

# The Global Approach and Partnership Framework

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## TAMPERE CONCLUSIONS

### A. A COMMON EU ASYLUM AND MIGRATION POLICY

#### I. PARTNERSHIP WITH COUNTRIES OF ORIGIN

11. *The European Union needs a comprehensive approach to migration addressing political, human rights and development issues in countries and regions of origin and transit. This requires combating poverty, improving living conditions and job opportunities, preventing conflicts and consolidating democratic states and ensuring respect for human rights, in particular rights of minorities, women and children. To that end, the Union as well as Member States are invited to contribute, within their respective competence under the Treaties, to a greater coherence of internal and external policies of the Union. Partnership with third countries concerned will also be a key element for the success of such a policy, with a view to promoting co-development.*

12. *In this context, the European Council welcomes the report of the High Level Working Group on Asylum and Migration set up by the Council, and agrees on the continuation of its mandate and on the drawing up of further Action Plans. It considers as a useful contribution the first action plans drawn up by that Working Group, and approved by the Council, and invites the Council and the Commission to report back on their implementation to the European Council in December 2000.*

#### D. STRONGER EXTERNAL ACTION

59. *The European Council underlines that all competences and instruments at the disposal of the Union, and in particular, in external relations must be used in an integrated and consistent way to build the area of freedom, security and justice. Justice and Home Affairs concerns must be integrated in the definition and implementation of other Union policies and activities.*

60. *Full use must be made of the new possibilities offered by the Treaty of Amsterdam for external action and in particular of Common Strategies as well as Community agreements and agreements based on Article 38 TEU.*

61. *Clear priorities, policy objectives and measures for the Union's external action in Justice and Home Affairs should be defined. Specific recommendations should be drawn up by the Council in close co-operation with the Commission on policy objectives and measures for the Union's external action in Justice and Home Affairs, including questions of working structure, prior to the European Council in June 2000.*

# PART 1: ASSESSMENT OF THE CURRENT SITUATION

The Tampere conclusions call for a comprehensive approach to migration that involves other countries, development policy and human rights. It also calls for greater coherence among member states and the EU in both internal and EU policies. In this chapter, the author examines how this call for more coherence and cooperation – both internal and external – has resulted in a problematic elision of border control and migration management, which in turn has led to negative externalities for the EU and its reputation.

Border control consists of measures to ensure that those persons who enter the EU at external border controls have the necessary documents and are not a threat to national security, as indicated in the relevant EU databases such as SIS II (i.e. the second generation Schengen Information System). It does not and cannot be a tool of migration management which is about how long and for what purposes third-country nationals (TCNs) remain in the EU. As Frontex, the EU Border and Coast Guard Agency has explained, a border guard has an average of 12 seconds to determine entry or refusal of entry at the EU's external borders.<sup>2</sup> This is adequate time to ensure that the document presented is in order and quickly check SIS II to make sure the person is not to be excluded – but nothing further.

TCNs who after entering wish to remain longer or carry out activities other than those of a visit need to be the subject of migration management, but this is not an activity which can be integrated into border management. Not only do people's interests and objectives change and vary before and after entry, but the decision on whether they should be permitted to remain longer than a visit depends on national

rules and regulations, too. Some of these migration management activities have been shifted to a pre-sift through mandatory visa requirements (e.g. family reunification, economic migration) which take place abroad.

Much criticism has been levied at these controls – delays, extra charges and bureaucratic burdens for families, or businesses seeking to employ TCNs. Choices which have been made supposedly authorised by the Tampere conclusions to extend the extraterritorial aspect of migration management and merge it with border controls have led to negative externalities in human rights compliance, efficiency, relations with third countries and resource allocation for the EU. Instead of pursuing this dead-end further, the EU needs to focus on the positive approach to partnership with third countries as intended by the Tampere conclusions. Following its traditional approach to cooperation with third countries in border and migration management (i.e. clearly separated as policy areas), the (a) liberalisation of visa requirements and border controls and (b) liberalisation of working conditions, access to self-employment and intra-corporate transfers of employees will provide a better foundation for future EU action in respect of both.

The argument that better border control (in particular, extraterritorially) is necessary to address a deep deficit in migration management as regards the irregular arrival and stay of TCNs in the EU is unsupported by the evidence provided by Frontex. To start, the question of whether there is a problem of irregular migration is never addressed. According to Frontex's risk analysis for 2019,<sup>3</sup> out of over 300 million entries at the EU's external border in 2018,

approximately 90 million were EU/EEA nationals while the rest were TCNs. A total of 190,930 persons were refused entry at the external borders of the EU. This constitutes approximately 0.06% of the total entries. This very low percentage of people refused entry at the external border does not transform into substantial pressure for irregular border crossing.

Also, according to the Agency, there were a total of 150,114 illegal border crossings into the EU, of which 114,276 were by sea.<sup>4</sup> This constitutes approximately 0.05% of entries at external borders. One argument sometimes put forward is that few people are refused entry at the external border because the ‘unsuitable’ ones are ‘weeded out’ at the visa stage. However, the European Commission tells us that of the approximately 16 million Schengen visas applied for in 2018, only 9.6% were not issued.<sup>5</sup> The political problem with these statistics is that they do not reveal a crisis in terms of pressure on the EU external borders. In fact, according to Frontex, the pressure is minuscule and dropping.<sup>6</sup> Any policy which is designed to address a statistical non-compliance issue of less than 0.05% as a ‘serious’ problem lacks credibility.

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In this chapter, the author makes four arguments regarding the incorporation of border control and migration management in EU relations with third countries:

1. The inclusion of border control and migration management objectives in the EU’s external relations with third countries must never undermine the EU’s role in the international community, in particular as regards its commitment to the full protection of human rights, the rule of law and democracy (see Part 1, A).
2. The EU should not promise actions which it cannot deliver in its arrangements with third countries (e.g. visa liberalisation as the quid pro quo for action by the other state; see Part 1, B). The EU must always bear in mind in its negotiations with third countries that the people it designates as ‘unwanted’ migrants are nationals of other states entitled to the protection of their state of nationality, including as regards their treatment on EU territory (i.e. consular protection).
3. The EU should respect regional integration regimes in other parts of the world, just as it expects other regional bodies to respect the Schengen Area. The abolition of border controls and free movement of persons is a major objective of many regional bodies, including the African Union (AU), Economic Community of West African States (ECOWAS) and Mercosur to mention just three. The EU should not pursue political projects that are contrary to regional free movement regions with third

countries (e.g. Morocco and the control of its borders with ECOWAS states; see Part 1, C).

4. Responsibility in international relations is central to successful outcomes with third countries. The EU's blatant discrimination against the nationals of some countries in comparison with those of others, for example regarding access to short-stay visas and cheap visa-light travel the EU's new European Travel Information and Authorisation System (ETIAS), which mimics the US' Electronic System for Travel Authorization, diminishes the EU's standing as a responsible and equitable player in international relations (see Part 1, D).

Traditionally, issues of migration and visa liberalisation in international agreements have related to the protection of nationals of the states entering into the agreements. They have included equal treatment in working conditions and social security and visa liberalisation. It was not until the 2000s that the EU broke with this tradition of liberalisation and began to pursue a policy of coercion in its international agreements with third countries regarding their citizens. The first readmission agreement, with Hong Kong, dates back to 2004.<sup>7</sup> At least these coercive agreements were adopted in accordance with EU rule of law requirements.

From 2005, the EU developed the Global Approach to Migration and Mobility (GAMM)<sup>8</sup> which aimed to adopt a broader approach that not only focused on the EU interest regarding the fight against irregular migration, but also legal migration and development in favour of third countries and later on international protection. The GAMM led to an increasing reliance on more informal types of interstate arrangements (e.g. mobility partnerships). This approach has not resulted in the EU being able to offer improved access to TCNs for economic purposes. Instead of transparency and clarity in EU relations with third countries, there has been less certainty and little obvious benefit for either side. While the EU claimed that the

GAMM was based on the principle of 'more for more' (i.e. more cooperation in the fight against irregular migration leads to more benefits for third countries), the EU started to also rely on the principle 'less for less' (i.e. less cooperation in the fight against irregular migration leads to sanctions against third countries). It moved to the new Partnership Framework,<sup>9</sup> again 'arrangements' rather than agreements with third states, thus not legally binding. In 2016, the EU added financing as an important component of the less-for-less approach, creating several trust funds in the aftermath of the 2015-16 refugee arrivals via Turkey. This refocused the Global Approach on the fight against irregular migration as the main priority in its relations with third countries, despite the broad approach of the Valletta Summit and Action Plan of 2015.

In pursuit of these objectives, the EU and its member states have adopted policies which include 'push- and pull-backs', refusals of disembarkation from boats carrying out humanitarian assistance and the criminal prosecution of their captains, seizure of said boats and harassment of staff. These have resulted in deaths at sea in the Mediterranean – 840 in 2019 at the time of writing. The EU and member states' policies against irregular migration are not benign: they result in violent deaths in the Mediterranean.

The reason for these negative externalities is the confusion of border control and migration management. Due to the EU's conflation of the two administrative fields, interior ministries and EU officials pretend that if they can direct border controls in third countries far from EU borders to ensure that other countries (e.g. Libya, Turkey, Morocco) do not admit to their territory people who might come to the EU but which the EU might not want, better migration management can be achieved for the EU. Death in the Mediterranean is not the only consequence of the externalisation of EU migration policies. It also has a chilling effect on the EU's relations with third countries, as shown by the four concrete examples below.

## A. ‘Irregular’ departures from Libya

The 2015 European Agenda on Migration,<sup>10</sup> adopted because of the so-called refugee crisis, sets out a plan of action to save lives and combat the smuggling and trafficking of migrants. The Agenda called for the use of the Common Security and Defence Policy to achieve this objective and resulted in a military intervention in international waters in the Mediterranean which aimed to destroy the business model of smugglers, called Operation Sophia. A year prior, the Italian Navy had carried out Mare Nostrum, a search and rescue operation, to save lives in the Mediterranean, mainly in respect of irregular departures from Libya. Disenchanted with the lack of EU solidarity regarding the reception of migrants and refugees rescued, the Italian authorities ended the programme. Pressure rose on the EU to act, and the outcome was Operation Sophia.

From the start, however, questions regarding compliance with international law arose. The European External Action Service (EEAS) managed to convince the UN Security Council to issue a resolution permitting the EU to launch a naval action in the Mediterranean. The Operation commenced in 2015 with a mission inter alia to save people, prevent human trafficking, dismantle smuggling networks and enhance the capacity of the Libyan border guard. But with the change of interior minister in Italy, EU member states withdrew their ships and so showed that their goal is not to save lives. The EU’s authority in the international community has not been enhanced by its inability to achieve its stated objective to save lives in the Mediterranean.

This is exacerbated by allegations against EU member states of human rights violations in the field of external action. The European Court of Human Rights held in a landmark case that so-called push-backs whereby the Italian Navy returned migrants seeking to

come to Italy from the high seas to a third country with a problematic human rights record constituted a breach of migrants’ human rights.<sup>11</sup> Since then, Italy has entered into agreements with Libya regarding responsibilities for rescue, which are challenged by human rights organisations and researchers as constituting pull-backs, where small boats are pulled back into Libyan territorial waters and ports to avoid their potential arrival in Italy.

A new low for the EU’s reputation was reached when a communication was submitted on 3 June 2019 to the Office of the Prosecutor of the International Criminal Court, alleging that the EU and member states bear responsibility for death by drowning in the Mediterranean, which are crimes against humanity. The core of the communication calls for the prosecution of senior EU and member state officials on the following grounds:

*“The evidence provided to the Prosecutor is diverse and includes an expert opinion on the situation of migrants in Libya; a victim statement confirming, for the first time to the best of our knowledge, the involvement of the Libyan Coast Guard (‘LYCG’) in smuggling, trafficking and detention of migrants; internal documents of high-level EU organs, framing the commission of multiple crimes against humanity within the context of a predefined plan executed pursuant to a policy aimed at stemming migration flows of Africans; statements by policymakers, made before, during and after the commission of the crimes, that establish their awareness of the lethal consequences of their decisions and implicate them in the alleged crimes; and reports by civil society organizations on the ‘dire and unacceptable’ human rights situation in Libya.”<sup>12</sup>*

The information contained in this communication is indeed troubling – but the EU and its member states’ actions vis-à-vis Libya did not end there. In 2017, the French government announced actions to free migrants held in slave-like conditions in Libya. This resulted in some UN agencies becoming engaged in evacuating migrants from Libya to Niger. The outcomes have been fairly chequered with some resettlement to European states but also some migrants abandoned in Niger. Why Niger? When the need arose to find a state to which to evacuate migrants from Libya, the EU and its member states planned to engage with Niger, Mauritania and Mali. The latter two states desisted quickly. Niger has been highly politically unstable for decades, having suffered a coup d’état in 2010, and after returning to democracy remains highly volatile. Niger’s weak political class with a substantial legacy of legitimacy problems acquiesced to the requests in return for financial contributions from the EU.

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## **B. The EU-Turkey statement**

The EU-Turkey statement of 2016<sup>13</sup> was the result of negotiations to seek an agreement that Turkey would prevent Syrians and others from leaving Turkey and heading towards Greek islands in particular, in return for substantial funding, some resettlement of Syrians from Turkey and the lifting of mandatory visa requirements for Turkish nationals. It was brokered in 2016 when the EU received larger than expected arrivals of refugees (mainly Syrian), sparking a reception crisis across the continent.

The deadline for lifting the mandatory visa requirement on Turkish nationals coming to the EU was the end of June 2016.<sup>14</sup> However, visa liberalisation has not yet happened. The unreliability of the EU in these negotiations with Turkey has unfortunate consequences for the EU’s reputation as a trustworthy partner in the international community.

The traditional position of the EU external policy has been based on reciprocity. Nevertheless, objectives in the area of readmission do not lend themselves to reciprocity. This is because the states to which the EU seeks to return nationals do not have populations of EU citizens which they wish to expel to the EU. They also tend to be countries in fairly weak economic and political situations in relation to the EU. The top two countries of origin of people detected as irregularly staying in the EU are Ukraine and Albania.<sup>15</sup> These are also the top two

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countries of origin of people returned from the EU. They are also neighbours with fragile economies and, in the case of Ukraine, very pressing political problems.

## C. Morocco and the repositioning of politics

**One of the contributing factors to the current situations has been the relative weakness of the EEAS in the EU structure at a time when interior ministries of the member states have sought to use EU external relations for border control and migration management concerns.**

The EU has economic and political links of long standing with Morocco. Cooperation agreements between the two date from the 1960s. However, pressure on Morocco in respect of border control and migration objectives has intensified in particular since 2005 and the introduction of the GAMM. Morocco has been included in all EU-Mediterranean initiatives in the field with a view to engage the Moroccan authorities ever more profoundly in EU efforts to diminish irregular migration, notwithstanding Frontex evidence that it is statistically insignificant. Yet, the EU has insisted on applying pressure on Morocco to agree to a readmission agreement. Finally, the failure of the EU mobility partnership with Morocco to result in increased access for Moroccan workers in the EU has cooled relations.

Morocco is now reassessing its position in international relations, moving away from the EU and associating itself with Africa – in particular, its position within the AU. It has also applied for membership of ECOWAS. This economic community has already instituted a common ID card system which ensures border control free movement among its states for its nationals. Should Morocco's application be successful, it will cement the country's position as a leader in Africa, and remove it further from EU policies which seek for Morocco to carry out border control activities at its external borders with African states, against nationals of other African states, to diminish the pressure to arrive in the EU.

## D. EU visa policy

The EU agreed on a substantial reform of the Visa Code 810/2009 with Regulation 2019/1155, which ties the cost, processing time of visas and availability of multiple entry visas to the success rate of member states' return efforts to the relevant country. The idea, proposed by the Commission and accepted by both



the Council and the Parliament, is that nationals of countries on the EU's visa blacklist should be punished for the inability of EU member states to return people (i.e. both nationals of the state and where permitted, non-nationals who travelled through) to their state. This collective punishment would take the form of an increase of visa costs (from the proposed €80 to €120 or even €160) or exclusion from simplified visa application procedures, waivers for holders of diplomatic and service passports, the 15-day visa processing time and access to multiple entry visas.

This could constitute discrimination on the basis of nationality within the class of states which are on the EU's visa blacklist. While the international community is becoming increasingly intolerant of discrimination on the basis of nationality in immigration procedure,<sup>16</sup> the EU appears to be embracing it in a particularly arbitrary form. The vast majority of people who will be punished by the new Visa Code have no control over or influence on the rates of return of their fellow countrymen and women from EU states, yet are the objects of this discrimination.

In comparison, the EU's new policy of pre-travel authorisation (i.e. ETIAS) will require nationals of these privileged states to obtain pre-travel authorisation to go to the EU (but at a cost of €7) and will not be dependent on the 'good' immigration behaviour of their fellow citizens. This kind of blatant discrimination on the basis of nationality is not conducive to good international relations.

## PART 2: IDEAS AND SUGGESTIONS FOR THE FUTURE

One of the contributing factors to the current situations has been the relative weakness of the EEAS in the EU structure at a time when interior ministries of the member states have sought to use EU external relations for border control and migration management concerns. Ensuring effectiveness in the EU external relations means indeed questioning whether these concerns are a coherent part of external relations.

If the EU is not to alienate important neighbours such as Morocco, international relations must be holistic and the EEAS sufficiently powerful to block border control or migration management demands of the Commission's Directorate-

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General for Migration and Home Affairs (DG HOME) and member state interior ministries when the consequences of pursuing them are disadvantageous to the international relations of the EU and its reputation. There are both short- and long-term consequences, and the EU should not be seen to be funding military dictators or oppressive regimes in return for carrying out its coercive border and migration policies.

The example of Ukraine shows a different tendency. Notwithstanding an influx of Ukrainians to the EU at a rate of half a million a year since the 2014 Russian annexation of Crimea, the EU's external policy has been to reinforce cooperation with that state. No pressure has been brought to bear on the Ukrainian authorities to prevent their nationals from leaving, nor measures taken in the EU to prevent their arrival. To the contrary, in 2017, the EU institutions lifted the mandatory visa requirement on Ukrainians so that they could lawfully enter the EU, rather than irregularly.

#### **INITIAL SUGGESTIONS AND IDEAS:**

1. All of the composite parts of the state must be considered in order of their relevance and importance, such as the positions of foreign affairs ministries, social ministries, interior ministries, border agencies and intelligence services. This will require stronger institutional support for EEAS and the voices of the other Commission DGs in framing policies which affects the reputation of the EU.

2. The EEAS should pay particular attention to developments regarding international policies of groups of third states on borders and migration, and ensure that EU policies are not diametrically opposed to developments in other regions, such as regimes of free movement of persons in the AU, Mercosur, etc. The impacts of coercive and exclusionary EU migration policies on

international relations – such as the Free Movement Protocol to the Treaty Establishing the African Economic Community<sup>17</sup> versus EU pressure to remove ‘unwanted’ migrants from Libya to Niger and elsewhere – must be considered more carefully.

3. For the EU's effectiveness and legitimacy as an international actor, it must deliver on what it promises in negotiations. If the EU is unable to deliver on labour migration opportunities which it seeks to offer other states in international relations contexts, it must refrain from making any promises. The EU's reputation is damaged by its failure to deliver on commitments made in the border control/migration management field.

4. Existing international commitments in agreements, such as the non-discriminatory access to education on the same basis as EU citizens, as stated in the ACP-EU Partnership Agreement should be applied correctly.<sup>18</sup>

5. Discrimination on the basis of nationality in the treatment of foreigners is increasingly unacceptable in international law and relations. The EU should avoid both overt and covert discrimination on the basis of nationality in its visa, border, migration and asylum policies.

6. The EU must cease funding or otherwise supporting pull-back operations (like in the case of Libya) when they lead to a real risk of inhuman or degrading treatment in order to respect the policy promoted by the Commission. In 2018, the Commission's annual report on the EU Charter of Fundamental Rights (the Charter) stated the following:

*“Funding instruments in the areas of migration, border management and security for the next Multiannual Financial Framework (MFF): These proposals highlight the need to use funds in full compliance with Charter rights and principles. Actions implemented with the support of EU funds should take particular*

*account of the fundamental rights of children, migrants, refugees and asylum seekers and ensure the full respect of the right to human dignity, the right to asylum, and the rights of those in need of international protection and protection in the event of removal.”<sup>19</sup>*

EU efforts to control and improve the conditions of migrants in detention centres as well as evacuate migrants to their country of origin or transit countries, with the help of international organisations, should have been quicker and more important. However, these more-than-necessary accompanying measures cannot justify a policy leading to the violation of absolute human rights, like the prohibition of inhuman or degrading treatments that migrants face when sent back by the Libyan Coast Guard, with the unacceptable support of the EU and its member states.

7. The Commission must ensure that internal consultations about the compatibility of policies and measures with the Charter are effectively done even in cases of emergency.

8. On the basis of Article 2 TEU regarding the EU’s values, the EU has a role in protecting EU citizens who are being criminalised for humanitarian action in support of migrants and refugees. It must call for a stop to judicial actions against NGOs and their personnel who are involved in search and rescue activities at sea that are in line with international and maritime law.

9. Another aspect of concern has been the creation of funds, such as the EU Emergency Trust Fund for Africa, which are deployed according to special rules without regard for the Charter, and lack effective monitoring following the European Court of Auditors’ Special Report n°32.<sup>20</sup>

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