the proposed Return Directive (recast): Legal Aspects*. European Parliamentary Research Service. 41.; European Commission. (2018). *Proposal for a Directive on common standards and procedures in Member States for returning illegally staying third-country nationals (recast)*, COM/2018/634 final. 1.

¹⁰⁹ Cassarino, Jean-Pierre & Marin, Luisa. (2022). *The Pact on Migration and Asylum: Turning the European Territory into a Non-territory?* European Journal of Migration and Law 2022 24. 17.

¹¹⁰ *Ibid.* 17.

on readmission with reluctant third countries cannot be obtained through visa policy measures alone”.¹¹¹

Article 25a of the Visa Code constitutes a monitoring mechanism under which the Commission assesses annually the third countries’ cooperation on readmission according to a few indicators: number of return decisions issued to nationals of a country, number of actual forced returns to a country, the number of readmission requests per Member State accepted by a country, level of practical cooperation.¹¹² Based on those factors, the issuance of visas can be restricted or made more difficult or expensive for "applicants or categories of applicants who are nationals of a third country that is considered not to be cooperating sufficiently" with readmissions, while respecting the principles of proportionality and adding that it should only be used as a last resort.¹¹³

Regarding only using Article 25a of the Visa Code as a last resort, the French Presidency of the Council has declared in February 2022 that Article 25(1)(a) should “not be seen as exceptional”.¹¹⁴ The Presidency also encouraged Member States to use other means to increase third country acceptance of deportations and improve the effectiveness of readmission in practice, such as “programming of NDICI (Neighbourhood, Development and International Cooperation Instrument) through a flexible incentive approach, legal migration and visa facilitation, trade and the political engagement through high-level visits”.¹¹⁵

Commissioner Johansson has stated in 2021 that the goal should be extending processing times for visas, increasing costs, and shortening the validity of visas for countries which are not cooperating sufficiently on readmission according to the Commission’s assessment.¹¹⁶

This is an example of the externalisation of migration control: the control of migration is shifting to the borders and to outside the EU’s territory.¹¹⁷ It is also an example of

¹¹¹ European Commission. (2002). *On a Community Return Policy on Illegal Residents, COM (2002) 564 final*. 24.; European Court of Auditors. (2021). *Special Report no. 17/2021 EU readmission cooperation with third countries: relevant actions yielded limited results*. §67-68 and §126.

¹¹² Article 25a (2) EU Regulation 2019/1155

¹¹³ Article 25a (1) EU Regulation 2019/1155.

¹¹⁴ Presidency of Council of the European Union. (14 February 2022). *Annual implementation of the visa-remission mechanism and perspectives on readmission*.

¹¹⁵ Statewatch. (17 March 2022). *EU: linking development aid to deportation compliance under discussion in the Council*.

¹¹⁶ ECRE. (2021). *Playing the Visa Card? ECRE’s Assessment of the EU’s plans to use visa leverage to increase readmission to third countries*. Policy Note No. 35. 1.

¹¹⁷ FitzGerald, David Scott. (2020). *Remote control of migration: theorising territoriality, shared coercion, and deterrence*. Journal of Ethnic and Migration Studies. 5.

Europeanisation beyond Europe: the fact that non-EU countries adopt EU rules and norms or accept to cooperate with the EU.¹¹⁸ Through these measures of restricting visas as leverage for cooperation, the EU is using its power to achieve goals that are beneficial to the EU, but are not executed by them or on their territory.¹¹⁹ It will restrict the access of visas into the EU for a country's nationals, when they want that specific country to cooperate with them on a subject, in this case on readmitting their own nationals. It is coercing the third countries into cooperating with the EU. Moreover, the EU and its Member States are forming a political unity (called "Team Europe") while they attempt to externalise migration control and attempt to compel third countries to adopt migration policies compatible with the EU's own migration policy goals through these coercing visa measures.¹²⁰ The EU has only once used these measures: to restrict short-stay visas of Gambian nationals in October 2021.¹²¹

As mentioned above, the readmission agreements and arrangements are also examples of externalisation of migration control: the third countries that agree with the cooperation on readmission are practically used as a buffer and dumping ground for the EU.¹²²

3.2.6. Challenges of the EU Return Policy

The abovementioned instruments and agencies are all part of the EU's Return Migration Policy. They show that many EU instruments are interconnected and linked to the return policy and readmission agreements, and the EU instrumentalises all its mechanisms to improve the return of migrants with an irregular status. There are, however, many challenges regarding the EU's Return Policy. The main challenges are as follows.

Firstly, the return system is not efficient enough according to the EU.¹²³ The rates of returns are too low. Many of those who lost the right to stay, do stay in the EU.¹²⁴ The low numbers are

¹¹⁸ Cham, Omar. N. & Adam, Ilke. (2021). *The politicization and framing of migration in West Africa: transition to democracy as a game changer?*. Territory, Politics, Governance. 4.

¹¹⁹ *Ibid.*

¹²⁰ Statewatch. (25 March 2022). *EU: Tracking the Pact: Externalisation and "Team Europe" at the heart of the "gradual approach"*.; European Council Presidency. (1 March 2022). *Subject: Migration et asile: première étape.*

¹²¹ See Chapter 6.4.; Council of the EU. (2021). *Decision on the suspension of certain provisions of Regulation (EC) No 810/2009 of the European Parliament and of the Council with respect to The Gambia.*

¹²² FitzGerald, David Scott. (2020). *Remote control of migration: theorising territoriality, shared coercion, and deterrence.* Journal of Ethnic and Migration Studies. 15-16.; Bendel, Petra. (2019). *Politics of International protection.* In Weinar, Agnieszka, Bonjour, Saskia & Zhyznomirska, Lyubov (Eds.). *The Routledge Handbook of the Politics of Migration in Europe.* Routledge. 295-296.

¹²³ European Commission. *COM (2021) 56 final.* 2.

¹²⁴ *Ibid.*

caused by inconsistencies and gaps between the national asylum and the return system,¹²⁵ which the EU tries to tighten through their above mentioned recent initiatives.¹²⁶

Moreover, the Covid-19 pandemic has not made the functioning of the return and readmission operations easier.¹²⁷ It had a decelerating effect, given the travel restrictions.¹²⁸ In 2020, more than 396.400 return decisions were issued by the Member States, which is the lowest number since 2013. Eventually, 70.200 non-EU citizens were returned to a non-EU country.¹²⁹ This amounts to 18% of all ordered return decisions and is a decrease from 29% in 2019. In the first half of 2021, this low trend persisted. Based on the data received and analysed thus far: 21.100 returns were completed, which is only 14% of the return orders issued.¹³⁰

The Commission's focus on forced returns of migrants is criticised, because this focus downgrades the procedural and logistical aspects of the current asylum and return procedures.¹³¹

Secondly, the EU itself also considers one of the main obstacles to an effective removal practice the lack of cooperation of third countries on readmission.¹³² This is the reason why the EU has recently considered the readmission policy more of a separate policy area, still linked to the return policy.¹³³ Some argue it has even become the political priority for the EU, due to it being one of the areas for which it is rather easy to find a political consensus.¹³⁴ To investigate the human rights protection of this new political priority, being the concluding of readmission agreements, is thus highly pertinent.

¹²⁵ European Commission. *COM (2020) 609 final*. 4.

¹²⁶ European Commission. (2021). *Press Release: Migration management: New EU Strategy on voluntary return and reintegration*. Retrieved from https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1931.

¹²⁷ European Commission. *COM (2021) 56 final*. 3.

¹²⁸ Frontex. (2022). *Risk Analysis for 2021*. 24.

¹²⁹ Eurostat. *Third country nationals returned following an order to leave – annual data (rounded)*. Retrieved on 26 March 2022 from http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_eirtn.

¹³⁰ European Commission. *Statistics on migration to Europe – Return*. Retrieved on 27 March 2022 from https://ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-life/statistics-migration-europe_en#returns.

¹³¹ Brouwer, Evelien; Campesi, Giuseppe; Carrera, Sergio, et.al. (2021). *The European Commission's legislative proposals in the New Pact on Migration and Asylum*. 45.

¹³² Council of the EU. (13 March 2015). *Note from Presidency to Delegations: Return and Readmission Policy*; Majcher, Izabella. (2019). *The European Union Returns Directive and Its Compatibility with International Human Rights Law*. Brill Nijhoff. 22.

¹³³ Council of the EU. (5 June 2014). *Council Conclusions on EU Return Policy*; Council of the EU. (9 June 2011). *Council Conclusions Defining the Eu Strategy on Readmission*; European Commission. (10 February 2021). *Communication from the Commission to the European Parliament and the Council Enhancing cooperation on return and readmission as part of a fair, effective and comprehensive EU migration policy*. COM (2021) 56 final.

¹³⁴ Sundberg Diez, Olivia. (2019). *Diminishing safeguards, increasing returns: non-refoulement gaps in the EU return and readmission system*. European Policy Centre. 5.

4. Applicable standards: international and European human rights standards

To assess whether the formal and informal readmission arrangements are fulfilling the human rights of the migrants with an irregular status, the relevant rights and principles will be outlined first. The EU and the Member States have the duty to ensure that their fundamental rights are fully complied with within the framework of their international obligations.¹³⁵ All these obligations and human rights can be found in international legal norms, such as the 1951 Convention relating to the Status of Refugees (Refugee Convention),¹³⁶ the UN Convention against Torture (CAT), the International Covenant on Civil and Political Rights (ICCPR),¹³⁷ as well as the European norms, which are the European Convention on Human Rights (ECHR)¹³⁸ and the EU Charter of Fundamental Rights (EU Charter or EU CFR)¹³⁹.

In light of the word limitations of this thesis, only the most relevant human rights standards will be discussed, namely the right to asylum, the non-refoulement principle and the rights of the migrants during the return process. There are more human rights and principles applicable, they will not be discussed in depth. For example, the prohibition of collective expulsion and the prohibition of arbitrary detention before return or removal could also come into play for returning migrants.¹⁴⁰

4.1. Non-refoulement principle

Asylum seekers and refugees whose application was refused or rejected, risk being expelled or returned from the state they are currently staying in.¹⁴¹ They could be sent to their state of origin, or transit, or – in the European Union – to another European Member State due to the Dublin Regulation.¹⁴² There is, however, for the expelled people a prevalent risk of being tortured or treated with inhuman or degrading treatment or punishment (IDTP) in the state they are being expelled to.¹⁴³ Therefore, states have to apply the non-refoulement principle based on

¹³⁵ *Ibid.*, 5.

¹³⁶ *United Nations Convention relating to the Status of Refugees.* (1951).

¹³⁷ *International Covenant on Civil and Political Rights.* (1966).

¹³⁸ *European Convention on Human Rights.* (1950).

¹³⁹ *Charter of Fundamental Rights of the European Union.* (2012).

¹⁴⁰ Article 4 Protocol no. 4 to ECHR.; Article 5 (1)(f) ECHR.

¹⁴¹ Article 1 Qualification Directive (recast) 2011/95/EU.; Article 2 Return Directive 2008/115/EC.

¹⁴² Regulation (EU) No 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).

¹⁴³ Mathew, Penelope. (2020). Non-refoulement. In Costello, Cathryn, Foster, Michelle & McAdam, Jane (Eds.). *The Oxford Handbook of International Refugee Law.* OUP. 2021. 901.

customary law.¹⁴⁴ This principle contains the obligation of a state, the sending state, to refrain from forcibly removing an individual to another State, the receiving state, where they might be ill-treated.¹⁴⁵

4.1.1. International non-refoulement principle

This prohibition is internationally enshrined in Article 33 of the UN 1951 Refugee Convention: “1. *No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.* 2. *The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country”.*

Further, Article 3 of UNCAT states: “*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”.*¹⁴⁶

Many international human rights bodies have confirmed the implicit obligation of non-refoulement, such as the Human Rights Committee,¹⁴⁷ Committee of the Rights of the Child¹⁴⁸ and the Committee on the Elimination of All Forms of Racial Discrimination.¹⁴⁹

¹⁴⁴ *Ibid.* 902-905.; Costello, Cathryn & Foster, Michelle. (2016). Chapter 10: Non-refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test. In M. den Heijer & H. van der Wilt (eds.), *Netherlands Yearbook of International Law 2015*. Netherlands Yearbook of International Law 46. 282.

¹⁴⁵ Hamdan, Eman. (2016). *The Principle of Non-Refoulement under the ECHR and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. Brill Nijhoff. 9.

¹⁴⁶ Article 3 UNCAT.

¹⁴⁷ UN Committee on Human Rights. (27 May 2008). *General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Convention*. 245.

¹⁴⁸ UN Committee on the Rights of the Child. (27 May 2008). *General Comment 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin*. 449.

¹⁴⁹ UN Committee on the Elimination of Racial Discrimination. (23 March 2009). *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding Observations of the CERD—Tunisia*. UN doc CERD/C/TUN/CO/19. §15; Mathew, Penelope. (2020). Non-refoulement. In Costello, Cathryn, Foster, Michelle & McAdam, Jane (Eds.). *The Oxford Handbook of International Refugee Law*. OUP. 2021. 901.

4.1.2. The ECHR and the European Court of Human Rights

Further, the non-refoulement principle is not enshrined in the ECHR, but is developed through the case law of the ECtHR, starting in the *Soering case*.¹⁵⁰ Soering was to be extradited to the USA from the UK.¹⁵¹ He went to ECtHR to challenge his extradition based on Article 3 ECHR, because he would be extradited to the State of Virginia in which prisoners wait for the death penalty on death row. The Court agreed with him: the extradition of a person to another State where he would be subjected or be likely subjected to torture or to inhuman or degrading treatment or punishment may give rise to an issue under Article 3 ECHR and constitute a responsibility of that sending State under the Convention.¹⁵² The sending state has the obligation to protect individuals from these abuses, next to prohibiting them.¹⁵³ Moreover, it must be reasonably proven that if a person would be extradited, he would face a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the receiving country.¹⁵⁴

Two years later, the Court ruled in *Cruz Varaz* that the non-refoulement principle also applies to asylum seekers in expulsion cases.¹⁵⁵ This has since been confirmed in many judgments.¹⁵⁶

This risk of torture or IDTP in the receiving state can appear in many forms, such as death row or the death penalty¹⁵⁷ or an illness for which the receiving states do not have the facilities or resources to treat it¹⁵⁸, but also detention conditions that constitute a violation of Article 3 ECHR.¹⁵⁹

¹⁵⁰ ECtHR. (1989). *Soering v. the United Kingdom*.; Hamdan, Eman. (2016). *The Principle of Non-Refoulement under the ECHR and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. Brill Nijhoff. 17-20.

¹⁵¹ ECtHR. (1989). *Soering v. the United Kingdom*. §15.

¹⁵² *Ibid.* §91.

¹⁵³ *Ibid.* §92.

Long, Debra. (2002). *Guide to Jurisprudence on Torture and Ill-treatment – Article 3 of the European Convention for the Protection of Human Rights*. APT. 20.

¹⁵⁴ ECtHR. (7 July 1989). *Soering v. the United Kingdom*. §90-91.

¹⁵⁵ ECtHR. (20 March 1991). *Cruz Varas and Others v. Sweden*. §69-70.

¹⁵⁶ ECtHR. (20 January 2011). *N.S. v. Denmark*. §69; ECtHR. (21 January 2011). *M.S.S. v. Belgium and Greece*.; ECtHR. (4 November 2014). *Tarakhel v. Switzerland*. §93; ECtHR. (28 February 2008). *Saadi v. Italy (GC)*. §152; Van Dijk, Pieter, Van Hoof, Fried, Van Rijn, Arjen & Zwaak, Leo. (2018). *Theory and Practice of the European Convention on Human Rights*. Intersentia. 12.

¹⁵⁷ ECtHR. (7 July 1989). *Soering v. the United Kingdom*.

¹⁵⁸ ECtHR. (27 May 2008). *N. v. the United Kingdom (GC)*. §42-43; ECtHR. (2 May 1997). *D. v. the United Kingdom*. §51-53; Hamdan, Eman. (2016). *The Principle of Non-Refoulement under the ECHR and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. Brill Nijhoff. 83.

¹⁵⁹ ECtHR. (21 January 2011). *M.S.S. v. Belgium and Greece (GC)*.; ECtHR. (20 February 2020). *M.A. and Others v. Bulgaria*.

The principle has even been extended to “indirect refoulement” in the notorious *M.S.S. Case*.¹⁶⁰ Indirect refoulement means an expulsion to a State from where migrants may face further deportation without a proper assessment of their situation.¹⁶¹ The landmark case *M.S.S. v. Belgium and Greece*¹⁶² concerned an Afghan asylum seeker with hepatitis B who arrived in Greece and travelled on to Belgium where he applied for asylum. According to the Dublin III Regulation of the European Union, an asylum application is desired to be assessed by the country the person entered the EU in.¹⁶³ The man was returned to Greece, where he was detained in a small space with twenty people. He was not allowed out into the open air and was given very little to eat. He was released after a couple of days and then lived in a park with other Afghan asylum seekers, without any support.¹⁶⁴

In 2011, the ECtHR judged the case. The Court relied on NGOs’ and international organisations’ reports to assess the Greek practice of asylum procedures and detention.¹⁶⁵ Concerning the detention conditions, they all mention overcrowding, dirt, lack of space and ventilation, and insufficient hygienic conditions.¹⁶⁶ They also indicate there was a constant concern for the risk of refoulement of asylum seekers by the Greek authorities.¹⁶⁷ The Court found a violation of Article 3 ECHR by Greece because the applicant’s detention conditions and the feeling of inferiority and anxiety constituted degrading treatment.¹⁶⁸ The Court also decided Greece violated Article 3 ECHR because of its inaction by letting him live on the streets for several months after his release from detention.¹⁶⁹

The Court did not stop there. It also found a violation of Article 3 ECHR by Belgium because it sent the applicant back to Greece and thus exposed him to detention and living conditions that are incompatible with Article 3 ECHR.¹⁷⁰ Belgium was condemned for the indirect refoulement of the applicant. The Court established states must “make sure that the intermediary country’s asylum procedure affords sufficient guarantees to avoid an asylum seeker being

¹⁶⁰ ECtHR. (21 January 2011). *M.S.S. v. Belgium and Greece* (GC).

¹⁶¹ Mathew, Penelope. (2020). Non-refoulement. In Costello, Cathryn, Foster, Michelle & McAdam, Jane (Eds.). *The Oxford Handbook of International Refugee Law*. OUP. 2021. 900.

¹⁶² ECtHR. (21 January 2011). *M.S.S. v. Belgium and Greece* (GC).

¹⁶³ *Ibid.*, §70-71.

¹⁶⁴ *Ibid.*, §32.

¹⁶⁵ *Ibid.*, §126.

¹⁶⁶ *Ibid.*, §160-166.

¹⁶⁷ *Ibid.*, §192.

¹⁶⁸ *Ibid.*, §229-234.

¹⁶⁹ *Ibid.*, §263-264.

¹⁷⁰ *Ibid.*, §365-368.

removed, directly or indirectly, to his country of origin without any evaluation of the risks he faces from the standpoint of Article 3 of the Convention”.¹⁷¹

The Court has since found other violations of indirect refoulement¹⁷², for example regarding Uighurs who would be detained in “re-education camps” when returned to China.¹⁷³

The ECtHR also protects refugees against refoulement through interim measures under Rule 39.¹⁷⁴ For example, it has stopped a Frontex coordinated deportation of an Iranian activist from Greece to Turkey with an interim measure.¹⁷⁵

4.1.3. The EU and the CJEU

Article 19 of the EU Charter of Fundamental Rights entails the principle of non-refoulement and prohibition of collective expulsions. Moreover, the non-refoulement principle is also included in several of the European regulations. Article 21 of the Qualification Directive entails the ‘Protection from refoulement’ to respect the prohibition. Further, the Return Directive mentions respect for the principle of non-refoulement in Article 4(4)(b), Article 5 and Article 9(1)(a), stating that while implementing this Directive the Member States need to respect it and take it into account.

The CJEU applied Article 19 of the EU Charter in *Abdida* regarding return procedures, following the ECtHR case law.¹⁷⁶ In this case, a person was to be returned, but he appealed because he was seriously ill and the return would expose him to a serious risk of grave and irreversible deterioration of his health.¹⁷⁷ The Court said no one may be deported to a state where there is a serious risk for him to be subjected to inhuman and degrading treatment and when a seriously sick person would not get the adequate treatment it falls within “exceptional cases” under the non-refoulement principle.¹⁷⁸ The Court explained that those “very exceptional cases” are characterised by the seriousness and irreparable nature of the harm that may be

¹⁷¹ *Ibid.*, §§342 and 360.

¹⁷² ECtHR. (11 December 2018). *M.A. and Others v. Lithuania*,; ECtHR. (23 February 2012). *Hirsi Jamaa and Others v. Italy (GC)*.

¹⁷³ ECtHR. (20 February 2020). *M.A. and Others v. Bulgaria*.

¹⁷⁴ Rule 39 of the Rules of the ECtHR.

¹⁷⁵ Gkliati, Mariana. (2020). *Frontex Return Operations and their Human Rights Implications*. In Soysüren, Ibrahim & Nedelcu, Mihaela (editors) “Deportation of Foreigners: EU instruments, Nation-State practices and social actors’ involvement”, Peter Lang Editions. 11.

¹⁷⁶ CJEU. (18 December 2014). *Centre Public d’action Sociale d’Ottignies-Louvain-La-Neuve v. Moussa Abdida*, C-562/13.; Majcher, Izabella. (2019). *The European Union Returns Directive and Its Compatibility with International Human Rights Law*. Brill Nijhoff. 179-180.

¹⁷⁷ CJEU. (18 December 2014). *Abdida*. C-562-13. §21.

¹⁷⁸ *Ibid.* §47.

caused by the removal of a person to a country in which there is a serious risk that he will be subjected to degrading treatment.¹⁷⁹

In *Tall*, the CJEU extended this case law.¹⁸⁰ An appeal must have a suspensive effect when it is brought against a return decision, otherwise, a serious risk of being subjected to the death penalty, torture, or other inhuman or degrading treatment or punishment may occur.¹⁸¹ The Court confirmed this in *Gnandi* that appeal against return decision on account of non-refoulement should have an automatic suspensive effect.¹⁸²

4.2. Right to asylum

Asylum seekers should be able to apply for asylum or international protection or the refugee status. The EU has recognised the right in Article 18 of the EU Charter of Fundamental Rights. Surprisingly, the ECHR does not include an explicit right to asylum.¹⁸³

4.2.1. International right to asylum

According to Article 14(1) of the UDHR, “everybody has the right to seek and to enjoy asylum from persecution”.¹⁸⁴ Such provision is not included in the Refugee Convention nor the ICCPR.¹⁸⁵ However, the rights set out in the Refugee Convention are generally accepted as a refugee’s right to enjoy asylum.¹⁸⁶

There is a cautious approach regarding this right from several human rights bodies.¹⁸⁷ The UN CAT Committee for example has stated that its “authority does not extend to a determination of whether or not the claimant is entitled to asylum under the national laws of a country”.¹⁸⁸

¹⁷⁹ *Ibid.* §46-50.

¹⁸⁰ CJEU. (December 17 2015). *Abdoulaye Amadou Tall v. Centre Public d’action Sociale de Huy*, C-239/14.

¹⁸¹ *Ibid.* §58.

¹⁸² CJEU. (June 19, 2018). *Sadikou Gnandi v. État Belge*, C-181/16. §54-56.

¹⁸³ Majcher, Izabella. (2019). *The European Union Returns Directive and Its Compatibility with International Human Rights Law*. Brill Nijhoff, 222-223.

¹⁸⁴ Article 14(1) UDHR.

¹⁸⁵ Gil-Bazo, Maria-Teresa & Guild, Elspeth. (2021). The Right to Asylum. In Costello, Cathryn, Foster, Michelle & McAdam, Jane (Eds.). *The Oxford Handbook of International Refugee Law*. OUP. 872.

¹⁸⁶ *Ibid.* 876.

¹⁸⁷ Majcher, Izabella. (2019). *The European Union Returns Directive and Its Compatibility with International Human Rights Law*. Brill Nijhoff. 223.

¹⁸⁸ CAT. (1995). *X v. Spain*. No. 23/1995. §7(3).

The Inter-American Court of Human Rights is the only human rights court that has affirmed that “the right to receive asylum means that the State must grant protection provided that the requirements and conditions for it to be provided are met”.¹⁸⁹

4.2.2. The ECHR and the European Court of Human Rights

The ECtHR has explained that the ECHR does not include a right to asylum, refugee status or residence permit but only the prohibition to expel people to a country where they may face treatment contrary to Article 3.¹⁹⁰ The ECtHR supports and defends the non-refoulement principle as explained above, but this does not imply that the states have a derived obligation to give the person permission to stay in any form. In *Ahmed v. Austria*, the Court did not want to speak on the adequacy of the decision to give or withdraw permission to stay (a refugee status in this case) by the state.¹⁹¹ This exposes a lacune: a migrant cannot be expelled due to the non-refoulement principle, but is also not protected with legal permission to stay.

However, the ECtHR case law is known to be dynamic and there is room for adjustments to their previous case law. Some authors have pointed out that the Court has since steered away from the “no obligation to give permission to stay”, but it has done so under Article 8 ECHR, instead of Article 3 ECHR.¹⁹² In circumstances where a person developed strong social ties to the host state society, which amounts to private life, it is not enough for the state to refrain from deporting the person concerned. The state has at that point positive obligations to let the person exercise the right to private life without interference, otherwise, a violation of Article 8 may occur.¹⁹³ This implies not returning people in some situations,¹⁹⁴ and even regularising a person’s stay.¹⁹⁵

¹⁸⁹ IACtHR. (30 May 2018). *Advisory Opinion OC-25/18 The Institution of Asylum and Its Recognition as a Human Right in the Inter-American System of Protection*. §123.; Gil-Bazo, Maria-Teresa & Guild, Elspeth. (2021). *The Right to Asylum*. In Costello, Cathryn, Foster, Michelle & McAdam, Jane (Eds.). *The Oxford Handbook of International Refugee Law*. OUP. 879.

¹⁹⁰ ECtHR. (24 August 1999). *Alimzhanova and Lisikov v. Sweden*, 38821/97, admissibility decision.; ECtHR. (15 September 2005). *Bonger v. The Netherlands*, 10154/04, admissibility decision.

¹⁹¹ ECtHR. (17 December 1996). *Ahmed v. Austria*. §47.

¹⁹² Majcher, Izabella. (2019). *The European Union Returns Directive and Its Compatibility with International Human Rights Law*. Brill Nijhoff. 131-145.

¹⁹³ *Ibid.*

¹⁹⁴ ECtHR. (21 June 1988). *Berrehab v. the Netherlands*. §29; ECtHR. (11 July 2000). *Ciliz v. the Netherlands*. §71.; ECtHR. (31 January 2006). *Rodrigues Da Silva and Hoogkamer v. the Netherlands*. §44.; ECtHR. (28 June 2011). *Nunez v. Norway*. §84-85.

¹⁹⁵ ECtHR. *Kaftailova v. Latvia*.; ECtHR. *Shevanova v. Latvia*; ECtHR. *Sisojeva and Others v. Latvia*, 16 June 2005.

Recently, the ECtHR has stopped a removal from the UK to Rwanda through an urgent interim measure in the case of *N.S.K. v. the UK*.¹⁹⁶ The Court has indicated to the UK Government that the applicant should not be removed to Rwanda until three weeks after the delivery of the final domestic decision in his ongoing judicial review proceedings.¹⁹⁷ In this manner, the ECtHR is protecting the procedural aspect of the right to asylum.

4.2.3. The EU and the CJEU

The EU formally recognised the right to asylum in Article 18 EU CFR, without providing what the right to asylum implies and covers, and who is entitled to it.¹⁹⁸ This is the reason why the CJEU rarely builds its reasoning on Article 18,¹⁹⁹ but prefers to invoke other articles of the CFR, such as the right to dignity, to integrity, the respect for private and family life, or the best interest of the child or the right to an effective remedy and fair trial.²⁰⁰ For example, in *NS* and *Halaf*, the CJEU was explicitly asked about the right to asylum, but did not pronounce itself on Article 18's content.²⁰¹ However, Advocate General Maduro in his opinion in *Elgafaji* did state that the right to asylum is a binding general principle of EU Law, resulting from the constitutional traditions of its Member States: “[The] fundamental right to asylum . . . follows from the general principles of Community law which, themselves, are the result of constitutional traditions common to the Member States.”²⁰²

¹⁹⁶ ECtHR. (14 June 2022). *N.S.K. v. the UK* no. 28774/22 - Interim measure.

¹⁹⁷ ECtHR. (14 June 2022). *Press Release: The European Court grants urgent interim measure in case concerning asylumseeker's imminent removal from the UK to Rwanda.*

¹⁹⁸ Gil-Bazo, Maria-Teresa. (2008). *The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union's Law*. Refugee Survey Quarterly Volume 27 Issue 3. 34.

¹⁹⁹ Gil-Bazo, Maria-Teresa & Guild, Elspeth. (2021). The Right to Asylum. In Costello, Cathryn, Foster, Michelle & McAdam, Jane (Eds.). *The Oxford Handbook of International Refugee Law*. OUP. 880.; Toggenburg, Gabriel N. (30 April 2021). *The 18th of all EU-r rights: asylum and how the Charter contributes.*

²⁰⁰ Articles 1, 4, 7, 24 and 47 EU Charter of Fundamental Rights.

²⁰¹ CJEU. (2011). *C-411/10 and C-493/10 NS v Secretary of State for the Home Department and ME and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform.*; CJEU. (2012). *C-528/11 Halaf v Darzhavna agentsia za bezhantsite pri Ministerski savet.* §42.; Gil-Bazo, Maria-Teresa & Guild, Elspeth. (2021). The Right to Asylum. In Costello, Cathryn, Foster, Michelle & McAdam, Jane (Eds.). *The Oxford Handbook of International Refugee Law*. OUP. 880.

²⁰² Advocate General Maduro. (2009). *Opinion in C-465/07 Elgafaji and Elgafaji v Staatssecretaris van Justitie.* §21.; Gil-Bazo, Maria-Teresa & Guild, Elspeth. (2021). The Right to Asylum. In Costello, Cathryn, Foster, Michelle & McAdam, Jane (Eds.). *The Oxford Handbook of International Refugee Law*. OUP. 881.

4.3. Human rights of the returning migrants prior to the removal

Some European national authorities fail to keep records up-to-date regarding appeals by people due to being deported, or to offer individuals the opportunity to apply for asylum or their inadequate or flawed decision-making procedures causing the enforcement of removal orders.²⁰³ The Greek Ombudsman has pointed out the failure to take into account individual's new claims for international protection with new evidence before a scheduled return flight and the failure to maintain medical files and carry out 'fitness to travel' checks on migrants.²⁰⁴

Another problem before the flight is the racial profiling, sometimes "for the purpose of attempting to fill charter flights".²⁰⁵ For example, Italian Interior Ministry issued a memo to police forces in 2017 instructing them to target Nigerians in an irregular situation since there was a deportation flight scheduled.²⁰⁶ Another example entails Frontex which has been accused of legitimizing the German practice of "systemic expulsion against the Roma community", while a significant number of expelled asylum seekers' claims had been refused in accelerated procedures.²⁰⁷

Further, the detention conditions after receiving a return decision are often inhuman, nor 'welcoming' for refugees.²⁰⁸

4.4. Human rights of the returning migrants during the return itself

There are numerous accounts of human rights violations during return flights, mostly physical abuse of returnees by escorts.²⁰⁹ There, the right to physical integrity or prohibition of torture and right to life may be at risk.²¹⁰ Reports of disproportionate use of force and degrading and

²⁰³ Statewatch. *Deportations: rights and responsibilities*. Retrieved on 10 July 2022, from <https://www.statewatch.org/deportation-union-rights-accountability-and-the-eu-s-push-to-increase-forced-removals/frontex-the-eu-s-deportation-machine/deportations-rights-and-responsibilities/>.

²⁰⁴ The Greek Ombudsman. (2020). *Return of Third Country Nationals*. 24-25.

²⁰⁵ Statewatch. *Deportations: rights and responsibilities*. Retrieved on 10 July 2022, from <https://www.statewatch.org/deportation-union-rights-accountability-and-the-eu-s-push-to-increase-forced-removals/frontex-the-eu-s-deportation-machine/deportations-rights-and-responsibilities/>.

²⁰⁶ Statewatch. (2 January 2017). *Italy: Police instructed to target Nigerians – There's a charter plane to fill and interviews with Nigerian authorities have already been agreed*.

²⁰⁷ Migreurop. (20 April 2012). *Press release: New Group Deportation Flight Coordinated by FRONTEX as means of Collective Expulsion towards Serbia*.

²⁰⁸ ECRE. (4 June 2021). *Asylum in Greece: a Situation Beyond Judicial Control?*. 3.

²⁰⁹ Statewatch. *Deportations: rights and responsibilities*.

²¹⁰ Gkliati, Mariana. (2020). *Frontex Return Operations and their Human Rights Implications*. In Soysüren, Ibrahim & Nedelcu, Mihaela (editors) "Deportation of Foreigners: EU instruments, Nation-State practices and social actors' involvement", Peter Lang Editions. 12.

inhuman treatment are prevalent.²¹¹ The ECtHR decided on a few cases concerning ill-treatment by officials during return processes.²¹²

Observers of the Committee Against Torture of the Council of Europe reported in 2018 on a Frontex coordinated return flight abuse, excessive and inappropriate use of force which constituted ill-treatment, namely “squeezing a person’s genitals” to ensure his compliance.²¹³ On flight in 2016, the children were separated from the parents and were all ordered not to speak to each other.²¹⁴

This aspect of Frontex coordinated return flights will be further elaborated, since it is important for the remainder of this thesis research.

Return or deportation flights are either operated by national authorities or by Frontex with the agreement of the Member State(s) or on Frontex’ own initiative.²¹⁵ Frontex can also intervene in a return operation of a Member State in order to assist with the implementation of return procedures or when a national operation faces pressure.²¹⁶

A return operation is carried out by forced-return specialists:²¹⁷ forced-return escorts who assist the national escorts,²¹⁸ forced-return monitors who supervise the operation and monitor the compliance with human rights,²¹⁹ and forced-return specialists.²²⁰

Since the 2019 amendment of the Frontex Regulation, each return operation organised or coordinated by Frontex shall be monitored by the forced-return monitor.²²¹ This monitor shall

²¹¹ Statewatch and Migreurop. (2012). *FRONTEX Fundamental Rights Strategy: joint submission to the Ombudsman of the European Union*. Retrieved from. <http://www.statewatch.org/analyses/no-193-eu-ombs-inquiry-frontex-evidence.pdf>. 10.

²¹² ECtHR. (18 September 2017). *Thuo v. Cyprus* no. 3869/07.; ECtHR. (24 June 2021). *Khachaturov v. Armenia* no. 59687/17.

²¹³ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). (2019). *Report to the German Government on the visit to Germany carried out from 13 to 15 August 2018*. CPT/Inf (2019) 14.

²¹⁴ D’Oliveira, Prakken. (2021). *EU agency Frontex charged with illegal pushbacks*. Retrieved from <https://www.prakkendoliveira.nl/en/news/news-2021/eu-agency-frontex-charged-with-illegal-pushbacks>.

²¹⁵ Gkliati, Mariana. (2020). *Frontex Return Operations and their Human Rights Implications*. In Soysüren, Ibrahim & Nedelcu, Mihaela (editors) “Deportation of Foreigners: EU instruments, Nation-State practices and social actors’ involvement”, Peter Lang Editions. 3-5.

²¹⁶ *Ibid.* 4; Article 50(1) and (3) Frontex Regulation 2019/1896.

²¹⁷ Article 52 Frontex Regulation 2019/1896.

²¹⁸ Article 50 Frontex Regulation 2019/1896.

²¹⁹ Article 51 and 110 Frontex Regulation 2019/1896.

²²⁰ Article 53 Frontex Regulation 2019/1896.; Gkliati, Mariana. (2020). *Frontex Return Operations and their Human Rights Implications*. In Soysüren, Ibrahim & Nedelcu, Mihaela (editors) “Deportation of Foreigners: EU instruments, Nation-State practices and social actors’ involvement”, Peter Lang Editions. 3.

²²¹ Article 50(5) Frontex Regulation 2019/1896.

submit a report on each forced-return operation to the executive director, the fundamental rights officer and to the competent national authorities of all the Member States involved in the given operation.²²²

The requirements for an effective return monitoring mechanism are prescribed in EU law, especially in Article 8(6) of the Return Directive: “Member States shall provide for an effective forced-return monitoring system”. This is explained as having sufficient resources and be granted access to all return operations, while their reports should be systematically taken into account by the authorities.²²³

If Frontex has concerns regarding the respect of fundamental rights at any stage of a return operation, it shall communicate them to the participating Member States and to the Commission.²²⁴ Moreover, the individual returnee who is directly affected by the actions or failure to act on the part of staff involved in a return operation and who considers himself or herself to have been the subject of a breach of his or her fundamental rights due to those actions or that failure to act, or any party representing such a person, may submit a complaint to Frontex under the independent complaints mechanism of Article 111 of the Frontex Regulation 2019/1896.

The fundamental rights officer is responsible for handling complaints.²²⁵ When the complaint concerns Frontex staff member(s), the fundamental rights officer will ensure the appropriate follow-up, including disciplinary measures or referral for the initiation of civil or criminal justice proceedings in accordance with the Frontex Regulation and national law.²²⁶ When the complaint concerns a member from a Member State’s team, the Member State will ensure the appropriate follow-up.²²⁷

What this ‘appropriate follow-up’ entails, is not explained in the Regulation. It seems to be fully internal and administrative, which causes a lack of procedural safeguards and transparency.²²⁸

²²² Article 50(5) Frontex Regulation 2019/1896.

²²³ Carrera, Sergio & Stefan, Marco. (2018). Complaint mechanisms in border management and expulsion operations in Europe. CEPS. 38.; Gkliati, Mariana. (2020). *Frontex Return Operations and their Human Rights Implications*. In Soysüren, Ibrahim & Nedelcu, Mihaela (editors) “Deportation of Foreigners: EU instruments, Nation-State practices and social actors’ involvement”, Peter Lang Editions. 13.

²²⁴ Article 50(6) Frontex Regulation 2019/1896.

²²⁵ Article 111(5) Frontex Regulation 2019/1896.

²²⁶ Article 111(6) Frontex Regulation 2019/1896.

²²⁷ Article 111(7) Frontex Regulation 2019/1896.

²²⁸ Gkliati, Mariana. (2020). *Frontex Return Operations and their Human Rights Implications*. In Soysüren, Ibrahim & Nedelcu, Mihaela (editors) “Deportation of Foreigners: EU instruments, Nation-State practices and social actors’ involvement”. Peter Lang Editions. 15.

Moreover, reports show that serious incidents are not being addressed.²²⁹ For example, a family spent more than three years following the internal Frontex complaints procedure after being deported to Turkey in violation of their human rights.²³⁰ Frontex concluded the procedure by saying that human rights violations had indeed taken place, the whole responsibility for the pushback lying with Greece, despite Frontex having coordinated the return operation to Turkey.²³¹ In the earlier mentioned case where a man's genitals were squeezed, the present Frontex monitors did not report the abuse to the agency.²³²

In April 2022, Frontex's former executive director, Fabrice Leggeri, resigned from the position after investigations, allegations and scrutiny over Frontex' role in illegal push backs and other internal misconduct.²³³ One of them was the agency's failure to recruit any of the 40 fundamental rights officers it is obliged to employ to protect the rights of migrants since the 2019 amendment of the Frontex Regulation.²³⁴

Another criticism on this system is the independence of the fundamental rights monitors.²³⁵ These fundamental rights monitors are employed by Frontex, but have to handle their alleged human rights violations.²³⁶ Thus, there is a need for an external independent monitoring body with the relevant expertise and sufficient resources.²³⁷

Further, the existing complaints mechanism should be made accessible and effective in practice, including by providing adequate information to returnees on how to make a complaint, both orally and in writing, in a language they understand.²³⁸

²²⁹ Nielsen, Nikolaj & Fotiadis, Apostolis. (30 September 2019). *'Inhumane' Frontex forced returns going unreported*. EUObserver.

²³⁰ D'Oliveira, Prakken. (2021). *EU agency Frontex charged with illegal pushbacks*. Retrieved from <https://www.prakkendoliveira.nl/en/news/news-2021/eu-agency-frontex-charged-with-illegal-pushbacks>.

²³¹ Statewatch. (25 January 2022). *Frontex: the ongoing failure to implement human rights safeguards*.

²³² Nielsen, Nikolaj & Fotiadis, Apostolis. (30 September 2019). *'Inhumane' Frontex forced returns going unreported*. EUObserver.

²³³ Barigazzi, Jacopo & Lynch, Suzanna. (29 April 2022). *EU border agency chief resigns after critical watchdog probe*. Politico.

²³⁴ Boffey, Daniel & Fotiadis, Apostolis. (19 January 2021). *EU border force head faces calls to quit over allegations he 'misled' MEPs*. The Guardian.

²³⁵ Statewatch. *Deportations: rights and responsibilities*. Retrieved on 10 July 2022, from <https://www.statewatch.org/deportation-union-rights-accountability-and-the-eu-s-push-to-increase-forced-removals/frontex-the-eu-s-deportation-machine/deportations-rights-and-responsibilities/>.

²³⁶ Gkliati, Mariana. (2020). *Frontex Return Operations and their Human Rights Implications*. In Soysüren, Ibrahim & Nedelcu, Mihaela (editors) "Deportation of Foreigners: EU instruments, Nation-State practices and social actors' involvement", Peter Lang Editions. 14.

²³⁷ *Ibid.*

²³⁸ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). (2019). *Report to the German Government on the visit to Germany carried out from 13 to 15 August 2018*. CPT/Inf (2019) 14.

When Frontex fails to take responsibility for its actions or lack thereof during the return flights or prevent it in the future, it can be held responsible before the CJEU.²³⁹ Frontex has been the subject of several cases before the CJEU which all portray the ongoing failure of Frontex to implement human rights safeguards.²⁴⁰

5. Readmission agreements

Under international law, a country has the obligation to readmit its own nationals, which is derived from the right of every state to expel foreigners and the right of everyone to return to one's country.²⁴¹ To make this process more smoothly, the EU makes the agreements with third countries to improve the cooperation between the several administrations when readmitting people who are residing irregularly in the EU.²⁴²

The European Migration Network has defined a readmission agreement as: “*An agreement between the EU and/or a Member State with a third country, on the basis of reciprocity, establishing rapid and effective procedures for the identification and safe and orderly return of persons who do not, or no longer, fulfil the conditions for entry to, presence in, or residence in the territories of the third country or one of the Member States of the European Union, and to facilitate the transit of such persons in a spirit of cooperation*”.²⁴³

Officially, a readmission agreement is based on reciprocity, however, this reciprocity is unbalanced.²⁴⁴ Readmission has asymmetric costs and benefits having economic, social and political implications for countries of origin.²⁴⁵ Additionally, the agreements are unpopular

²³⁹ Article 97 Frontex Regulation 2019/1896.

²⁴⁰ D'Oliveira, Prakken. (2021). *EU agency Frontex charged with illegal pushbacks*. Retrieved from <https://www.prakkendoliveira.nl/en/news/news-2021/eu-agency-frontex-charged-with-illegal-pushbacks>.; Statewatch. (5 January 2022). *EU: Frontex asks court to reject human rights case, seeks legal costs from asylum seekers*.; Statewatch. (25 January 2022). *Frontex: the ongoing failure to implement human rights safeguards*.

²⁴¹ Giuffré, Mariagiulia. (2020). *The readmission of asylum seekers under international law*. Hart Publishing, an imprint of Bloomsbury Publishing Plc. 133-135.

²⁴² *Ibid.* 27.

²⁴³ EMN. *EMN Glossary & Thesaurus*.

²⁴⁴ Cassarino, Jean-Pierre. (2018). Informalizing EU Readmission Policy. In Servent, Ariadna Ripoll & Trauner, Florian. *The Routledge Handbook of Justice and Home Affairs Research*. Routledge. 85.

²⁴⁵ Cassarino, Jean-Pierre & Marin, Luisa. (2022). *The Pact on Migration and Asylum: Turning the European Territory into a Non-territory?* European Journal of Migration and Law 2022 24. 19.

amongst the population of third countries and the readmission is humiliating, stigmatizing, violent and traumatic for the returning migrants.²⁴⁶

Further, as a prerequisite, “a readmission agreement is a precondition for inter-state cooperation but it does not automatically imply a functioning return cooperation.”²⁴⁷ And the fact there is not signed a readmission agreement or arrangement does mean there are no readmission and returns happening.²⁴⁸

As explained in the introduction, there are several different readmission agreements: the formal agreements and the informal arrangements. Initially, the EU only concluded formal readmission agreements, but there has been a trend since 2016 that it concludes informal and legally non-binding readmission arrangements.²⁴⁹

5.1. Formal Readmission Agreements (EURA)

The European Commission is tasked with negotiating EURAs, and improving cooperation with third countries on readmission.²⁵⁰ The EURAs are then adopted by a Council decision, after the European Parliament has given its consent.²⁵¹

The first formal EURA was signed with Hong Kong in 2004, the latest with Belarus in 2020. Following is a list of all formal EURAs (as of June 2022).

²⁴⁶ *Ibid.*; Schuster, L. and Majidi, N. (2015). *Deportation stigma and re-migration*. *Journal of Ethnic and Migration Studies* (4). 641.

²⁴⁷ Trauner, Florian. (2019). Return and readmission policy in Europe: understanding negotiation and implementation dynamics. In Weinar, Agnieszka, Bonjour, Saskia and Zhyznomirska, Lyubov (Eds.). *The Routledge Handbook of the Politics of Migration in Europe*. Routledge. 255.

²⁴⁸ Sundberg Diez, Olivia. (2019). *Diminishing safeguards, increasing returns: non-refoulement gaps in the EU return and readmission system*. European Policy Centre. 4.

²⁴⁹ Slagter, Jonathan. (2019). *An “Informal” Turn in the European Union’s Migrant Returns Policy towards Sub-Saharan Africa*. Migration Policy Institute.

²⁵⁰ Article 79(3) TFEU.

²⁵¹ European Court of Auditors. (2021). *Special Report no. 17/2021 EU readmission cooperation with third countries: relevant actions yielded limited results*. §11.

Formal EURAs	Year
Hong Kong ²⁵²	2004
Macao ²⁵³	2004
Sri Lanka ²⁵⁴	2005
Albania ²⁵⁵	2006
Russia ²⁵⁶	2007
Ukraine ²⁵⁷	2008
North Macedonia ²⁵⁸	2008
Bosnia & Herzegovina ²⁵⁹	2008
Montenegro ²⁶⁰	2008
Serbia ²⁶¹	2008
Moldova ²⁶²	2008
Pakistan ²⁶³	2010
Georgia ²⁶⁴	2011
Armenia ²⁶⁵	2014

²⁵² *Agreement between the European Community and the Government of the Hong Kong Special Administrative Region of the People's Republic of China on the Readmission of Persons Residing without Authorisation.* (24 January 2004). OJ 2004 L 17/25.

²⁵³ *Agreement between the European Community and the Macao Special Administrative Region of the People's Republic of China on the Readmission of Persons Residing without Authorisation.* (30 April 2004). OJ 2004 L 143/99.

²⁵⁴ *Agreement between the European Community and the Democratic Socialist Republic of Sri Lanka on the Readmission of Persons Residing without Authorisation.* (17 May 2005). OJ 2005 L 124/43.

²⁵⁵ *Agreement between the European Community and the Republic of Albania on the Readmission of Persons Residing without Authorisation.* (17 May 2005). OJ 2005 L 124/22.

²⁵⁶ *Agreement between the European Community and the Russian Federation on Readmission.* (17 May 2007). OJ 2007 L 129/40.

²⁵⁷ *Agreement between the European Community and Ukraine on the Readmission of Persons.* (18 December 2007). OJ 2007 L 332/48.

²⁵⁸ *Agreement between the European Community and the Former Yugoslav Republic of Macedonia on the Readmission of Persons Residing without Authorisation.* (19 December 2007). OJ 2007 L 334/7.

²⁵⁹ *Agreement between the European Community and Bosnia and Herzegovina on the Readmission of Persons Residing without Authorisation.* (19 December 2007). OJ 2007 L 334/68.

²⁶⁰ *Agreement between the European Community and the Republic of Montenegro on the Readmission of Persons Residing without Authorisation.* (19 December 2007). OJ 2007 L 334/26.

²⁶¹ *Agreement between the European Community and the Republic of Serbia on the Readmission of Persons Residing without Authorisation.* (19 December 2007). OJ 2007 L 334/46.

²⁶² *Agreement between the European Community and the Republic of Moldova on the Readmission of Persons Residing without Authorisation.* (19 December 2007). OJ 2007 L 334/149.

²⁶³ *Agreement between the European Community and the Islamic Republic of Pakistan on the Readmission of Persons Residing without Authorisation.* (4 November 2010). OJ 2010 L 287/52.

²⁶⁴ *Agreement between the European Union and Georgia on the Readmission of Persons Residing without Authorisation.* (25 February 2011). OJ 2011 L 52/47.

²⁶⁵ *Agreement between the European Union and the Republic of Armenia on the Readmission of Persons Residing without Authorisation.* (31 October 2013). OJ 2013 L 289/13.

Azerbaijan ²⁶⁶	2014
Turkey ²⁶⁷	2014
Cape Verde ²⁶⁸	2014
Belarus ²⁶⁹	2020, but suspended in 2021 by the Belarusian Parliament. ²⁷⁰

All these EURAs have a similar structure. In this thesis, the common elements will be discussed shortly.²⁷¹

The EURAs start with several definitions of concepts used in the document and some fundamental principles. Some examples are nationals of a Member State, third-country nationals, stateless persons, residence permits, and a visa.

Next and mainly, the EURAs entail the reciprocal obligation for both parties to readmit their own nationals, and even non-citizens.²⁷² In practice, this means that the country where the person travels should deliver identity or travel documents, or accept the use of the European Travel Document for Return.²⁷³ This European Travel Document for Return facilitates removals in the context of readmission agreements or other arrangements concluded by the EU or the Member States with third countries and even in the context of return cooperation not covered by formal agreements.²⁷⁴ This obligation to readmit a person falls in the majority of the cases not on a European country, but on a third country.

²⁶⁶ *Agreement between the European Union and the Republic of Azerbaijan on the Readmission of Persons Residing without Authorisation*. (30 April 2014). OJ 2014 L 128/17.

²⁶⁷ *Agreement between the European Union and the Republic of Turkey on the Readmission of Persons Residing without Authorisation*. (25 February 2011). OJ 2011 L 52/47.

²⁶⁸ *Agreement between the European Union and the Republic of Cape Verde on the Readmission of Persons Residing without Authorisation*. (24 October 2013). OJ 2013 L 282/15.

²⁶⁹ *Agreement between the European Union and the Republic of Belarus on the readmission of persons residing without authorisation*. OJ 2020 L 181/3, (9 June, 2020).

²⁷⁰ Independent. (5 October 2021). *Belarus Parliament votes to suspend readmission of migrants*.

²⁷¹ For an extended and detailed comparison of the EURAs (except the Belarus EURA), consult: Carrera, Sergio. (2016). *Implementation of EU Readmission Agreements*. SpringerBriefs in Law. Annex.

²⁷² Majcher, Izabella. (2019). *The European Union Returns Directive and Its Compatibility with International Human Rights Law*. Brill Nijhoff. 25. Footnote 92.

²⁷³ Regulation 2016/1953 of the European Parliament and of the Council of 26 October 2016 on the Establishment of a European Travel Document for the Return of Illegally Staying Third-Country Nationals, and Repealing the Council Recommendation. (30 November 1994).

²⁷⁴ Preamble §6 and 8 of Regulation 2016/1953.

Often the third countries try to delay or avoid returns by not accepting EU-issued travel documents for the purpose of return,²⁷⁵ but in the readmission agreements, it will state that the third country needs to accept these documents. Moreover, there can be some practical impediments. Third countries often refrain from cooperation on a return request due to missing documentation or an uncertain/contested identity of the irregular migrant.”²⁷⁶ This entails also another benefit of the EURAs, specifically for voluntarily returning migrants, that the acceptance of their documents is made more smoothly.²⁷⁷

Secondly, a “third country clause” is included in the EURAs.²⁷⁸ This clause makes the parties obligated to not only readmit their own nationals as their country of origin, but also other third country nationals, who stayed in or transited through the country.²⁷⁹ Exactly this clause is an obstacle for the third countries to agree to a formal EURA, since this makes the burden bigger for them than for EU countries.²⁸⁰ That is the reason why third countries have been reluctant to conclude formal EURAs. The Commission tries to convince them with visa facilitation schemes, trade concessions, financial assistance, technical cooperation, and broader incentives regarding matters beyond migration.²⁸¹ Even with all these incentives, the third countries are not coming around, hence why the EU has been focusing on more informal cooperation and readmission arrangements recently.²⁸²

Thirdly, the procedures of the readmissions are discussed. These include some time limits, information that must be included in the readmission application, and the evidence needed to prove nationality. Also, the transfer modalities and modes of transportation of the readmission are discussed, even the consequence of an error made, which is taking the person back to the requesting state. For example, in the Belarusian EURA, this can be found in Articles 7 to 13.

²⁷⁵ Interview #4, June 2022.; Trauner, Florian. (2019). Return and readmission policy in Europe: understanding negotiation and implementation dynamics. In Weinar, Agnieszka, Bonjour, Saskia and Zhyznomirska, Lyubov (Eds.). *The Routledge Handbook of the Politics of Migration in Europe*. Routledge. 255.

²⁷⁶ Trauner, Florian. (2019). Return and readmission policy in Europe: understanding negotiation and implementation dynamics. In Weinar, Agnieszka, Bonjour, Saskia and Zhyznomirska, Lyubov (Eds.). *The Routledge Handbook of the Politics of Migration in Europe*. Routledge. 255.

²⁷⁷ Interview #5, June 2022.

²⁷⁸ European Court of Auditors. (2021). *Special Report no. 17/2021 EU readmission cooperation with third countries: relevant actions yielded limited results*. p22.

²⁷⁹ Majcher, Izabella. (2019). *The European Union Returns Directive and Its Compatibility with International Human Rights Law*. Brill Nijhoff. 25.

²⁸⁰ Dedja, Sokol. (2012). *Human Rights in the EU Return Policy: The Case of the EU-Albania Relations*. European Journal of Migration and Law 14, no. 1. 95–114.

²⁸¹ Majcher, Izabella. (2019). *The European Union Returns Directive and Its Compatibility with International Human Rights Law*. Brill Nijhoff. 26.

²⁸² *Ibid.* 26.

Fourthly, for each concluded EURA a Joint Readmission Committee (JRC) is appointed.²⁸³ The JRC is tasked with monitoring the application of the EURA, making decisions on implementing arrangements necessary for the uniform application of the EURA, having regular exchanges of information and recommending amendments to the EURA.²⁸⁴ The decisions of the JRC are confidential but binding on the parties, except for the EURA with Pakistan.²⁸⁵ Each JRC has its own rules of procedures and is composed of representatives of each party, such as high-level civil servants, not politicians.²⁸⁶ For example, on the side of the third country, the Director general from the Ministry of Interior and servant of the Ministry of Foreign Affairs are included because the Ministry of Interior needs to confirm the identity of a returning migrant and the Foreign Affairs Ministry needs to issue the correct travel documents for the migrants. On the EU side, representatives of the European Commission and interested Member States are included and experts on the matter from Frontex, interested Member States and of the third country.²⁸⁷

Next, in the annexes, EURAs include a Common List of documents the presentation of which is considered as proof of nationality. Although they are ‘only’ included in an annex, the process of determining the person’s identity has become a very controversial aspect in the implementation of EURAs, because third countries try to avoid returns by delaying the identification processes of migrants with a return decision or not identifying a person as their national, which makes return of the person not possible under the readmission agreements.²⁸⁸

These are all the common elements. There are however also some more exceptional elements that cannot be found in all or most EURAs. A non-affected clause is only included in the EURA with Turkey and with Belarus.²⁸⁹ This clause requires the agreements will be without “prejudice to the rights, obligations and responsibilities of the [parties] arising from international law including from international conventions to which they are a party, in particular from” international human rights treaties on asylum, extradition and transit and multilateral

²⁸³ Cassarino, Jean-Pierre. (2018). “Informalizing EU Readmission Policy” In A. Ripoll Servent and F. Trauner (eds.), *The Routledge Handbook of Justice and Home Affairs Research*. 84.

²⁸⁴ Article 19 EURA Belarus.; Cassarino, Jean-Pierre. (2018). “Informalizing EU Readmission Policy” In A. Ripoll Servent and F. Trauner (eds.), *The Routledge Handbook of Justice and Home Affairs Research*. 84.

²⁸⁵ Carrera, Sergio. (2016). *Implementation of EU Readmission Agreements*. SpringerBriefs in Law. 34.

²⁸⁶ Cassarino, Jean-Pierre. (2018). “Informalizing EU Readmission Policy” In A. Ripoll Servent and F. Trauner (eds.), *The Routledge Handbook of Justice and Home Affairs Research*. 84.

²⁸⁷ European Commission. (2011). *Communication on the Evaluation of EU Readmission Agreements*. COM (2011) 76. 9-10.

²⁸⁸ Carrera, Sergio. (2016). *Implementation of EU Readmission Agreements*. SpringerBriefs in Law. 2-3.

²⁸⁹ Article 18 EURA Belarus and Article 18 EURA Turkey.

international conventions and agreements on the readmission of foreign nationals. In short, the clause requires the parties to comply with international human rights treaties.²⁹⁰ Furthermore, a data protection section is added to the most recent EURA with Belarus (2020), referring to the EU General Data Protection Regulation.²⁹¹ Lastly, some readmission agreements are in force immediately for the third country's own nationals, but are only later in force for other nationals and stateless persons. For example, the 2020 Belarus EURA (now suspended by the Belarusian Parliament) was only in force after a two-year transitional period for other than Belarusian nationals and stateless persons.²⁹²

To conclude, some criticism on the formal EURA should be included. The effectiveness of readmission agreements in general is questioned: does the amount of returns increase after the conclusion of a readmission agreement? According to Stutz and Trauner, formal and informal readmission agreements and arrangements have less impact than widely assumed.²⁹³ They often lead only to “temporary increases in the return rates of third countries – if at all”.²⁹⁴

Secondly, the biggest flaw of the EURAs is according to Sergio Carrera that “little is known about the operability, uses and effects on the ground” of EURAs.²⁹⁵ Cassarino adds that monitoring mechanisms of the EURAs would be valuable to understand how the EURAs are implemented, especially given the European Parliaments legislative and budgetary functions, however these monitoring mechanisms are not fully established yet.²⁹⁶ Although, the Commission is now providing annual updates on the EU readmission cooperation and implementation with third countries.²⁹⁷ Additionally, the earlier mentioned proposals by MEPs

²⁹⁰ Giuffr , Mariagiulia. (2020). *The readmission of asylum seekers under international law*. Hart Publishing, an imprint of Bloomsbury Publishing Plc. 156.

²⁹¹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). OJ EU L 119. 4.5.2016.

²⁹² Johansson, Ylva. (2020). *Statement on the occasion of the European Union and Belarus signing a visa facilitation agreement and a readmission agreement*. Retrieved from https://ec.europa.eu/commission/commissioners/2019-2024/johansson/announcements/statement-ylva-johansson-occasion-european-union-and-belarus-signing-visa-facilitation-agreement-and_en.

²⁹³ Stutz, Philipp & Trauner, Florian. (2021). *The EU's 'return rate' with third countries: Why EU readmission agreements do not make much difference*. International Migration 2021:00.

²⁹⁴ *Ibid.*

²⁹⁵ Carrera, Sergio. (2016). *Implementation of EU Readmission Agreements*. SpringerBriefs in Law. 2.

²⁹⁶ Cassarino, Jean-Pierre. (2018). “Informalizing EU Readmission Policy” In A. Ripoll Servent and F. Trauner (eds.), *The Routledge Handbook of Justice and Home Affairs Research*. 85.

²⁹⁷ European Commission, DG Migration and Home Affairs. (28 January 2022). *Letter to Mr. Lopez Aguilar with the subject: EU readmission cooperation with partner countries – state of play (Ares(2022)656813)*.

regarding the Recast Return Directive could be helpful, namely their proposal to add post-return monitoring after the returns of migrants to third countries.²⁹⁸

Lastly, the EU considers EURAs ‘only’ as technical instruments bringing procedural improvements to cooperation between administrations.²⁹⁹ Thus, the situation of the returning migrants has not been regulated in the EURAs, leaving those issues to relevant international, European and national applicable law.³⁰⁰

5.2. Informal or legally non-binding Readmission Arrangements

Readmission arrangements are forms of cooperation at the technical and operative levels that seek to produce “effective” outcomes.³⁰¹ As mentioned above, the EU has recently been focusing on more informal cooperation and legally non-binding readmission arrangements.³⁰²

This trend has multiple explanations and reasons. Third countries are reluctant to conclude formal EURAs, since they entail more obligations for them than for the EU and the countries are afraid of national public hostility.³⁰³ Through informal options, they increase the flexibility of the content and obligations.³⁰⁴ This creates as a tailor-made approach for each country, leaving some contentious issues outside of the negotiations, such as the above mentioned third country national clause.³⁰⁵ Moreover, sometimes the conclusion of an EURA does not seem feasible in a short period, thus an informal readmission arrangement is negotiated.³⁰⁶

²⁹⁸ Interviews #6 and #7, June 2022.

²⁹⁹ European Commission. (2011). *Communication on the Evaluation of EU Readmission Agreements*. COM (2011) 76. 10.

³⁰⁰ See Chapter 7.

³⁰¹ Statewatch. (9 March 2022). *EU: Deportations: overview of readmission cooperation in key countries*. Retrieved from <https://www.statewatch.org/news/2022/march/eu-deportations-overview-of-readmission-cooperation-in-key-countries/>.

³⁰² Majcher, Izabella. (2019). *The European Union Returns Directive and Its Compatibility with International Human Rights Law*. Brill Nijhoff. 26.; Slagter, Jonathan. (2019). *An “Informal” Turn in the European Union’s Migrant Returns Policy towards Sub-Saharan Africa*. Migration Policy Institute.

³⁰³ European Court of Auditors. (2021). *Special Report no. 17/2021 EU readmission cooperation with third countries: relevant actions yielded limited results*. §9.

³⁰⁴ Majcher, Izabella. (2019). *The European Union Returns Directive and Its Compatibility with International Human Rights Law*. Brill Nijhoff. 26.

³⁰⁵ European Court of Auditors. (2021). *Special Report no. 17/2021 EU readmission cooperation with third countries: relevant actions yielded limited results*. §37.

³⁰⁶ *Ibid.* §25.

Secondly, in this manner, they avoid parliamentary oversight,³⁰⁷ and proper democratic accountability and judicial oversight.³⁰⁸ The European Commission negotiates the informal arrangements, which are confirmed by the Council, but contrary to the EURAs, this is without consent of the European Parliament.³⁰⁹

Thirdly, Carrera concludes - through interviews with EU officials - that the EU's main purpose behind these informal methods is finding the "soft spot" in the third country concerned, "i.e. the authority or actor which may be willing to cooperate in identity determination and/or issuing travel documents".³¹⁰ This soft spot could be that the third country authority does not want to openly and publicly cooperate with the EU on readmission, since it fears to lose popularity among its nationals, both still in the country or residing in the EU. Another possibility is that the third country authorities want to avoid domestic debates if an agreement is public and formal.³¹¹

The EU is now supporting this trend of informal readmission arrangements, because this way they hope to increase the return rates.³¹² According to the EU itself, it only signed legally non-binding readmission arrangements with Afghanistan, Guinea, Bangladesh, Ethiopia, The Gambia and Ivory Coast.³¹³ This is, however, not a complete list. Due to the inventory of Jean-Pierre Cassarino,³¹⁴ also the following countries have concluded non-standard agreements linked to readmission. Some of these non-binding documents were signed, and after, the same country signed a formal EURA, while other countries only have an informal arrangement.

There are many different versions of an informal readmission arrangement, such as Mobility Partnership (MP); Common Agenda on Migration and Mobility (CAMM); Joint Way Forward (JWF); Joint Declaration on Migration Cooperation (JDMC); Joint Statement (JS); Standard

³⁰⁷ Cassarino, Jean-Pierre & Giuffré, Mariagiulia. (2017). *Finding Its Place In Africa: Why Has the EU Opted for Flexible Arrangements on Readmission?*. FMU Policy Brief No. 01/2017. University of Nottingham, Human Rights Law Centre.

³⁰⁸ Carrera, Sergio. (2016). *Implementation of EU Readmission Agreements*. SpringerBriefs in Law. 45.; Cassarino, Jean-Pierre. (2018). Informalizing EU Readmission Policy. In Servent, Ariadna Ripoll & Trauner, Florian. *The Routledge Handbook of Justice and Home Affairs Research*. Routledge. 94.

³⁰⁹ European Court of Auditors. (2021). *Special Report no. 17/2021 EU readmission cooperation with third countries: relevant actions yielded limited results*. §12.

³¹⁰ Carrera, Sergio. (2016). *Implementation of EU Readmission Agreements*. SpringerBriefs in Law. 45-46.

³¹¹ *Ibid.* 45-46.

³¹² *Ibid.* 45.

³¹³ European Commission Migration and Home Affairs. *Return and readmission*. Retrieved on March 1, 2022 from https://ec.europa.eu/home-affairs/policies/migration-and-asylum/irregular-migration-and-return/return-and-readmission_en.

³¹⁴ Cassarino Jean-Pierre. *Inventory of the bilateral agreements linked to readmission*. Retrieved from <https://www.jeanpierrecassarino.com/datasets/ra/>.

Operating Procedure for the identification and return of persons without an authorization to stay (SOP); Good Practices for the efficient operation of the return procedure (GP); Admission Procedures for the return of foreign nationals from European Union Member States (AP); and Joint Migration Declaration (JMD). The following table is entirely based on the inventory of Jean-Pierre Cassarino.³¹⁵ (ø) indicates the document has not been leaked online (thus far). The confidentiality of most informal arrangements makes it a bit more difficult to analyse them because it must be fairly certain the leaked version is legitimate.

Informal Readmission arrangements:	Mobility Partnership
Cape Verde	5 June 2008
Moldova ³¹⁶	5 June 2008
Georgia ³¹⁷	30 November 2009
Armenia ³¹⁸	27 October 2011
Morocco ³¹⁹	7 June 2013
Azerbaijan ³²⁰	5 December 2013
Tunisia	3 March 2014
Jordan ³²¹	9 October 2014
Belarus ³²²	13 October 2016

³¹⁵ *Ibid.*

³¹⁶ Council of the EU. (2008). *Joint Declaration on a Mobility Partnerships between the European Union and the Republic of Moldova*. Retrieved from https://ec.europa.eu/home-affairs/system/files/2020-09/mobility_partnership_republic_of_moldova_en.pdf .

³¹⁷ Council of EU. 2009. *Joint Declaration on a Mobility Partnerships between the European Union and Georgia*. Retrieved from https://ec.europa.eu/home-affairs/system/files/2020-09/mobility_partnership_gerogia_en.pdf .

³¹⁸ Council of EU. 2011. *Joint Declaration on a Mobility Partnerships between the European Union and Armenia*. Retrieved from https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/125698.pdf .

³¹⁹ Council of EU. 2013. *Joint declaration establishing a Mobility Partnership between the Kingdom of Morocco and the European Union*. Retrieved from https://ec.europa.eu/home-affairs/system/files/2020-09/20130607_declaration_conjointe-maroc_eu_version_3_6_13_en.pdf .

³²⁰ Council of EU. 2013. *Joint Declaration on a Mobility Partnership between the Republic of Azerbaijan and the European Union and its Participating Member States*. Retrieved from https://ec.europa.eu/home-affairs/system/files/2016-12/mobility_partnership_of_azerbaijan_en.pdf .

³²¹ Council of EU. 2014. *Joint declaration establishing a Mobility Partnership between the Hashemite Kingdom of Jordan and the European Union*. Retrieved from https://ec.europa.eu/home-affairs/system/files/2016-12/20141009_joint_declaration_establishing_the_eu-jordan_mobility_partnership_en.pdf .

³²² Council of the European Union. (2016). *Joint Declaration on a Mobility Partnership between the Republic of Belarus and the European Union and its Member States*. Retrieved from https://ec.europa.eu/home-affairs/system/files/2017-02/mobility_partnership_of_belarus_en.pdf .

	Common Agenda on Migration and Mobility
Nigeria ³²³	12 March 2015
Ethiopia ³²⁴	11 November 2015
India ³²⁵	29 March 2016
	Joint Way Forward
Afghanistan ³²⁶	2 October 2016
	Joint Declaration on Migration Cooperation
Afghanistan ³²⁷	26 April 2021
	Joint Statement
Turkey ³²⁸	18 March 2016
	Standard Operating Procedure for the identification and return of persons without an authorization to stay
Bangladesh ³²⁹	25 September 2017
	Admission Procedures for the return of foreign nationals from European Union Member States
Ethiopia ³³⁰	5 February 2018

³²³ Joint Declaration on a Common Agenda on Migration and Mobility between the Federal Republic of Nigeria and the European Union and its Member States. (2015). Retrieved from https://download.taz.de/migcontrol/eu/EU_Nigeria_Joint%20Declaration%20on%20Migration_2015.03.12_eng.pdf

³²⁴ EU. (2015). *Joint Declaration on a Common Agenda on Migration and Mobility between the Federal Democratic Republic of Ethiopia and the European Union and its Member States*. https://download.taz.de/migcontrol/eu/EU_Ethiopia_Mobility%20Partnership_2015.11.11_eng.pdf .

³²⁵ Council of EU. 2016. *Joint Declaration on a Common Agenda on Migration and Mobility between India and the European Union and its Member States*. Retrieved from <https://www.consilium.europa.eu/media/23674/20160329-joint-declaration-camm.pdf> .

³²⁶ EU. (2016). *Joint Way Forward on migration issues between Afghanistan and the EU*. https://eeas.europa.eu/sites/default/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf .

³²⁷ Council of the European Union. (2021). *Joint Declaration on Migration Cooperation between Afghanistan and the EU*. <https://www.statewatch.org/media/1801/eu-council-joint-declaration-afghanistan-5223-21-add1.pdf>

³²⁸ European Council (2016). *EU-Turkey statement*. Retrieved from <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/> .

³²⁹ European Commission. 2017. *EU-Bangladesh Standard Operating Procedures for the Identification and Return of Persons without an Authorisation to Stay*. C(2017)6137. Retrieved from [https://ec.europa.eu/transparency/documents-register/detail?ref=C\(2017\)6137&lang=en](https://ec.europa.eu/transparency/documents-register/detail?ref=C(2017)6137&lang=en) .

³³⁰ Council of EU. 2017. *Draft EU-Ethiopia Admission Procedures for the return of foreign nationals from European Union Member States*. Retrieved from

	Good Practices for the efficient operation of the return procedure
Guinea (ø)	24 July 2017
Cote d' Ivoire (ø)	1 October 2018
The Gambia (ø)	16 November 2018
	Joint Migration Declaration
Ghana (ø)	16 April 2016
Niger (ø)	3 May 2016
Mali (ø)	11 December 2016

The limit of this thesis does not allow for an in-depth comparison between the different informal arrangements, but in general, there are some similarities. It is a non-binding promise of cooperation between the EU and the third state regarding migration challenges.³³¹ They determine and define some priority areas in which they want to develop further their dialogue and cooperation. Most of the informal arrangements mention these areas: migration management, mobility and legal migration, facilitating return process, information and awareness-raising, return programmes, reintegration assistance, fight against smuggling and trafficking in human beings, transportation, establishing nationality, travel document validity, issuance of laissez-passer, border management, etc.

The Common Agendas on Migration and Mobility mention the principle of voluntary participation of the EU Member States.³³²

The Mobility Partnerships mention explicitly that they are not designed to create legal rights or obligations under international law.³³³ This is not the case in the other informal arrangements.

<https://www.statewatch.org/media/documents/news/2018/jan/eu-council-regugees-return-ethiopians-15762-17.pdf>.

³³¹ Sundberg Diez, Olivia. (2019). *Diminishing safeguards, increasing returns: non-refoulement gaps in the EU return and readmission system*. European Policy Centre. 10.

³³² CAMM Ethiopia, CAMM Nigeria,

³³³ MP Moldova, §17.; MP Belarus, §44.; MP Georgia, §23.; MP Morocco, §46.

Further, most of the informal arrangements mention how many times a year or every few years they want to meet to discuss the arrangement and its implementation³³⁴ and whether or not a working group will be established to facilitate the application of the arrangement.³³⁵

Moreover, there are rarely any non-affectation clauses (as some formal EURAs have) or any references to international protection of refugees and human rights.³³⁶ Only the Joint Way Forward with Afghanistan has references equivalent to those in the EURAs.³³⁷

Next, there is an academic discussion whether or not these arrangements constitute international agreements.³³⁸ Informal agreements are international arrangements, which some consider to be outside the realm of law.³³⁹ Some argue this entails a subtle denial and weakening of the enforceability of universal norms and standards on human rights.³⁴⁰

Concluding with some criticism, the implementation, the control and the impact of informal readmission arrangements are harder - to impossible - to assess.³⁴¹

Lastly, the trend of informal and legally non-binding readmission arrangements creates more legal uncertainty.³⁴² Moreover, it increases the inconsistencies and can undermine the credibility of the EU's readmission policy, which is now not common and harmonized as the EU claims to aim building.³⁴³

³³⁴ MP Belarus, §39.; MP Moldova, §14.; MP Georgia, §20.

³³⁵ JWF Afghanistan 2016, Part VI.; EU-Bangladesh Standard Operating Procedure for the identification and return of persons without an authorization to stay.

³³⁶ European Court of Auditors. (2021). *Special Report no. 17/2021 EU readmission cooperation with third countries: relevant actions yielded limited results.* §37.

³³⁷ *Ibid.* §37.

³³⁸ Cassarino, Jean-Pierre. (2018). Informalizing EU Readmission Policy. In Servent, Ariadna Ripoll & Trauner, Florian. *The Routledge Handbook of Justice and Home Affairs Research.* Routledge. 94.

³³⁹ Giuffré, Mariagiulia. (2020). *The readmission of asylum seekers under international law.* Hart Publishing, an imprint of Bloomsbury Publishing Plc. 9.

³⁴⁰ Cassarino, Jean-Pierre. (2018). Informalizing EU Readmission Policy. In Servent, Ariadna Ripoll & Trauner, Florian. *The Routledge Handbook of Justice and Home Affairs Research.* Routledge. 95.

³⁴¹ European Court of Auditors. (2021). *Special Report no. 17/2021 EU readmission cooperation with third countries: relevant actions yielded limited results.* p38-40.

³⁴² Cassarino, Jean-Pierre. (2018). Informalizing EU Readmission Policy. In Servent, Ariadna Ripoll & Trauner, Florian. *The Routledge Handbook of Justice and Home Affairs Research.* Routledge. 94.; Sundberg Diez, Olivia. (2019). *Diminishing safeguards, increasing returns: non-refoulement gaps in the EU return and readmission system.* European Policy Centre. 10.

³⁴³ Carrera, Sergio. (2016). *Implementation of EU Readmission Agreements.* SpringerBriefs in Law. 46.

6. The Gambia case study: protection of human rights through informal readmission arrangement from the perspective of irregular migrants

As mentioned before, The Gambia was chosen as a case study for this thesis because between 2014 and 2019 it was in the top ten countries of arriving migrants in the EU, while being the smallest country on the African mainland with a population of 2,6 million.³⁴⁴ This was caused by the unstable and problematic situation in The Gambia at the time.

6.1. Background information on The Gambia's political history and situation

In 1965, The Gambia gained independence from the United Kingdom.³⁴⁵ Since, they have had three governments. The first government reigned from 1965 until 1994. In 1994, the army conducted a coup. In the following years, they killed suspected opponents within the army and even the civilian Finance Minister.³⁴⁶ Yahya Jammeh took control over the reigning group in 1996 and transformed it into a political party, of which he was the leader. His party won the (criticised) elections and he became the president and dictator of The Gambia for 22 years.³⁴⁷ During his dictatorship, murders, disappearances, torture, rapes, detentions, corruption and gross maladministration were prevalent as he ruled with ruthless repression of dissent and criticism.³⁴⁸ The Gambian Truth, Reconciliation and Reparations Commission concluded in 2021 that former officials – including Jammeh – should be prosecuted for their worst human rights abuses committed during Jammeh's presidency.³⁴⁹

In December 2016, the Gambians elected the opposition party. Jammeh first accepted and then rejected these election results, which caused a political and national crisis.³⁵⁰ Through international support and pressure (for example by the Economic Community of West African States), the democratically elected president, Adama Barrow, could take office in January

³⁴⁴ UNFPA. (2022). *World Population Dashboard: Gambia*. Consulted on 26 June 2022. Retrieved from <https://www.unfpa.org/data/world-population/GM>.

³⁴⁵ Zanker, Franzisca & Altrogge, Judith. (2019). *The political economy of migration governance in The Gambia*. Arnold Bergstraeser Institut 11.; Bekele, Daniel, Dufka, Corinna and Thompson, Felicity. (2015). *State of Fear: Arbitrary Arrests, Torture, and Killings*. Human Rights Watch. 10.

³⁴⁶ Faal, Gibril. (2020). *Civil Society Input to EU-Africa Cooperation on Migration: The Case of The Gambia*. ECRE. 3.

³⁴⁷ Bekele, Daniel, Dufka, Corinna & Thompson, Felicity. (2015). *State of Fear: Arbitrary Arrests, Torture, and Killings*. Human Rights Watch. 11.

³⁴⁸ Bekele, Daniel, Dufka, Corinna & Thompson, Felicity. (2015). *State of Fear: Arbitrary Arrests, Torture, and Killings*. Human Rights Watch. 4.; Faal, Gibril. (2020). *Civil Society Input to EU-Africa Cooperation on Migration: The Case of The Gambia*. ECRE. 3.

³⁴⁹ Human Rights Watch. (25 November 2021). *The Gambia: Truth Commission Calls for Prosecuting Ex-Officials*.

³⁵⁰ Faal, Gibril. (2020). *Civil Society Input to EU-Africa Cooperation on Migration: The Case of The Gambia*. ECRE. 3.

2017.³⁵¹ Initially, he only intended to have a three year reign, but he decided to run again as president (which was heavily contested)³⁵² and he got re-elected in December 2021.³⁵³

During Jammeh's reign, thousands of Gambians fled to the EU, mostly through the Sahara and the Mediterranean to Italy and Spain, which they call the "back way" in The Gambia.³⁵⁴ In total, an estimated between 118.000 and 140.000 Gambians fled abroad.³⁵⁵ Between 65.000 and 70.000 of them are in the EU, while thousands died in the Mediterranean or in the Sahara.³⁵⁶ Gambian migrants opt for Europe as a destination "more often than migrants from other West African countries".³⁵⁷ Currently, the USA, Italy, the United Kingdom, Spain and Germany house the most Gambian migrants.³⁵⁸ Most Gambian migrants with irregular status who arrived in Spain were placed on regularisation and settlement schemes. Therefore, there are not many Gambian refugees and asylum seekers in Spain and even fewer Gambians that need to be returned. Another big amount of fleeing Gambians arrived in Italy and travelled to Germany. Germany send many back to Italy and only granted a small percentage of refugee status. In Italy, more Gambians were granted refugee status (than in Germany), but still many were eventually rejected protection and were ordered to go back to The Gambia, especially after the end of Jammeh's dictatorship.³⁵⁹ In 2020, 5000 Gambians needed to be returned from Germany to The Gambia.³⁶⁰ According to the Deutsche Welle, there were almost 7000 Gambians without

³⁵¹ Deutsche Welle. (2017). *Gambia's new President Barrow sworn in, for second time.*; Cham, Omar. N. & Adam, Ilke. (2021). *The politicization and framing of migration in West Africa: transition to democracy as a game changer?*. Territory, Politics, Governance. 6.

³⁵² Zanker, Franzisca & Altrogge, Judith. (2019). *The political economy of migration governance in The Gambia*. Arnold Bergstraeser Institut. 11.

³⁵³ BBC News. (2021). *Gambia: elections: Adama Barrow declared presidential election winner*.

³⁵⁴ Faal, Gibril. (2020). *Civil Society Input to EU-Africa Cooperation on Migration: The Case of The Gambia*. ECRE. 2-3.

³⁵⁵ IOM. (2022). *The Gambia*. Retrieved on 26 June 2022 from <https://gambia.iom.int/>; Kebbeh, C. Omar. (2019). *A Statistical Portrait of Gambians Living Abroad*.

³⁵⁶ Faal, Gibril. (2020). *Civil Society Input to EU-Africa Cooperation on Migration: The Case of The Gambia*. ECRE. 2.; European Stability Initiative. (17 February 2020). *The Gambia Plan – Beyond empty words and threats: how a breakthrough is possible*.

³⁵⁷ Zanker, Franzisca & Altrogge, Judith. (2017). *The politics of migration governance in The Gambia*. Arnold Bergstraeser Institut. 3.; Cham, Omar. N. & Adam, Ilke. (2021). *The politicization and framing of migration in West Africa: transition to democracy as a game changer?*. Territory, Politics, Governance. 5.

³⁵⁸ Faal, Gibril. (2020). *Overview of the Gambian Diaspora Population*. Migration and Sustainable Development in The Gambia.

³⁵⁹ Faal, Gibril. (2020). *Civil Society Input to EU-Africa Cooperation on Migration: The Case of The Gambia*. ECRE. 7.

³⁶⁰ *Ibid.* 8.

residence rights in Germany in 2021.³⁶¹ This makes returning Gambians a hot topic in the German politics, since some Gambians appear in the media for their criminal activities.³⁶²

On all these Gambians abroad weighs a heavy burden. Almost every Gambian knows a person living abroad,³⁶³ and they depend on the remittances Gambian nationals living abroad send back to them. These remittances are used to feed families, start businesses and support community-based initiatives.³⁶⁴ The overseas remittances account for over 20% of the country's GDP in 2020 according to IOM,³⁶⁵ while the World Bank estimated it around 22,3% for 2020.³⁶⁶ For 2021, the deputy permanent secretary at the Office of the Gambian President, Mr. Saikou J.K. Trawally, stated the percentage was at around 50%.³⁶⁷

With Jammeh as a president, the international relations deteriorated: his government unilaterally ended dialogue with the EU in November 2014 (which lasted a year).³⁶⁸ The current president Barrow recovered the relations and cooperation with international organisations, such as the EU.³⁶⁹ The EU provided hundreds of millions of euros to The Gambia during and even more after the dictatorship, making it the largest donor and development partner of The Gambia.³⁷⁰ Additionally, the EU funded millions of euros in Gambian development projects to address the root causes of destabilisation, forced displacement and irregular migration.³⁷¹ Some

³⁶¹ Takambou, Mimi Mefo. (5 September 2021). *EU escalates row with Gambia over expelled migrants*. Deutsche Welle.

³⁶² European Stability Initiative. (17 February 2020). *The Gambia Plan – Beyond empty words and threats: how a breakthrough is possible*.

³⁶³ Altrogge, Judith & Zanker, Franzisca. (18 November 2019). *Why return from Europe is causing problems for The Gambia*. The Conversation.

³⁶⁴ Cham, Omar. N. & Adam, Ilke. (2021). *The politicization and framing of migration in West Africa: transition to democracy as a game changer?*. Territory, Politics, Governance. 5.

³⁶⁵ IOM. (2022). *The Gambia*. Retrieved on 26 June 2022 from <https://gambia.iom.int/>.

³⁶⁶ The World Bank. *Personal remittances received (% of GDP) for The Gambia*. Retrieved on 26 June 2022 from <https://data.worldbank.org/indicator/BX.TRF.PWKR.DT.GD.ZS?locations=GM>.

³⁶⁷ Camara, Sanna. (11 October 2021). *EU ambassador breaks silence on return, readmission of Gambians*. The Point.

³⁶⁸ Faal, Gibril. (2020). *Civil Society Input to EU-Africa Cooperation on Migration: The Case of The Gambia*. ECRE. 4.

³⁶⁹ Zanker, Franzisca & Altrogge, Judith. (2019). *The political economy of migration governance in The Gambia*. Arnold Bergstraeser Institut. 14.

³⁷⁰ *Ibid.*; Faal, Gibril. (2020). *Civil Society Input to EU-Africa Cooperation on Migration: The Case of The Gambia*. ECRE. 4-5.

³⁷¹ Altrogge, Judith & Zanker, Franzisca. (18 November 2019). *Why return from Europe is causing problems for The Gambia*. The Conversation.; Camara, Sanna. (11 October 2021). *EU ambassador breaks silence on return, readmission of Gambians*. The Point.

examples are the European Development Fund (EDF) and the Youth Empowerment Program in The Gambia, which addresses the root causes of irregular migration.³⁷²

The cooperation between the EU and The Gambia was also solidified in an informal readmission arrangement in 2018, to smoothen the return of Gambian migrants, because not all the Gambians arriving in Europe were and are allowed to stay in the EU, especially not after The Gambia returned to democracy under Barrow.³⁷³

6.2. Good Practices document in 2018

In 2018, the EU and The Gambia signed a legally non-binding readmission arrangement, called the ‘Good Practices Document on Identification and Return Procedures’ (further: Good Practices Document). This conclusion coincides with the general shift towards informal readmission politics between the EU and Sub-Saharan African states.³⁷⁴

There are no (leaked) readmission agreements between The Gambia and EU Member States known to the outside world.³⁷⁵ Although, one interviewee mentions ambiguity over a possible informal readmission arrangement between Germany and The Gambia, which is denied by the Gambian government.³⁷⁶

After the Good Practices Document, 12% of the European return decisions were enforced in 2019. In 2020, only 7% of return decisions were enforced, which was mainly caused by a drop in orders to leave the EU, partly caused by the Covid-19 pandemic: “2765 Gambian nationals who have no right to stay in the Member States, were issued return decisions and 195 were effectively returned to The Gambia”.³⁷⁷

³⁷² Faal, Gibril. (2020). *Civil Society Input to EU-Africa Cooperation on Migration: The Case of The Gambia*. ECRE. 4.; Website Gambia Youth Empowerment Project: <https://www.yep.gm/>.

³⁷³ Altrogge, Judith & Zanker, Franzisca. (18 November 2019). *Why return from Europe is causing problems for The Gambia*. The Conversation.

³⁷⁴ Zanker, Franzisca & Altrogge, Judith. (2019). *The political economy of migration governance in The Gambia*. Arnold Bergstraeser Institut. 15.; Slagter, Jonathan. (2019). *An “Informal” Turn in the European Union’s Migrant Returns Policy towards Sub-Saharan Africa*. Migration Policy Institute.

³⁷⁵ Cham, Omar. N. & Adam, Ilke. (2021). *The politicization and framing of migration in West Africa: transition to democracy as a game changer?*. Territory, Politics, Governance. 15.

³⁷⁶ Interview #4, June 2022.; Africa Press. (20 December 2020). *Gambia denies bribery for deportation allegations*.

³⁷⁷ European Commission, DG Migration and Home Affairs. (28 January 2022). *Letter to Mr. Lopez Aguilar with the subject: EU readmission cooperation with partner countries – state of play (Ares(2022)656813)*. Retrieved from <https://www.statewatch.org/media/3155/eu-com-readmission-cooperation-overview-letter-to-libe-28-1-22.pdf>.

The EU has confirmed the existence of the document. The Gambian government initially denied having signed the document, but now their Minister of Foreign Affairs and the EU Ambassador to The Gambia have confirmed its existence.³⁷⁸

The text of the document is confidential. Through the interviews conducted, some elements have been revealed. According to an interviewee, “the document is similar to other EU informal readmission arrangements”.³⁷⁹ This is going to allow for a few hypotheses in this thesis.

This implies there should be a Joint Working Group that meets annually or bi-annually. However, there are no records of meetings of this group in leaked EU documents, while there are for other confidential informal readmission arrangements.³⁸⁰

According to an interviewee, during the negotiations, the two parties had different goals regarding the amount of migrants to be returned to The Gambia.³⁸¹ The EU wanted 25 returnees each month, while The Gambia wanted only a maximum of 15 Gambians returning every three months. Eventually, they did not include a specific amount in the document,³⁸² but a Gambian refugee association claims that maximum 15 Gambians will be deported every months until all Gambians with a rejected asylum application are returned.³⁸³

Furthermore, the arrangement states that “return numbers should not overstretch the country’s capacity to receive returnees” and that “adequate notice must be given before asylum seekers are returned”.³⁸⁴

³⁷⁸ Camara, Sanna. (11 October 2021). *EU ambassador breaks silence on return, readmission of Gambians*. The Point.

³⁷⁹ Interview #3, May 2022.

³⁸⁰ European Commission, DG Migration and Home Affairs. (28 January 2022). *Letter to Mr. Lopez Aguilar with the subject: EU readmission cooperation with partner countries – state of play (Ares(2022)656813)*.

³⁸¹ Interview #4, June 2022.

³⁸² Interview #4, June 2022.

³⁸³ Njie, Juldeh. (8 March 2019). *Hundreds march for ‘end’ to mass deportation of Gambians*. Standard Newspaper.

³⁸⁴ Altrogge, Judith & Zanker, Franzisca. (18 November 2019). *Why return from Europe is causing problems for The Gambia*. The Conversation.

6.3. The aftermath of the Good Practices Document

To assess whether the Good Practices Document has had a positive impact in accordance with the EU's goals, the number of Gambian returnees from the EU has to be analysed.

Year	Number of Gambian returnees from the EU
2009	460 ³⁸⁵
2017	329 ³⁸⁶
2018	440 ³⁸⁷
2019	455 ³⁸⁸
2020	195 ³⁸⁹
2021	140 ³⁹⁰
2022: January - March	15 ³⁹¹

First of all, the data on returns are not a hundred percent accurate.³⁹² Nonetheless, it can be concluded from these amounts above that neither the Good Practice Document, nor the regime change in The Gambia have had a spectacular impact on the number of Gambians returning from the EU, as the EU had hoped for.³⁹³ There are a few factors that come into play regarding this matter. Mainly, the Gambian government has thus far imposed several moratoriums on the Good Practices Document under which Gambians could be not returned from the EU to The Gambia.

The Gambian government is very reluctant to facilitate mass returns, because it does not want to be seen as being complicit in the mass deportation of Gambians by European states.³⁹⁴ Moreover, the return of too many Gambians would cause economic problems, which are

³⁸⁵ Cham, Omar. N. & Adam, Ilke. (2021). *The politicization and framing of migration in West Africa: transition to democracy as a game changer?*. Territory, Politics, Governance. 6.

³⁸⁶ Eurostat. *Third Country nationals returned following an order to leave – persons returned to a third country*.

³⁸⁷ *Ibid.*

³⁸⁸ *Ibid.*

³⁸⁹ European Commission, DG Migration and Home Affairs. (28 January 2022). *Letter to Mr. Lopez Aguilar with the subject: EU readmission cooperation with partner countries – state of play (Ares(2022)656813)*.

³⁹⁰ EIGE. *Gender Statistics Database: Third country nationals returned following an order to leave by citizenship age and sex - quarterly data (rounded)*. Retrieved from <https://eige.europa.eu/de/gender-statistics/>.

³⁹¹ *Ibid.*

³⁹² European Court of Auditors. (2021). *Special Report no. 17/2021 EU readmission cooperation with third countries: relevant actions yielded limited results*. p53-54.

³⁹³ Cham, Omar. N. & Adam, Ilke. (2021). *The politicization and framing of migration in West Africa: transition to democracy as a game changer?*. Territory, Politics, Governance. 5.

³⁹⁴ Faal, Gibril. (2020). *Civil Society Input to EU-Africa Cooperation on Migration: The Case of The Gambia*. ECRE. 7.

already present through a recent increase in youth unemployment and youth crime.³⁹⁵ It would also risk unrest and instability, since many people would protest in the media and on the streets.³⁹⁶ The media now play an instrumental role in shaping the public opinion, after they gained press freedom following Barrow's election.³⁹⁷ In general, the government states that mass migrant returns and deportation will undermine its transition from dictatorship to a democracy.³⁹⁸ Moreover, returning too many people too quickly will overburden the country's struggling government, risking its political stability.³⁹⁹

The first moratorium came after a protest in February 2019, following a return flight from Germany.⁴⁰⁰ The government argued the flight was conducted against the Good Practices Document, because the government was not notified of the flight and some returnees reported they were shackled on the plane by their hands and ankles.⁴⁰¹ Therefore, it wanted more humane modalities of the returns countering the inhuman treatment.⁴⁰² Barrow's government issued the first moratorium on all forced return operations by charter flights from the EU in March 2019.⁴⁰³ This moratorium was later extended to returns by commercial flights (from June to October 2019), including individual returns of documented illegally staying migrants.⁴⁰⁴ After a few months, the moratorium was lifted on 1 January 2020.⁴⁰⁵

The second moratorium was justified by the government in 2020 because of the Covid-19 pandemic and the lack of capacity to readmit Gambians, since its health care system had already

³⁹⁵ *Ibid.*; Cham, Omar. N. & Adam, Ilke. (2021). *The politicization and framing of migration in West Africa: transition to democracy as a game changer?*. Territory, Politics, Governance. 18.

³⁹⁶ Cham, Omar. N. & Adam, Ilke. (2021). *The politicization and framing of migration in West Africa: transition to democracy as a game changer?*. Territory, Politics, Governance. 19.

³⁹⁷ *Ibid.* 6-7.

³⁹⁸ Faal, Gibril. (2020). *Civil Society Input to EU-Africa Cooperation on Migration: The Case of The Gambia*. ECRE. 7.

³⁹⁹ Zanker, Franzisca & Altrogge, Judith. (2017). *The politics of migration governance in The Gambia*. Arnold Bergstraeser Institut. 6.

⁴⁰⁰ Altrogge, Judith & Zanker, Franzisca. (18 November 2019). *Why return from Europe is causing problems for The Gambia*. The Conversation.

⁴⁰¹ *Ibid.*; Hunt, Louise. (28 January 2020). *Warning over Gambian migrant returns as democratic transition wobbles*. The New Humanitarian.; Njie, Juldeh. (8 March 2019). *Hundreds march for 'end' to mass deportation of Gambians*. Standard Newspaper.

⁴⁰² Cham, Omar. N. & Adam, Ilke. (2021). *The politicization and framing of migration in West Africa: transition to democracy as a game changer?*. Territory, Politics, Governance. 13.

⁴⁰³ *Ibid.* 13.

⁴⁰⁴ European Commission, DG Migration and Home Affairs. (28 January 2022). *Letter to Mr. Lopez Aguilar with the subject: EU readmission cooperation with partner countries – state of play (Ares(2022)656813)*. Statewatch.

⁴⁰⁵ Cham, Omar. N. & Adam, Ilke. (2021). *The politicization and framing of migration in West Africa: transition to democracy as a game changer?*. Territory, Politics, Governance. 2.

not been coping well with the Covid-19 outbreak and the arrival of migrants would have been an added burden for the country.⁴⁰⁶

In April 2021, the Gambian government indicated for the third time that the country was not in a position to receive returnees until further notice.⁴⁰⁷ In June 2021, they confirmed the moratorium ‘on forced return or repatriation until after the elections in December 2021’.⁴⁰⁸ The government reasoned that it wished to have a peaceful election period. Returns would cause societal problems, possible protests and unrest, which was to be avoided during election periods.⁴⁰⁹ Political observers wrote that President Barrow could be seeking “political capital from his decision not to welcome migrants expelled from the EU”, since his popularity since being elected had decreased.⁴¹⁰ President Barrow won the December 2021 elections.⁴¹¹

In September 2021, the Gambian government rejected another return flight, reasoning that there are security concerns and that the country is unable to reintegrate the returning migrants.⁴¹² Some interviewees assumed that this rejection was the last straw for the EU to adopt visa restrictions for the lack of cooperation by The Gambia on the readmission of its nationals.⁴¹³

Next to imposing moratoriums, the Gambian government delays and avoids confirming possible returnees of their Gambian nationality (such as many other third country governments), to prevent them being returned to The Gambia.⁴¹⁴ The Gambian government also does not provide (or even withdraws) landing permits for charter planes,⁴¹⁵ or visas for the guiding police or immigration officers accompanying the returnees on the flights.

⁴⁰⁶ Takambou, Mimi Mefo. (5 September 2021). *EU escalates row with Gambia over expelled migrants*. Deutsche Welle.

⁴⁰⁷ European Commission, DG Migration and Home Affairs. (28 January 2022). *Letter to Mr. Lopez Aguilar with the subject: EU readmission cooperation with partner countries – state of play (Ares(2022)656813)*.

⁴⁰⁸ *Ibid.*

⁴⁰⁹ Cham, Omar. N. & Adam, Ilke. (2021). *The politicization and framing of migration in West Africa: transition to democracy as a game changer?*. Territory, Politics, Governance. 8.

⁴¹⁰ Takambou, Mimi Mefo. (5 September 2021). *EU escalates row with Gambia over expelled migrants*. Deutsche Welle.

⁴¹¹ BBC News. (2021). *Gambia: elections: Adama Barrow declared presidential election winner*. Retrieved from <https://www.bbc.com/news/world-africa-59542813>.

⁴¹² Takambou, Mimi Mefo. (5 September 2021). *EU escalates row with Gambia over expelled migrants*. Deutsche Welle.

⁴¹³ See next subtitle.; Interviews #4 and #5, June 2022.

⁴¹⁴ Interviews #4 and #5, June 2022.

⁴¹⁵ European Stability Initiative. (17 February 2020). *The Gambia Plan – Beyond empty words and threats: how a breakthrough is possible*.

6.4. Restrictions on short-stay visas for Gambians by the EU in 2021

On 7 October 2021, the EU adopted - for the first time ever - a restriction on the issuing of short-stay visas, namely to the Gambian nationals.⁴¹⁶ It is a sanction for the lack of cooperation by The Gambia on readmission, due to the moratoriums imposed and difficult dialogue with the Gambian authorities.⁴¹⁷ With these restrictions, the European Commission and Member States aimed to make the Gambian authorities sit down and discuss readmission cooperation, which The Gambia rejected to do before.⁴¹⁸

An earlier and criticised (leaked) proposal from the EU suggested to even send an international consultant to help the Gambian government with “technical skills to communicate with its citizens that forced deportations are a good thing”.⁴¹⁹

This visa restrictions were adopted under Article 25a of the EU Visa Code and is in force as of 1 November 2021.⁴²⁰ It temporarily suspends the application of certain provisions in the Visa Code, namely Article 14 (6), Article 16(5) (b), Article 23(1) and Article 24(2) and (2c). This entails that the visa fee for Gambian holders of diplomatic and service passports will not be waived and that the decisions on all visa application do not need to be decided within 15 calendar days. It also means that multiple-entry visa possibilities are restricted. The restrictions do not concern family reunification applications or students, nor working members of civilian air and sea crew.⁴²¹ The European Commission is monitoring the impact of these measures and will report to the European Parliament and to the Council on the progress achieved.⁴²²

Interviewees from the Gambian side note that some (richer) Gambians have not been able to receive a short-stay visa, but overall the ordinary Gambian does not possess the means to travel to the EU and therefore does not need to apply for a European visa.⁴²³ Hence, there is no

⁴¹⁶ Council of the EU. (2021). *Council Implementing Decision on the suspension of certain provisions of Regulation (EC) No 810/2009 of the European Parliament and of the Council with respect to The Gambia.*

⁴¹⁷ European Commission. (2021). *Explanatory Memorandum to COM(2021)413 - Suspension of certain provisions of Regulation 810/2009 with respect to The Gambia.*

⁴¹⁸ Interview #5, June 2022.

⁴¹⁹ European Stability Initiative. (17 February 2020). *The Gambia Plan – Beyond empty words and threats: how a breakthrough is possible.*

⁴²⁰ Council of the EU. (2021). *Council Implementing Decision on the suspension of certain provisions of Regulation (EC) No 810/2009 of the European Parliament and of the Council with respect to The Gambia.*

⁴²¹ *Ibid.* Article 1 (2) and (3).

⁴²² Article 25a (6) and (7) Regulation 2019/1155.

⁴²³ Interviews #2 and #4, May and June 2022.

movement (in the media, on social media, etc.) happening in opposition to the visa restrictions or at least not visibly.⁴²⁴

An interviewee from the EU side stated that the discussions with The Gambia are going more smoothly since the visa restrictions were imposed and that the EU holds hope that the relations and cooperation will be restored to a sufficient level to decrease the visa restrictions on Gambian nationals.⁴²⁵ It is unclear whether return flights have happened yet after the issuing of the visa restrictions, but according to EIGE's statistics, already 15 refugees have been returned to The Gambia in 2022.⁴²⁶ The interviewee added that when the lack of cooperation continues, the next steps of Article 25a of the EU Visa Code will be considered and most likely, heavier restrictions will be put in place.⁴²⁷

In the Visa Code, human rights concerns are included,⁴²⁸ but in practice, it is not clear how these provisions are taken into consideration, especially not if the visa restrictions are issued. The situation in The Gambia is now more calmed down, but other countries the EU is monitoring and possibly targeting for visa restrictions are experiencing human rights violations. For example, Bangladesh and Iraq were named together with The Gambia (eventually only The Gambia was issued the restrictions).⁴²⁹ In Iraq, arbitrary arrests and detentions, torture and other ill-treatment, suppression of freedom of expression, unlawful killings, and enforced disappearances are prevalent.⁴³⁰ ECRE points out that in those countries targeted for potential visa restrictions, individuals may face persecution, human rights violations or conflict which could result in them having to leave their country, but the possible visa restricting measures will make travel to safety using regular routes even more unattainable than it already is.⁴³¹ One

⁴²⁴ *Ibid.*; Council of the EU. (2021). *Council Implementing Decision on the suspension of certain provisions of Regulation (EC) No 810/2009 of the European Parliament and of the Council with respect to The Gambia*. Article 1 (2) and (3).

⁴²⁵ Interview #5, June 2022; Article 25a (8) Regulation 2019/1155.

⁴²⁶ EIGE. *Gender Statistics Database: Third country nationals returned following an order to leave by citizenship age and sex - quarterly data (rounded)*. Retrieved from <https://eige.europa.eu/de/gender-statistics/>.

⁴²⁷ Article 25a (5) Regulation 2019/1155.

⁴²⁸ Interview #5, June 2022; Regulation 810/2009 Whereas 15), 16).

⁴²⁹ European Commission. (2021). *Press Release: Visa Code: The Commission proposes temporary visa measures for Bangladesh, Iraq and The Gambia to improve cooperation on return and readmission.*; Council of EU. (2021). *Proposal for a Council Implementing Decision on temporary visa measures with respect to Bangladesh.*; Council of EU. (2021). *Proposal for a Council Implementing Decision on temporary visa measures with respect to Iraq.*

⁴³⁰ Amnesty International. (2022). *The State of World's Human Rights 2021/2022*. 54.

⁴³¹ ECRE. (2021). *ECRE's assessment of the EU's plans to use visa leverage to increase readmission to third countries*.

interviewee points out that this is also problematic for human rights defenders wanting to flee a country that they are criticising, but are then unable to do so.⁴³²

A possible middle way could be to only restrict the issuing of diplomats' visas.⁴³³ For example, regarding the Belarusian situation, the EU puts restrictions on the issuing of visas for specific categories of officials linked to the regime (e.g. diplomats).⁴³⁴ This does not affect the ordinary civilians, nor human rights defenders, nor other more vulnerable people, but it does make a point and puts pressure on a country to cooperate, without involving civilians.

7. Human Rights protection under the EU-The Gambia informal arrangement for returned migrants

In some formal EURAs, there is a provision included regarding respect for human rights, called the non-affected clause.⁴³⁵ This clause confirms the applicability of and respect for instruments on human rights.⁴³⁶ Consequently, any return and readmission can only be carried out as a result of a return decision which may only be issued if the guarantees mentioned above are observed (such as the non-refoulement principle). Furthermore, Member States must respect the EU Charter of Fundamental Rights when they are implementing the EURAs.⁴³⁷

This non-affected clause is missing in most informal arrangements: according to a report by the European Court of Auditors only the Afghan 'Joint Way Forward' has "references equivalent to" a non-affected clause in an EURA.⁴³⁸ This is going to allow for a hypothesis that such a clause is not included in the Gambian informal arrangement. However, this clause only has a purely declaratory value and may be considered as an additional safeguard "to avoid the application of readmission agreements after deciding to expel an asylum seeker in breach

⁴³² Interview #7, June 2022.

⁴³³ Interview #7, June 2022.

⁴³⁴ Council of the EU. (28 October 2021). *COUNCIL DECISION on the partial suspension of the application of the Agreement between the European Union and the Republic of Belarus on the facilitation of the issuance of visas*.

⁴³⁵ Carrera, Sergio. (2016). *Implementation of EU Readmission Agreements*. SpringerBriefs in Law. 11.

⁴³⁶ *Ibid.* 11.

⁴³⁷ Cassarino, Jean-Pierre. (2018). "Informalizing EU Readmission Policy" In A. Ripoll Servent and F. Trauner (eds.), *The Routledge Handbook of Justice and Home Affairs Research*. 85.

⁴³⁸ European Court of Auditors. (2021). *Special Report no. 17/2021 EU readmission cooperation with third countries: relevant actions yielded limited results*. §37

of international law”.⁴³⁹ Moreover, the clause remains non-committal and far from a guarantee against human rights violations after the return, because there is no monitoring after the return thus a secondary expulsion is possible and therefore, a possible violation of the indirect or chain-refoulement prohibition.⁴⁴⁰ Additionally, there are no consequences or remedies attached to the non-affected clause, when reports reveal a country fails to protect returnees.⁴⁴¹ Nonetheless, the inclusion of such a provision is beneficial to reiterate that human rights obligations are still applicable to the implementation of the agreement.⁴⁴²

Secondly, regarding the non-refoulement principle, this is normally checked before people embark on the return flight by national authorities of the EU Member States. However, if there are new elements regarding the non-refoulement principle, this needs to be examined and the person cannot board the plane.⁴⁴³

Thirdly, when a formal readmission agreement is negotiated, there will be parliamentary oversight by the European Parliament and by the national parliaments of the third country before it is signed by the EU and a third country.⁴⁴⁴ They will check whether the proposed EURA is in accordance with European and national law and with international standards. Furthermore, after the EURA is concluded, judicial oversight is possible by the CJEU (through Article 218 TFEU, which regulates the adoption of international agreements in accordance with the ordinary legislative procedure) and by the courts in the third countries.⁴⁴⁵

These two oversight mechanisms are not present for informal readmission arrangements. There is no parliamentary oversight possible by either the European Parliament or the national parliament of the third country, since they do not have to approve it before signing.⁴⁴⁶ Neither is judicial oversight regarding the legality of the arrangement possible *ex ante* or at a later stage

⁴³⁹ Giuffré, Mariagiulia. (2020). *The readmission of asylum seekers under international law*. Hart Publishing, an imprint of Bloomsbury Publishing Plc. 157.

⁴⁴⁰ Sundberg Diez, Olivia. (2019). *Diminishing safeguards, increasing returns: non-refoulement gaps in the EU return and readmission system*. European Policy Centre. 14.

⁴⁴¹ *Ibid.* 14.

⁴⁴² Giuffré, Mariagiulia. (2020). *The readmission of asylum seekers under international law*. Hart Publishing, an imprint of Bloomsbury Publishing Plc. 158.

⁴⁴³ The Greek Ombudsman. (2020). *Return of Third Country Nationals*. 24-25.; Interview #6, June 2022.

⁴⁴⁴ Cassarino, Jean-Pierre. (2018). *Informalizing EU Readmission Policy*. In Servent, Ariadna Ripoll & Trauner, Florian. *The Routledge Handbook of Justice and Home Affairs Research*. Routledge. 94.; Giuffré, Mariagiulia. (2020). *The readmission of asylum seekers under international law*. Hart Publishing, an imprint of Bloomsbury Publishing Plc. 164.

⁴⁴⁵ Cassarino, Jean-Pierre. (2018). *Informalizing EU Readmission Policy*. In Servent, Ariadna Ripoll & Trauner, Florian. *The Routledge Handbook of Justice and Home Affairs Research*. Routledge. 94.

⁴⁴⁶ Giuffré, Mariagiulia. (2020). *The readmission of asylum seekers under international law*. Hart Publishing, an imprint of Bloomsbury Publishing Plc. 164.

by the CJEU.⁴⁴⁷ This is because technically they do not fall within the scope of Article 218 TFEU, which would allow the European Parliament to “obtain the opinion of the CJEU as to whether an agreement envisaged is compatible with the Treaties”.⁴⁴⁸ The Gambian parliament did not check whether the Good Practices Document is in accordance with the Gambian laws, neither could the civil society.⁴⁴⁹

Regarding informal readmission arrangements, national courts of the third countries could play a significant role. For example, an Italian Civil Court declared a readmission of a Pakistani asylum seeker under an Italy-Slovenia informal arrangement unlawful, because the arrangement was never ratified by the Italian Parliament.⁴⁵⁰ The man was readmitted to Slovenia and then 48 hours later to Croatia and then he was pushed back to Bosnia-Herzegovina. The Court stated that the readmission procedure was carried out in clear violation of the international, European and internal rules that regulate access to the asylum procedure.⁴⁵¹ “The concerned persons were not offered any remedies and their individual situations were not examined. The Court, therefore, concluded clear infringement of the right of defence and the right to an effective remedy. The Court also observed de facto detention carried out without any order from the judicial authority and it further concluded that the procedure clearly violates the obligation of non-refoulement, which prohibits exposing persons to risks of inhuman and degrading treatment, which, as documented by numerous NGOs, is a systematic practice at the Croatian border.”⁴⁵² After this decision, readmission procedures at the eastern border of Italy have been suspended.⁴⁵³

Similar cases could be useful before national courts of third countries to review the legality of informal readmission agreements. This is only indirectly possible before the CJEU: an informal arrangement’s legality cannot be challenged before the CJEU.⁴⁵⁴ Nonetheless, an EU institution

⁴⁴⁷ Cassarino, Jean-Pierre. (2018). Informalizing EU Readmission Policy. In Servent, Ariadna Ripoll & Trauner, Florian. *The Routledge Handbook of Justice and Home Affairs Research*. Routledge. 94.

⁴⁴⁸ *Ibid.*

⁴⁴⁹ Sundberg Diez, Olivia. (2019). *Diminishing safeguards, increasing returns: non-refoulement gaps in the EU return and readmission system*. European Policy Centre. 10.

⁴⁵⁰ Civil Court of Rome. (18 January 2021). Retrieved from: <https://bit.ly/33d0VnE>.

⁴⁵¹ ECRE. (2022). *Country Report Italy: Access to the territory and push backs*. Retrieved from <https://asylumineurope.org/reports/country/italy/asylum-procedure/access-procedure-and-registration/access-territory-and-push-backs/>.

⁴⁵² ECRE. (2022). *Country Report Italy: Access to the territory and push backs*.

⁴⁵³ ECRE. (2022). *Country Report Italy: Access to the territory and push backs*.

⁴⁵⁴ Cassarino, Jean-Pierre. (2018). Informalizing EU Readmission Policy. In Servent, Ariadna Ripoll & Trauner, Florian. *The Routledge Handbook of Justice and Home Affairs Research*. Routledge. 94.

or agency could be held responsible for the return and some violations happen during the return of migrants under an informal arrangement.⁴⁵⁵

Furthermore, for both formal and informal readmission agreements and arrangements, Frontex' of national (of the EU Member States) fundamental rights monitors are present on the flight, or should be, to flag problems and/or violations of human rights during the return flights.⁴⁵⁶ The national monitors are regulated under national rules, but this is outside of the scope of this thesis. As explained in 4.4., each return flight operated by Frontex should have a fundamental rights monitor present, but due to intern mismanagement this is not yet the case.⁴⁵⁷ Moreover, records and reports show that human rights violations happening during the flights are often not reported by fundamental rights monitors.⁴⁵⁸ Several Gambian returnees testified that they were handcuffed and shackled on a 2019 flight, which many Gambians remember as colonial practices.⁴⁵⁹ Civil society organizations argued that this mistreatment echoes 'slave treatment' and they want the 'maltreatment to halt', also stating that 'these are heartless, wicked, racist acts'.⁴⁶⁰ There are no (public) records of any consequences given to these acts.

Additionally, when a returning migrant makes a complaint of alleged human rights violations during the return process to the fundamental rights officer of Frontex, the procedure can take years, the complaint is often minimalised and there is no responsibility taken by Frontex for its member's actions.⁴⁶¹

This is the only complaint mechanisms available. There is no specific mechanism for complaints included in the readmission agreements or arrangement.⁴⁶² One could think the Joint

⁴⁵⁵ Article 97 Frontex Regulation 2019/1896.; Statewatch. (25 January 2022). *Frontex: the ongoing failure to implement human rights safeguards*.

⁴⁵⁶ Article 50(5) Frontex Regulation 2019/1896.

⁴⁵⁷ Boffey, Daniel & Fotiadis, Apostolis. (19 January 2021). *EU border force head faces calls to quit over allegations he 'misled' MEPs*. The Guardian.

⁴⁵⁸ Nielsen, Nikolaj & Fotiadis, Apostolis. (30 September 2019). *'Inhumane' Frontex forced returns going unreported*. EUObserver.

⁴⁵⁹ Hunt, Louise. (28 January 2020). *Warning over Gambian migrant returns as democratic transition wobbles*. The New Humanitarian.; Njie, Juldeh. (8 March 2019). *Hundreds march for 'end' to mass deportation of Gambians*. Standard Newspaper.

⁴⁶⁰ Cham, Omar. N. & Adam, Ilke. (2021). *The politicization and framing of migration in West Africa: transition to democracy as a game changer?*. Territory, Politics, Governance. 15.; Njie, Juldeh. (8 March 2019). *Hundreds march for 'end' to mass deportation of Gambians*. Standard Newspaper.

⁴⁶¹ Gkiliati, Mariana. (2020). *Frontex Return Operations and their Human Rights Implications*. In Soysüren, Ibrahim & Nedelcu, Mihaela (editors) "Deportation of Foreigners: EU instruments, Nation-State practices and social actors' involvement", Peter Lang Editions. 15.; Nielsen, Nikolaj & Fotiadis, Apostolis. (30 September 2019). *'Inhumane' Frontex forced returns going unreported*. EUObserver.

⁴⁶² Sundberg Diez, Olivia. (2019). *Diminishing safeguards, increasing returns: non-refoulement gaps in the EU return and readmission system*. European Policy Centre. 5.

Working Groups or Joint Readmission Committees would be able to step in and remedy the situation for future returns, however they are not complaint bodies with judicial or even advisory power. In the authors opinion, they should gain some advisory power. Currently, these Joint Working Groups or Readmission Committees are mostly beneficial for having a forum available for the EU to communicate with a third country's government and authorities.⁴⁶³

8. Recommendations

All readmission agreements and arrangements should be made public, to enhance the transparency of the obligations, rights and provisions included.

Human rights clauses (non-affection clauses) should be included in all readmission agreements and arrangements the EU (and the Member States) concludes. Additionally, consequences or remedies should be attached to the non-affection clauses in case a country or the EU fails to protect returnees.⁴⁶⁴ Therefore, all readmission agreements and arrangements should provide for suspension clauses when human rights are persistently violated under the agreement.⁴⁶⁵

All readmission agreements and arrangements should provide for specific clauses regarding voluntary return from the EU, to make sure that smoother administrative procedures regarding travel documents apply in that case.⁴⁶⁶

The parties concluding readmission agreements and arrangements should include a complaints mechanism enabling returning migrants to file a complaint to the JWG and JWC. The parties will probably not agree to give these groups and committees jurisdiction, however, it would already be a step forward if these groups could adopt non-binding findings and recommendations. It would at least increase the awareness of the high officials present in the committees for some questionable situations that are happening under the agreement or arrangement.

To go even further, every return flight should be accompanied by a fundamental rights monitor who monitors how the people are treated on the flight and during the boarding and deboarding

⁴⁶³ Interview #5, June 2022.

⁴⁶⁴ Sundberg Diez, Olivia. (2019). *Diminishing safeguards, increasing returns: non-refoulement gaps in the EU return and readmission system*. European Policy Centre. 14.

⁴⁶⁵ European Commission. (2011). *Communication on the Evaluation of EU Readmission Agreements*. COM (2011) 76. 12.

⁴⁶⁶ *Ibid.* 12.

process, as it is designed in the Frontex Regulation.⁴⁶⁷ This is not taking place in practice due to malfunctioning of Frontex and due to preventing the recruitment of new fundamental rights monitors.⁴⁶⁸ Some Members of the European Parliament also want this to be included in the Recast Return Directive as an additional safeguard.⁴⁶⁹

Further, Frontex' existing complaints mechanism should be made accessible and effective in practice,⁴⁷⁰ including by providing adequate information to returnees on how to make a complaint in a language they understand.⁴⁷¹

Frontex' fundamental rights monitors and the complaint mechanisms itself should be independent. The Fundamental Rights Agency (FRA) has suggested that an external body with human rights monitoring expertise monitors the human rights violations of Frontex in view of the independence of the monitoring.⁴⁷²

The lack of data and statistics on readmission and the period after the return and readmission needs to improve.⁴⁷³ Currently, migrants are "returned and lost", since they are not tracked or supported after their return.⁴⁷⁴ Therefore, post-return monitoring should be added.⁴⁷⁵ Some authors and European Parliament Members suggest that in the period after the return some returning migrants should be followed up at random.⁴⁷⁶ For example, to check how the migrants were returned, whether their human rights were respected after the readmission, how they are treated in the period after the return and whether or not they are prosecuted in the third country, etc. The European Commission already in 2011 pointed out that in this post-return monitoring

⁴⁶⁷ Article 50(5) Frontex Regulation 2019/1896.

⁴⁶⁸ Boffey, Daniel & Fotiadis, Apostolis. (19 January 2021). *EU border force head faces calls to quit over allegations he 'mised' MEPs*. The Guardian.

⁴⁶⁹ Interviews #6 and #7, June 2022.

⁴⁷⁰ Sundberg Diez, Olivia. (2019). *Diminishing safeguards, increasing returns: non-refoulement gaps in the EU return and readmission system*. European Policy Centre. 5.

⁴⁷¹ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). (2019). *Report to the German Government on the visit to Germany carried out from 13 to 15 August 2018*. CPT/Inf (2019) 14.

⁴⁷² FRA. (2018). *Opinion 5/2018 [EBCG] The revised European Border and Coast Guard Regulation and its fundamental rights implications*.

⁴⁷³ Sundberg Diez, Olivia. (2019). *Diminishing safeguards, increasing returns: non-refoulement gaps in the EU return and readmission system*. European Policy Centre. 14.

⁴⁷⁴ *Ibid.* 14.

⁴⁷⁵ European Commission. (2011). *Communication on the Evaluation of EU Readmission Agreements*. COM (2011) 76. 13.

⁴⁷⁶ Interviews #6 and #7, June 2022.; Sundberg Diez, Olivia. (2019). *Diminishing safeguards, increasing returns: non-refoulement gaps in the EU return and readmission system*. European Policy Centre. 13.

due attention needs to be paid to practical feasibility, respect for the sovereignty of third countries and ways of encouraging returnees to actively cooperate in post-return monitoring.⁴⁷⁷

In the end, prevention of return and readmission is better for the migrants themselves. Firstly, Youths Against Irregular Migration (YAIM) are conducting sensibilisation campaigns in The Gambia against irregular migration to create awareness about irregular migration and cut down the numbers of migrants leaving The Gambia in an irregular manner.⁴⁷⁸ The Gambian media often cite job creation, youth empowerment and the provision of viable opportunities to the young population as possible solutions to reduce irregular migration from the Gambia.⁴⁷⁹

Secondly, interviewees from the Gambian civil society and the EU side all agree on one aspect: the need for more access to legal pathways to reduce irregular migration.⁴⁸⁰ “Gambians want the EU to make it as easy for Gambians to go to the EU, as Europeans have it to come to The Gambia”.⁴⁸¹

For example, the EU ambassador to The Gambia, Mr. Pampaloni, is encouraging Gambians to utilise the Erasmus Plus Programme which allows “university students with outstanding background to pursue their education in Europe at no cost other than their own support”.⁴⁸²

Others suggest circular migration possibilities.⁴⁸³ For example, the EU could implement seasonal visas like in New Zealand where people work in the country for a season and then go back to their own country.⁴⁸⁴

Another interviewee suggests schemes where third country nationals can work in the EU for a year and then go back “because no one wants to stay in Europe: the first day you arrive, you are already thinking of the day you return back home”.⁴⁸⁵ He adds that rules could be put in place to regulate what would happen when anybody violates the scheme’s conditions, for

⁴⁷⁷ European Commission. (2011). *Communication on the Evaluation of EU Readmission Agreements*. COM (2011) 76. 13.

⁴⁷⁸ Voice Gambia. (11 February 2019). *YAIM Launches Sensitization Campaign Against Irregular Migration*.

⁴⁷⁹ Cham, Omar. N. & Adam, Ilke. (2021). *The politicization and framing of migration in West Africa: transition to democracy as a game changer?*. Territory, Politics, Governance. 6.

⁴⁸⁰ Interviews #4, #5, #6, #7, June 2022.; Zanker, Franzisca & Altrogge, Judith. (2019). *The political economy of migration governance in The Gambia*. Arnold Bergstraeser Institut. 9.

⁴⁸¹ Interview #4, June 2022.

⁴⁸² Camara, Sanna. (30 August 2021). *Gambians could apply Schengen Visa from Banjul*. The Point.; Fatou, Kerr. (20 May 2022). *Special interview with His Excellency Corrado Pampaloni EU Ambassador Gambia*. Youtube.

⁴⁸³ Interview #4, #5, #7, June 2022.; Fatou, Kerr. (20 May 2022). *Special interview with His Excellency Corrado Pampaloni EU Ambassador Gambia*. Youtube.

⁴⁸⁴ Interview #5, June 2022.

⁴⁸⁵ Interview #4, June 2022.

example, when they overstay, they will be forcibly returned to their country.⁴⁸⁶ Finally, the interviewee makes the following, valuable recommendation:

“Instead of using The Gambia as a testing ground for visa restrictions under the amended Visa Code, utilise it as a testing ground for these schemes. Moreover, these schemes can be used as an incentive for The Gambia to cooperate on readmission”.⁴⁸⁷

9. Conclusions

For decades, the EU has been prioritising returning migrants with an irregular status in its migration policy. One of the means to do so is through concluding readmission agreements with third countries to smoothen the return and readmission process.

Formal and legally binding readmission agreements used to be the standard practice, however, in the last decade, the EU has been shifting its focus and efforts to concluding more informal and non-binding readmission arrangements. These informal arrangements do have a few downfalls, mainly regarding human rights protection and implementation and monitoring issues.

This thesis investigated what the human rights protections entail for the returning migrants under these agreements and arrangements. Not all EU’s formal and informal readmission agreements and arrangements could be analysed due to word limitations, hence the EU-The Gambia informal readmission arrangement was used as an illustrative case study.

The result is rather disappointing. In practice, there are few human rights protections under the formal readmission agreements. The respective parliaments of the parties to the agreement (and possibly constitutional courts) can review the text before it is signed, whether it is in accordance to their respective laws. Before and after the conclusion of the agreements, the judicial bodies of the parties can review its legality and resolve legal disputes. The formal EURAs also include a human rights provision, namely the non-affectation clause. Unfortunately, this provision has a purely declaratory value without an effective guarantee against human rights violations and without consequences, increasing the returnees’ risk of (indirect) refoulement.

⁴⁸⁶ Interview #4, June 2022.

⁴⁸⁷ Interview #4, June 2022.

These human rights protections become even more minimal regarding the informal readmission arrangements, as illustrated by the Gambia-EU readmission arrangement. There is no parliamentary nor judicial oversight. The informal arrangements only exceptionally include a human rights clause, causing the same risk of human right violations, the same risk of indirect refoulement and the same problems of impunity or remedying of human rights violations.

There are few aspects of indirect protection of returning migrants' human rights for both types of readmission agreements and arrangements, namely Frontex' fundamental rights monitors on the returns flights and Frontex' complaint mechanism. However, the indirect protection is not effective in practice due to the internal malfunctioning of Frontex. Additionally, records and reports show that human rights violations happening during the flights are often not reported to fundamental rights officer. When the migrants do make a complaint, the procedure takes years and the abusive acts are eventually minimised, to diminish Frontex' responsibility. Moreover, the returning migrants are not aware of the complaint mechanism for human rights violations happening during the flights. If amended and working effectively and independently, these fundamental rights monitors and the complaint mechanism could have potential to protect the returnees' human rights.

Thus, it can be concluded that the human rights of the returning migrants are not respected and not protected sufficiently under the informal readmission arrangements.

Additionally, the readmission agreements and arrangements do rarely increase the amount of returning migrants in the long term, which is the EU's main goal, especially not in the case of The Gambia.

Therefore, one could wonder whether the EU should continue its shift to informal readmission arrangements, given the poor human rights protection of the returnees and the fact that it does not change the return rate to a specific third country.

Yet, there are some advantageous elements to concluding an informal readmission arrangement. It creates a forum for the authorities of the EU and a third country to communicate in an informal manner regarding readmission problems. They are also benefits for migrants who are returning voluntarily, because the readmission arrangements do smoothen the administrative return process for them, for example by approving specific travel documents. However, these benefits are assumably not very significant for the EU to continue to put enormous effort into negotiating informal readmission arrangements.

Therefore, the EU should primarily redirect its time, effort and resources into improving the human rights protection of returnees, for example by improving the existing complaint mechanism and making it independent, by recruiting more fundamental rights monitors and finally, by starting to monitor the post-return phase of returnees to avoid risk of indirect refoulement.

Another argument for the EU to redirect its time, effort and resources away from negotiating new informal readmission agreements, is the addition of Article 25a to the EU Visa Code into consideration. Now, the EU can impose visa restrictions on third countries, even without having a (formal or informal) readmission agreement in place.

Nonetheless, these negative incentives to coerce a country into cooperation on readmissions, such as visa restrictions, are being questioned. Some (Gambians) argue they should be replaced by positive incentives. Instead of using The Gambia as a testing ground for the new visa restrictions under Article 25a of the Visa Code, the EU should use The Gambia as a testing ground for new circular migration schemes, such as seasonal working visas or other possibilities, to compel The Gambia into cooperation on readmissions.

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Annex I: Interviews with Officials from EU Institutions, academia and national organisations

No.	Date	Type of stakeholder	Country	Institution	Gender	Interview
1.	18/05/2022	Expert/professor	Poland	University	M	Video call
2.	23/05/2022	Civil society actor	Gambia	Press Union	M	Video call
3.	24/05/2022	Official	Luxembourg	EU	M	Video call
4.	8/06/2022	Researcher	Belgium/Gambia	University	M	Video call
5.	9/06/2022	Official	Gambia	EU	M	Video call
6.	24/06/2022	Policy advisor	Belgium	European Parliament	M	In person
7.	30/06/2022	Professor/policy expert	Belgium	European Parliament	F	In person