

EUROPEAN CONFERENCE

FROM TAMPERE 20 TO TAMPERE 2.0

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Background Note: The Global Approach and the Partnership Framework

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Pre-Conference Version

DISCLAIMER

The draft of this note has been prepared by Elspeth Guild, Jean Monnet Professor ad personam, Queen Mary University of London, Radboud University. The present document is, however, the result of a process during which some changes have been made following a preparatory workshop and in liaison with the author. This means that the author might not agree with all of the suggestions proposed in this note. Final versions of all the background notes, which will take account of the input provided by the conference, will be published and widely disseminated. References to authors quoted have been reduced to a strict minimum contrary to academic rules due to a lack of space. More details will be provided in the published version of this note.



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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.*

I. ASSESSMENT OF THE CURRENT SITUATION:

In contrast to the external agreements concluded by the European (Economic) Community with third countries build upon the principle of equal treatment regarding wages and work conditions and coordination of social security, the EU started the implementation of the Tampere conclusions by a new style of partnership with third countries which was mainly oriented towards return as the purposes of border control and migration management. The main manifestation of this new approach were

readmission agreements with third countries, the objective of which is to facilitate the return of nationals of the parties no longer allowed remain on the territory of the other. Agreements with Hong Kong and Macao (2004), Sri Lanka in 2005, Albania in 2006, Russia in 2007, Bosnia, Macedonia, Moldova, Montenegro, Serbia and Ukraine in 2008, Pakistan in 2010, Georgia in 2011, Armenia, Azerbaijan, Belarus, Cape Verde and Turkey in 2014 were concluded. The Commission was specifically requested to negotiate that these agreements cover not only nationals of the parties but also third country nationals who transited the territory of the other before entering the EU. This effort was partially successful with such extension agreed in some agreements but resisted in others. In some cases, readmission agreements were accompanied by visa liberalisation (eg Armenia and Azerbaijan in 2014) but not always (visa liberalisation without readmission for instance, with Brazil, Mauritius and most of the Caribbean islands in 2009).

The EU developed as from 2005 the Global Approach to Migration and Mobility (GAMM) aiming a broader approach not focused only 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 inter-state agreements such as mobility partnerships. This approach has not resulted in the EU being able to offer improved access to third country nationals 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 from hard or soft law approaches. While it had based its policy on the principle “more for more” (more cooperation in the fight against irregular migration leads to more benefits for third countries), the EU started to rely also on the principle “Less for less” (less cooperation in the fight against irregular migration leads to sanctions against third countries) with the adoption of the New Partnership Framework in 2016 backed by several trust funds consecutively to the crisis of 2015. This refocuses the Global Approach on the fight against irregular migration as the main priority of the EU in its relations with third countries despite the broad approach of the Valletta summit and action plan of 2015.

EU policy concerns about irregular migration appear actually unjustified. The starting place as regards determining whether there is a problem of irregular migration is never addressed. According to Frontex Risk Analysis 2019, out of over 300 million entries at the external border in 2018, approximately 90 million of which were EU/EEA nationals, the rest were third country nationals. A total of 190,930 persons were refused entry at external borders of the EU. This constitutes approximately 0.0006% of total entries at external borders. This very low percentage of people refused entry at the external border does not transform into substantial pressure for irregular border crossing. According to the Agency, there were a total of 150,114 illegal border crossings into the EU of which 114,276 were by sea. This constitutes approximately 0.0005% of the 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 Commission tells us that of the approximately 16 million Schengen visas applied for in 2018, only 9.6% were not issued. The political problem with these statistics is that they do not reveal a crisis in terms of pressure on the EU external borders. The pressure is miniscule and dropping according to Frontex. Any policy which is designed to address as a ‘serious’ problem a statistical non-compliance issue of less than 0.0005% lacks credibility.

The policies which the EU and its Member States have adopted includes push and pull backs (see below), refusal of disembarkation from boats carrying out humanitarian assistance and the criminal prosecution of their captains, seizure of their boats and harassment of their 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 the violent deaths in the Mediterranean. The reason for these negative externalities is the confusion of border control and migration management. Because the

EU has conflated 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 such as Libya, Turkey or 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 externalization 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 EU Agenda on Migration 2015 adopted because of the so-called refugee crisis sets out a plan of action to save lives and combating smuggling and trafficking of migrants. The Agenda calls for using the Common Security and Defence Policy (CSDP) to achieve this objective and resulted in a military intervention in international waters in the Mediterranean aimed at destroying the business model of smugglers called Operation Sophia. In 2014, the Italian navy had carried out Mare Nostrum, a search and rescue operation aimed at saving lives in the Mediterranean, mainly in respect of irregular departures from Libya. Disenchanted with the lack of EU solidarity regarding reception of migrants and refugees rescued, the Italian authorities ended the programme. Pressure rose on the EU to do something and the outcome was Operation Sophia. But from the start, questions arose regarding compliance with international law. The 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 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 (Hirsi of 23 February 2012) that so-called push backs where Italy's navy returned from the high seas migrants seeking to come to Italy to a third country with a problematic human rights record, constituted a breach of human rights of migrants. Since then, Italy has entered into agreements with Libya regarding responsibilities for rescue which are challenged by human rights NGOs 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.

The peak has been reached with a communication to the prosecutor of the International Criminal Court made on 3 June 2019 alleging EU and Member State responsibility for death by drowning in the Mediterranean. The core of the communication calls for the prosecution of senior EU and Member State officials on the following grounds:

"1001. 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.”

The information contained in the communication is indeed troubling. But the EU and its Member States actions vis-à-vis Libya do not end there. In 2017, the French government announced action 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. But why Niger? When the need arose to find a state where 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 but the military leaders in Niger acquiesced to the requests in return for financial contributions. Effectively, the EU and its Member States have been funding a dictatorship in pursuit of their migration policy.

B. The EU-Turkey Statement:

The EU-Turkey Statement of 2016 was the result of negotiations to seek agreement that Turkey would prevent Syrians and others from leaving Turkey 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.

Numbers of arrivals from Turkey to Greece dropped substantially and rapidly after this statement. Resettlement of Syrian refugees from Turkey to EU and EEA states stood at 20,292 as at 19 March 2019 according to the Commission. According to the Statement immediate resettlement of 18,000 would take place presumably in 2016-17 with a cap of 54,000. The deadline for lifting the mandatory visa requirement on Turkish nationals coming to the EU was the end of June 2016. But visa liberalisation has not happened. The unreliability of the EU in these negotiations with Turkey in so far as the Turkish authorities who risk claims that they are violating the human right to leave a country, 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. But objectives in the area of readmission do not lend themselves to reciprocity. This is because the states with 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 (according to Frontex Annual Risk Assessment 2018) are Ukraine and Albania. These are also the top two 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:

The EU has economic and political links of long standing with Morocco. Cooperation agreements between the two date from the 1960s. But pressure on Morocco in respect of border control and migration objectives have 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 the EU efforts to diminish irregular migration, notwithstanding Frontex evidence

that it is statistically insignificant. Yet, the EU has insisted in applying pressure on Morocco to agree 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 re-assessing its position in international relations moving away from the EU and associating itself with Africa, in particular its position within the African Union. It has also applied for membership of ECOWAS (the West African economic community). ECOWAS 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 that country's position as a leader in Africa and remove it further from EU policies which seek that Morocco 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 a substantial reform of the Visa Code 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 both by the Council and the Parliament, is that nationals of countries on the EU's visa black list, should be punished for the inability of EU Member States to return people (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 the cost of a visa (from the proposed € 80 to € 120 or even € 160) or exclusion from simplified visa application procedures, from waivers for holders of diplomatic and service passports, from 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 black list. While the international community is becoming increasingly intolerant of discrimination on the basis of nationality in immigration procedure¹, the EU appears to be embracing it in a particularly arbitrary form. The vast majority of the people the new Visa Code will punish 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 (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.

II. IDEAS AND SUGGESTIONS FOR THE FUTURE:

One of the contributing factors to the current situations has been the relative weakness of the European External Action Service (EEAS) in the EU structure at a time when interior ministries of the Member States sought to use EU external relations for the purpose of border/migration concerns. Ensuring effectiveness in the EU external relations means indeed questioning whether border control and migration management concerns are a coherent part of external relations.

¹ See for instance [No 2018/36 Qatar v UAE Provisional Measures decision of 23 July 2018](#) where the International Court of Justice gave provisional relief to Qatar regarding the threatened collective expulsion of its nationals from UAE in reliance on the [Convention on the Elimination of All Forms of Racial Discrimination](#).

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 DG Home and Member State interior ministries where the consequences of pursuing them are disadvantageous to the international relations of the EU. There are both short term 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.

An example where the answer to that question has been a resounding no is Ukraine. 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 coming irregularly.

1. All 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 a stronger institutional support for EEAS and the voices of the other Commission DGs Home 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 to ensure that EU policies are not diametrically opposed to developments in other regions such as free movement of persons regimes in the African Union, MERCOSUR, etc. The impacts of EU coercive and exclusionary migration policies on international relations, such as the Free Movement Protocol to the AU Convention versus EU pressure to remove 'unwanted' migrants from Libya to Niger and elsewhere must be more carefully considered.

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. Correct application of existing international commitments in agreements such as non-discriminatory access to education on the same basis as EU citizens as stated in the ACP Agreement.

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 visa, border, migration and asylum policies.

6. The EU must cease funding or otherwise supporting pull back (like in the case of Libya) operations when they lead to a real risk of inhuman or degrading treatment in order to respect the policy promoted by the Commission. One can indeed read in its 2018 report on the EU Charter. In 2018 the Commission report on the EU Charter stated about the *"Funding instruments in the areas of migration, border management and security for the next Multiannual Financial Framework (MFF) (that) 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"* (COM(2019)57, p.7). **EU efforts to control and improve the conditions of migrants in detention centres as well as to 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 returned by the Libyan Coast Guards with the unacceptable support of the European Union and its Member States.

7. The Commission must ensure that internal consultations about the compatibility of policies and measures with the EU 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 EU Charter and lack effective monitoring following Report n°32 of 2018 of the European Court of Auditors.