EXPERT OPINION

On the EU- The Gambia Good Practices Agreement

Written by the

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1. COMPLAINANTS

The present expert opinion is drafted by the *International Human Rights Legal Clinic* ("*IHRLC*"),[1] a clinical course offered to the students of the Law Department of the University of Torino. The IHRLC aims at allowing students to be directly involved in litigation of human rights violations before national, European and international courts and bodies, and/or in the drafting of advocacy and policy-making reports on pressing human rights issues. Students have the chance to work in close cooperation with lawyers and institutions. In particular, this submission is part of a joint project between the clinic and the ASGI project Sciabaka&Oruka,[2] aimed at monitoring formal and informal repatriation agreements concluded by the EU and its Member States with third Countries. This opinion supports the Complaint submitted by Ms Diletta Agresta.

[1] The team of the IHRLC is composed of Andrea Spagnolo (Director), Mattia Colli Vignarelli and Giulia Perrone (Tutors), Valentina Boldurescu, Renata Dorina Bud, Sara Comba, Virginia Marinelli, Francesca Mastragostino, Beatrice Miano, Gaia Rizzo and Michela Rossettini. The views expressed in this expert opinion do not necessarily reflects those of the University of Turin, its staff and its students

[2] See https://sciabacaoruka.asgi.it/

2. PURPOSE OF THE SUBMISSION

The purpose of this complaint is to request the European Ombudsman to open an inquiry into whether the decision of the European Commission to deny public access to the 2018 EU-The Gambia Good Practices Procedures on Identification and Return (hereinafter 'EU-The Gambia Agreement') constitutes maladministration.

In recent years, EU institutions are following a trend of 'deinstitutionalization',[3] alias 'de-formalization' i.e., the EU migration and asylum policies are shifting towards informal ways of cooperation.[4] The so-called 'extra-Treaty cooperation'[5] and related instruments pose major EU constitutional challenges. The first victims of this trend are the fundamental rights, which the EU must comply with in its external action.[6]

After the submission of the application for access to the EU-The Gambia Agreement in accordance with Art. 7(2) of Regulation (EC) No 1049/2001, the Commission adopted Decision C (2021) 7082, by which confirmed refusal to access. The refusal was grounded on Art. 4(1) of Regulation (EC) No 1049/2001, according to which "*the institutions shall refuse access to a document where disclosure would undermine the protection of the public interest as regards international relations".*

First, we hold the view that the 'international relations exception' is to be set aside, since it is incompatible with the Commission's claim on the mere procedural nature of the document. In fact, only a substantive agreement could justify the use of such an exception.

Secondly, if the document is legally binding, it requires compliance with EU primary law constraints for *treaty making* in relation to return procedures. Constitutional constraints cannot be relinquished for the sake of international relations. Fundamental rights, as recognized by the

[3] Sergio Carrera, Juan Santos Vara and Tineke Strik, *The external dimensions of EU migration and asylum policies in times of crisis* (EE Elgar 2019), 11.
[4]Jean-Pierre Cassarino, *Informalizing EU Readmission Policy*, in The Routledge Handbook of Justice and Home Affairs Research, ed. Ariadna Ripoll Servent et al. (Abingdon, New York, NY: Routledge, 2017), 83–98.
[5] Sergio Carrera, Juan Santos Vara and Tineke Strik, *The external dimensions of EU migration and asylum policies in times of crisis* (EE Elgar 2019), 11.
[6] Claudio Molinari, *The EU and its perilous journey through the migration crisis: informalisation of the EU return policy and rule of law concerns* (2019) ELR, 824–40.

Charter of Fundamental Rights of the European Union,[7] are at the heart of the constitutional architecture on which the EU is built. Indeed, the EU can exist only as a legal order founded on the rule of law.

In conclusion, regardless of the nature of the document at issue, the 'international relations exception' does not seem to be applicable.

The Complaint is structured in two parts.

First, we infer that the Agreement at issue is a treaty and, thus, subject to publication in the Official Journal of the European Union. In accordance with international law and EU primary law, allegedly non-binding agreements, such as the EU-The Gambia Agreement, are legally binding to the extent that they contain precise commitments producing rights and obligations for the Contracting Parties. In this regard, we contend that, notwithstanding the impossibility to access the content of the EU-The Gambia Agreement, the overall context in which it was adopted and the measures of its implementation supports the argument that it is a legally binding Agreement.

In the second part, we argue that, should the EU-The Gambia Agreement be considered as a non-legally binding arrangement, its scope and objectives nonetheless require a proper legal basis[8] as well as the disclosure of repatriation procedures. Without knowledge of the latter, an affected migrant would be unable to raise a claim against the jeopardization of his or her non-refoulement guarantee or violation of another human right.[9] Furthermore, the lack of a legal basis in the conclusion of return agreements amounts per se to an instance of maladministration.[10] In fact, the combined provisions of Art. 79 TFEU, Art. 218 TFEU, Art. 13 TEU and Art. 19 TEU require the form of a treaty to regulate this subject matter. The use of informal non-binding agreements also circumvents the required democratic scrutiny of the

[7] Consolidated Version of the Treaty on European Union [2008] OJ C115/13, Art. 6 TEU.
[8] Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/1, Art. 79(3).
[9] Panizzon, Marion. "*Readmission agreements of EU member states: a case for EU subsidiarity or dualism?*" in *Refugee Survey Quarterly*, vol. 31, no. 4, 2012, pp. 101–33, http://www.jstor.org/stable/45054949. Accessed 7 May 2022.
[10] According to the European Ombudsman, *"[m]aladministration occurs if an institution or body fails to act in accordance with the law or the principles of good administration or violates human rights. Maladministration can include administrative irregularities, unfairness, discrimination, or the abuse of power, for example in the managing of EU funds, procurement or recruitment policies. It also includes the failure to reply, or the refusal or unnecessary delay in granting access to information in the public interest*" < https://www.ombudsman.europa.eu/en/make-a-complaint >.

European Parliament. Therefore, we hold the view that the recourse to non-binding agreements for repatriation deals represents a breach of the rule of law.

The publication of the Agreement, far from undermining international relations, could even strengthen public confidence in the Commission's action. Greater transparency, as recently stated by the Ombudsman herself in a recommendation, would likewise reinforce the political legitimacy of the Agreement.[11]

For the above mentioned reasons, the complainants claim that the failure on the part of the European Commission to disclose the EU-The Gambia Agreement can amount to instances of maladministration. In this regard, the complainants urge the European Ombudsman to solicit full disclosure of the 2018 EU-The Gambia Good Practices Agreement.

[11] Recommendation on the Council of the European Union's refusal to give full public access to a legal opinion related to the EU trade agreement with the United Kingdom (case 717/2021/DL).

3. THE EU-THE GAMBIA GOOD PRACTICES AGREEMENT IS A TREATY

In spite of its title and the informal procedure followed for its conclusion, the EU-The Gambia Agreement has to be considered a treaty under both international law and EU primary law as well as from the context in which it was concluded and implemented.

In this section, the complaint will first recall the applicable international law rules to the present case. Secondly, it will highlight the context in which the Agreement was signed and executed. Finally, the complaint will make reference to the relevant EU law, requiring the European institutions to inform the European Parliament on the procedure regarding Common Foreign Security Policy and to publish legally binding treaties, such as the EU-The Gambia Agreement, in the Official Journal of the European Union.

3.1 Under international law

It is the argument of our submission that the 2018 EU-The Gambia Agreement is a treaty, as the collected evidence will further support.

The Vienna Convention on the Law of Treaties defines an international treaty as "*an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation*".[12]

The designed name of a given instrument does not alter its suitability to create obligations between the Parties under international law. In this regard, it is important to recall the approach adopted by the International Court of Justice (ICJ) in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, 1994.

In that case, which finds confirmation in a well-established case-law,[13] the ICJ held that to distinguish between mere 'political' commitments and legally binding agreements it is necessary to look firstly at the content and terms of the agreement; secondly, at the context and

[12] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS331 (VCLT) art 2(1)(a).
[13] See *Aegean Sea Continental Shelf (Greece v. Turkey)*, ICJ, [1978] and *Land and Maritime Boundary (Cameroon v. Nigeria)*, ICJ, [2002].

circumstances leading to its adoption, and the conduct of the Parties; lastly, at the intention of the Parties.

The ICJ has reiterated this approach on several occasions, establishing a consolidated test for determining legally binding agreements, which has not been contested by the European Court of Justice and EU institutional bodies. In accordance with this interpretation, it is impossible to evaluate the content of the Agreement, ie. the first criterion, due to its lack of publication; however, we can infer from the documented context, circumstances and conduct of the parties that there are clear obligations arising from the Agreement, which are intended to be legally binding upon both parties.

The following chapter will analyse the evidence gathered over the years, since the entry into force of the Agreement, supporting the claim that the EU-The Gambia Agreement is to be considered a treaty with legally binding nature under international law.

3.2 Evidence of the legally binding nature of the EU – The Gambia Agreement

The factual analysis provided below aims at demonstrating the existence of the binding nature of the EU - The Gambia Agreement, stemming from its practical application.

In particular, it will focus on: 1) the return procedures implemented after the entry into force of the treaty and the subsequent moratorium unilaterally imposed by the Gambian Government in March 2019, showing respectively the effective implementation of the obligations arising from the Agreement and the suspension of the commitments; 2) the return procedures implemented by the EU after the lifting of the moratorium and the second moratorium imposed by The Gambia in April 2021 to suspend once again the commitments between the EU and the country; 3) the projects funded by the EU starting from 2016 implementing life conditions in The Gambia intervening on the root causes of irregular migration; 4) the penalties imposed by the Council under the Visa Code to The Gambia due to insufficient cooperation between the EU and The Gambia since the entry into force of the Agreement.

The evidence reported suggests that the alleged non-binding Agreement contains *de facto* legal commitments as to produce the same effects of a binding international agreement.

3.2.1 First return procedures and moratorium – March 2019

The EU-The Gambia Good Practices Procedures on Identification and Return was signed in May 2018; on the Gambian Government's request, the EU agreed postponing the start of implementation until 16 November 2018.[14]

Notwithstanding this grace period, in August 2018, a charter flight from Germany returned 15 migrants to The Gambia. Overall, throughout 2018 and subsequent to the entry into force of the Agreement,[15] 144 people (113 more than the previous year) were returned.[16]

On 23 February 2019, the Gambian government wrote a letter to German authorities asking to reduce the number of returns. The communication was ignored by Germany, leading to a continuation of returns.[17]

In March 2019, the Gambian government unilaterally imposed a moratorium on deportations from the EU. This initiative prevented effective returns throughout most of 2019, hampering the effective application of the EU-The Gambia Agreement.[18]

The triggering cause of the moratorium was founded on a specific return operation carried out on 25 February 2019 from Germany. On that occasion, German authorities were accused of the lack of information, which led the Gambian authorities to deny entry. Entry was later accepted, resulting in adverse consequences between returnees and authorities.

Subsequent similar incidents, resulting in the uprising of public contestations, led to the declaration of the aforementioned moratorium, which was lifted in January 2020, paving the way for more and more controversial returns.[19]

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[14] Commission, 'Letter on EU readmission cooperation with partner countries - state of play', 29th January 2022.
[15] Ibidem.
[16] Gerald Kanus 'The Gambia Plan – win-win with Africa - the 11th commandment' (5/2019) ESI < https://www.esiweb.org/newsletter/gambia-plan-win-win-africa-11th-commandment > Accessed March 2022.
[17] Gerald Kanus 'The Gambia Plan – Beyond empty words and threats: how a breakthrough is possible' (2/2020) ESI < https://www.esiweb.org/newsletter/gambia-plan-beyond-empty-words-and-threats-how-breakthrough-possible> Accessed March 2022.
[18] *Proposal for a Council implementing decision on the suspension of certain provisions of Regulation (EC) 810/2009 of the European Parliament and of the Council with respect to The Gambia* [2021] Brussels, 15.7.2021 COM(2021) 413 final 2021/0233(NLE) (European Commission).
[19] Altrogge, J. and Zanker, F., 2019. *"The Political Economy of Migration Governance in the Gambia."*. [online] Arnold-bergstraesser.de.
Available at: <https://www.arnold-bergstraesser.de/sites/default/files/medam_gambia_report_altrogge_zanker.pdf> [Accessed 5 April 2022]. par. 2.2.2.

3.2.2 Second returns and moratorium - April 2021

Notwithstanding the lifting of the moratorium, The Gambia kept obstructing the implementation of return procedures. On 18th November 2020, a group of 20 Gambians were returned to their origin country[20] from Germany.[21] A week after, members of the German voluntary network Gambia Helfernetz acquired the letter by the German Embassy in Dakar of October 20th, that included the list of 22 'deportees' from Germany.[22]

According to Mr. Sonko, spokesperson of The Gambia Refugee Association (GRA) Europe Branch, the country was expecting four more flights of deportees before the month of March 2021,[23] noting that The Gambia government is still not ready to undergo negotiations with its German counterparts in avoiding the ongoing mass deportation.

Moreover, on the 6th of April 2021 the government issued a moratorium declaring the impossibility to receive returnees until further notice.

3.2.3 EU-Funded Projects

During the last two years, the EU Commission confirmed its will of finding agreeable solutions through several projects regarding return procedures, support to Gambian authorities and police staff, and an enforced fight against humans' traffic and smuggling.

Many projects aimed at ensuring a dignified return to the migrants, intervening on the root causes of irregular migration and addressing the socio-economic needs of the Gambian citizens thus preventing them from leaving.

In December 2016, the European Union Trust Fund for Africa launched a EU-IOM Joint Initiative for Migrant Protection and Reintegration, for a total amount of € 3.9 million.[24] This

[20] We're acquainted with this episode, following the garning of a document by the Gambian Refugee Association; in the document, namely a letter, a request to the Gambian Ministry of Foreign Affairs, International Cooperation and Gambians Abroad for a landing permission of a deportation flight departing on November 18th from Frankfurt (Main), and landing on November 19th,in Banjul at 3 a.m. was advanced. [Aino Korvensyrjä 'Resumption of charter deportations from Germany to The Gambia' (*MigrationControl.Info*, 12 December 2020) <https://migration-control.info/resumption-of-charter-deportations-from-germany-to-the-gambia-exploring-the-integration-deportation-nexus/> Accessed March 2022].

[21] Pa Modou Cham '20 Gambians deported from Germany, gov't accused of having a hand' *The Point* (November 2020).

[22] BadischeZeitung, 'Strobl fordert mehr Druck auf Gambia' August 2020 <https://www.badische-zeitung.de/strobl-fordert-mehr-druck-auf-gambia--193212767.html#embedcode> Accessed March 2022.

[23] Yusupha Jobe 'Gambians to protest mass deportation' The Point (January 2019) <https://thepoint.gm/africa/gambia/headlines/gambians-to-protest-mass-deportation >.

[24] "*Willing to go back home or forced to return? The centrality of repatriation in the migration Agenda and the challenges faced by the returnees in The Gambia*", Action Aid, R. Sensi ed., research concluded on 18/11/2019, p.32.

project provides every migrant with a reintegration package and incentives collective reintegration by also allowing multiple people to combine their packages to start a joint business activity (an option that has remained residual at this time).

In 2017 the International Trade Centre inaugurated the Youth Empowerment Project (YEP), endeavouring to achieve higher levels of youth employment and to enhance entrepreneurship as an alternative to job-seeking.[25] The project offers job and apprenticeship opportunities and allows young Gambian citizens to take part in training and vocational programs.

Since the signing and entry into force of the Good Practices Agreement between the EU and The Gambia in May 2018, the EUTF funded another project, "*Building a future - Make it in The Gambia*", starting from May 2018 (the very same month of the 'Good Practices' Agreement) for a total amount of € 23 million.[26] This initiative aims at improving the attractiveness of employment in The Gambia with a focus on the rural areas by raising awareness on the opportunities provided by the country and the risks of irregular migration for the individuals.

Since 2019, the Commission has also taken steps to improve The Gambia's level of cooperation in the return of illegally staying third country nationals. Those steps consisted of several meetings to find mutually agreeable solutions with the Gambian authorities at both technical and political level and to agree on further support projects to the benefit of The Gambia. In parallel, high-level exchanges between the Commission and the Gambian counterparts have taken place. The issues were also raised as a part of other meetings organised by the EEAS.

From all the foregoing, it stands out that the EU has demonstrated a strong will to collaborate with The Gambia, and to implement return practices with the country, thus ensuring the enforcement of the Good Practices Agreement.

3.2.4 Penalties imposed under the visa code

Taking into account the steps taken so far by the Commission to improve the level of cooperation and the Union's overall relations with The Gambia, the Union has considered that

[25] Ibidem, p.33.
[26] Action Document for EU Trust Fund, Annex IV to the Agreement establishing the European Union Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa and its internal rules.

The Gambia's cooperation with the Union on return matters is not sufficient and that action is therefore needed.[27]

In accordance with the New Pact on Migration and Asylum, which points to the newly created Visa Code Article 25a mechanism as a leverage to improve cooperation with third countries on return and repatriation, the Council implemented a decision on 7 October 2021 - in force since 1 November 2021 - to temporarily suspend the application of certain provisions of the Visa Code in respect of Gambian nationals.[28]

The second step of such a mechanism, under Article 25a(5), which contemplates an implementing decision applying, on a gradual basis, one of the visa fees set out in Article 16(2a) to all nationals of the third country concerned or to certain categories thereof, may also be implemented by the Council if the cooperation with The Gambia does not change.[29]

The Gambia will, therefore, be a testing ground for the EU's 'carrot and stick' approach to treat non-compliance with the EU's return demands, leading to possible pecuniary penalties.[30]

The ongoing penalty imposed on The Gambia regarding its non-sufficient cooperative behaviour, together with the evidence provided above, lead us to the conclusion that the content of the EU-The Gambia Agreement creates rights and obligations on the Parties. The aforementioned mutual actions and reactions show that the commitments taken by the Parties were so strong as to lead to retaliatory measures in response to non-compliance, showing their substantially binding nature.

Therefore, we argue that the EU-The Gambia Agreement ought to be recognised as a treaty, subject to EU law rules and, accordingly, to publication in the Official Journal of the European Union.

[27] Commission, 'Letter on EU readmission cooperation with partner countries - state of play', 29th January 2022, pp. 8-9.
[28] Ibidem pp. 8-9.
[29] Council, 'Communication on enhancing cooperation on return and readmission (including the Commission's Assessment of third countries' level of cooperation on readmission in 2019) – Presidency discussion paper', Council document 6583/21, LIMITE, 5 March 2021.
[30] Statewatch, 'EU: Deportations: overview of readmission cooperation in key countries' (9 March 2022), <https://www.statewatch.org/news/2022/march/eu-deportations-overview-of-readmission-cooperation-in-key-countries/> accessed on 10 April 2022.

3.3 EU legal framework on International Treaties

The European institutions must act in accordance with EU primary law, namely its 'constitutional framework', in line with the principle of conferral[31] and by the obligation of sincere inter-institutional cooperation.[32] In order to deem the EU-The Gambia Agreement lawful, we have to assume that it is coherent with applicable primary law provisions.

Therefore, as far as it concerns specifically return agreements, the applicable legal bases are the combined provisions of Art. 79 and 216 TFUE.[33]

EU international agreements are concluded between the European Union and non-EU countries to facilitate the return of people irregularly residing in the EU to their country of origin or to a country of transit. It is worth mentioning that they are negotiated in a broader context of international cooperation through visa facilitation, financial support and trade liberalisation.[34]

Return agreements between the Union and third countries have to be negotiated and concluded in accordance with the treaty-making procedure set out in art. 218 TFEU in relation to the Common Foreign and Security Policy (CFSP), according to which "*[t]he European Parliament shall be immediately and fully informed at all stages of the procedure*" of negotiation and conclusion of the international agreement.

According to the CJEU judgements in the Tanzania[35] and Mauritius[36] cases, the non-compliance with the *duty to inform* impinges on the Parliament's performance of its duties related to the Common Foreign and Security Policy and constitutes an infringement of an

[31] Consolidated Version of the Treaty on European Union [2008] OJ C 115/13, Art 5.
[32] Art 13(2) TEU.
[33] Art. 216(1), (2) TFEU reads: "*The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope. Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States."*
Art. 79(3) TFEU: *"The Union may conclude agreements with third countries for the readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States".*
[34] In fact, the cooperation with non-EU countries on readmission of irregular migrants has been substantiated so far in the conclusion of 18 readmission agreements. More specifically, with Hong Kong, Macao, Sri Lanka, Albania, Russia, Ukraine, North Macedonia, Bosnia & Herzegovina, Montenegro, Serbia, Moldova, Pakistan, Georgia, Armenia, Azerbaijan, Turkey, Cape Verde, Belarus. <https://ec.europa.eu/home-affairs/policies/migration-and-asylum/irregular-migration-and-return/return-and-readmission_en >
[35] Case C-263/14 *Parliament v Council* (Tanzania) [2016] ECLI:EU:C:2016:435.
[36] Case C-658/11 *EP v Council* (Mauritius) [2014], ECLI:EU:C:2014:2025.

essential procedural requirement and of the democratic principle on which the EU is founded. Indeed, "*the information requirement ensures that the Parliament is in a position to exercise democratic control over the European Union's external action and, more specifically, to verify that the choice of the legal basis for a decision on the conclusion of an agreement was made with due regard to the powers of the Parliament*".[37]

In accordance with EU law, international agreements are to be published in the Official Journal of the European Union to ensure transparency and openness[38] towards the EU citizens thereby enhancing the legitimacy and credibility of public institutions.[39]

In the past, the European Parliament has raised concerns that some international agreements do not provide sufficient human-rights safeguards to always ensure the protection of returnees.[40] This risk is almost certainly arguably higher in the soft and not publicly disclosed agreements, which make it difficult to monitor possible violation of fundamental rights.[41]

In the light of the analysis provided in this section, it can be concluded that, notwithstanding the declared non-binding nature of the document, the EU-The Gambia Agreement has to be considered as containing legal and precise commitments; these produce the same effects of a binding international agreement, which, according to EU law, ought to be published in the Official Journal of the European Union.

[37] Tanzania case, paras 68–77.
[38] Art 1(1) Regulation (EC) No 1049/2001.
[39] Article 15 TFEU states that the obligation to grant access to documents has the objective to *"promote good governance and ensure the participation of civil society"*.
[40] The EURA with Albania (signed in 2005) was the first to reflect the EP's concerns about this insufficient reference to human rights. <https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2015)554212> .
[41] See also Sergio Carrera, *Implementation of EU Readmission Agreements: Identity, Determination, Dilemmas and the Blurring of Rights.* Berlin: Springer Open 2016.

4. EVEN IF THE AGREEMENT WERE DEEMED NON-BINDING, IT SHOULD BE PUBLISHED

The Commission's assumption that the EU-The Gambia Agreement is not a legally binding agreement poses serious issues of compliance with fundamental values enshrined in Article 2 TEU, the rule of law and the respect for human rights.[42] In this regard, it is worth taking as reference the EU definition of rule of law which the Commission gave in 2014, namely "*legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law*".[43]

In addition, it does not respect the mechanisms of allocation of powers envisaged in the Treaties. The scope and objectives of the agreement at issue require a proper legal basis, which a soft deal concerning return procedures does not find either in the Treaties or the CJEU jurisprudence. Nevertheless, the European institutions have extensively resorted to 'soft' deals concerning returns, whose growing number throughout the past years has led to an opacification of the cooperation in return. Despite the Return Directive's[44] claim that "*[c]ommon EU rules on return provide for clear, transparent and fair treatment of irregularly staying migrants, while fully respecting the human rights and fundamental freedoms of the persons concerned*", the EU-The Gambia Agreement itself shows that the treatment is far from being clear and transparent, as agreements whose nature is allegedly not binding are not made public. Such a practice by the Commission leads to the departure of its action from the very same EU definition of rule of law, resulting in an arbitrariness in the exercise of public powers not subject to the public scrutiny.

Moreover, such a practice leads to violation of the principle of allocation of powers and institutional balance as reflected in Art. 13(2) TEU, according to which "*[e]ach institution shall*

[42] Article 2 TEU reads: "*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."*

[43] Communication from the Commission to the European Parliament and the Council [2014] COM/2014/0158 *A new EU Framework to strengthen the Rule of Law.*

[44] Directive of the European Parliament and of the Council 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L348/98.

act within the limits of the powers conferred on in the Treaties, and in conformity with the procedures, conditions and objectives set out in them". We take the view that the principle should apply every time an EU institution 'acts', including through soft deals, since "*[i]nstitutional balance is relevant and applicable to the production of both hard and soft law*" and "*it should fully display its normative force precisely when no decision-making procedure is envisaged in the EU Treaties for the adoption of certain acts, as in the case for soft-deals*".[45]

Article 218 TFEU indicates the way in which the different institutions are required to interact when concluding a formal treaty, and, in doing so, establishes the weight of the two institutions in the sphere of external relations in general: the participation somehow of the Parliament appears to be indispensable. "*Albeit not directly applicable, Article 218 TFEU is also relevant [in the field of soft deals], to the extent that it gives useful indications on the role that the different institutions are required to play in the EU's external relations*".[46]

Comparing the available evidence on the EU-The Gambia Agreement with the 'non-binding agreements' and the official agreements on return which have been made public, we assume that they share almost the same core content.

If the procedures set out in Article 218 TFEU may result difficult to comply with, we argue that, nevertheless, the compliance with the institutional balance, namely the fundamental and substantial constraints, is unavoidable. Therefore, even when concluding a 'non-binding agreement' on return, the Commission has to include the Parliament, and, hence, the public scrutiny, in the process.[47]

Therefore, we urge the disclosure of the content of the EU-The Gambia Agreement.

4.1 Return procedures must comply with substantial and procedural standards

Return procedures entail an interference with the migrants' human rights and therefore must comply with substantial and procedural standards.

[45] Caterina Molinari, 'EU Readmission Deals and Constitutional Allocation of Powers: Parallel Paths that Need to Cross?' in Eva Kassoti and Narin Idriz (eds), *The Informalisation of the EU's External Action in the Field of Migration and Asylum,* in Global Europe: Legal and Policy Issues of the EU's External Action (volume 1, Springer, Asser Press, 2022) p. 27.
[46] Ibidem, p. 29.
[47] Case C-149/85 Roger Wybot v Edgar Faure and others [1986] ECR 1986-02391, according to which "*[i]n accordance with the balance of powers between the institutions provided for by the Treaties, the practice of [an institution] cannot deprive the other institutions of a prerogative granted to them by the Treaties themselves*".

Most importantly, the principle of non-refoulement is to be respected. This is stated in Article 33 of the Geneva Convention relating to the Status of Refugees, and indirectly covered by Article 3 of the European Convention on Human Rights, as well as Articles 18 and 19(2) of the Charter of Fundamental Rights of the European Union.

In *Saadi v. Italy*[48] the European Court of Human Rights affirmed that "*[...] Contracting States have the right to control the entry, residence and removal of aliens [...] However, expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3. In such a case Article 3 implies an obligation not to deport the person in question to that country*".

When a 'real and personal risk' originates from the return, the State must conduct an assessment of both the general situation in the country of origin and the migrants' personal situation, in order to verify his or her membership to a group that is subjected to ill-treatment.

The ECtHR also reiterates the principle according to which indirect refoulement leaves the State's responsibility intact. It is stated in the case of *Hirsi Jamaa and Others v. Italy* that "*[i]t is a matter for the State carrying out the return to ensure that the intermediary country offers sufficient guarantees to prevent the person concerned being removed to his country of origin without an assessment of the risks faced*".[49]

With reference to the EU-The Gambia Agreement, it is necessary to take into account the situation of migrants transiting through The Gambia from countries whose governments perpetuate severe human rights violations according to the international reports and documents - such as Ethiopia and Eritrea. The secrecy of the repatriation procedure makes it impossible to verify whether The Gambia offered the sufficient guarantees mentioned above.

The principle of non-refoulement links to the prohibition of collective expulsion contemplated by Article 4, Protocol 4 of the ECHR.

Collective expulsion is defined by the case-law as "*any measure of the competent authorities compelling aliens as a group to leave the country, except where such a measure is taken after*

[48] ECtHR, *Saadi v. Italy,* Application No. 37201/06, 28 February 2008, para. 74.
[49] ECtHR, *Hirsi Jamaa and Others v. Italy,* Application No. 27765/09, 23 February 2012, para. 147.

and on the basis of a reasonable and objective examination of the particular cases of each individual alien of the group" (*Andric v. Sweden*).[50]

The previously cited 'deportations' that took place in accordance with the EU-The Gambia Agreement highlight the relevance of this provision in the present case.

Article 4, Protocol 4 does not automatically forbid the expulsion of multiple aliens at the same time, as long as an individualised examination is conducted and "*every person concerned is given the opportunity to put arguments against his expulsion to the competent authority on an individual basis*" (*Andric v. Sweden*; *Čonka v. Belgium*).[51] The risk of refoulement represents one of the individual circumstances that the state of return is obliged to take into consideration in order to avoid a violation of this Article.

According to Article 13 ECHR, "*Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by personal acting in an official capacity*".

Concerning the returnees, the effectiveness of the remedy implies a series of procedural guarantees as to the form of the return decision, the language used, the motivation, the access to information on the asylum procedure and the available legal remedies, or the access to a lawyer.

In the case of *Čonka v. Belgium* the Court also claims that "*[…] the notion of an effective remedy under Article 13 requires that the remedy may prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible*".[52] Therefore, in the light of the potentially irreversible effects of torture and ill treatment, the right granted by Article 3 requires a rigorous scrutiny.

Further to the legislation cited so far, the Charter of Fundamental Rights of the European Union ('Charter') encompasses the principle of non-refoulement in Articles 18 and 19. The Charter is a legally binding instrument, which EU bodies, institutions and Member States must abide by, pursuant to Article 51(1) of the Charter.

[50] ECtHR, Andric v. Sweden, Application No. 45917/99, 23 February 1999, para. 59.
[51] *Andric v. Sweden*, op. cit., para. 1; ECtHR, *Čonka v. Belgium*, Application No. 51564/99, 5 February 2002, para. 59.
[52] *Čonka v. Belgium*, op. cit., para. 79.

The purpose of Articles 18 and 19 is to prevent States from removing migrants without examining their personal circumstances or giving them access to an effective remedy to contest their removal. In that sense, any form of removal or interception activity that prevents entry may constitute collective expulsion if it is not based on an individual decision and if effective remedies against the decision are unavailable. Such measures may also violate the right to an effective remedy enshrined in Article 47 of the Charter[53].

In regards to the application of the EU-The Gambia Agreement, the return procedures adopted seem to violate the provisions of the Charter in so far as they do not provide for an effective remedy to the returnees to contest their removal from the European Union.

According to the ECHR and Charter provisions as well as established case law regarding the principle of non-refoulement, we argue that, even if the EU-The Gambia Agreement were deemed not to be a treaty, it should still be published. By doing so, the returnees' fundamental rights would be safeguarded and a legal basis for the EU institutions' compliance with procedural standards in return operations would be guaranteed.

4.2 Decision in case 640/2019/te

In her decision of 2019, the Ombudsman stated a general requirement of openness and transparency that applies to the conduct of the EU institutions' work - whether it is legislative in nature or not.[54] In her assessment, the Ombudsman determined that acts which are directly binding on the Member States and, are either directly or indirectly binding on citizens, require an even higher standard of transparency; the same argument is reiterated for the decision-making processes that are of particular importance to the public and therefore require a particularly high standard of transparency,

It follows that procedures concerning the return of illegal migrants, such as those contained in the EU-The Gambia Agreement - which are of particular importance not only to the public

[53] European Union Agency for Fundamental Rights, 'Scope of the principle of non-refoulement in contemporary border management: evolving areas of law'(2016), Publications Office of the European Union, <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-scope-non-refoulement_en.pdf> accessed on 1st May 2022

[54] Complaint submitted by the environmental law organization ClientEarth, which concerned the transparency of the decision-making process in the Council of the EU, that led to the adoption of the annual regulations setting total allowable catches (TACs) of certain fish stocks in the Northeast Atlantic for 2017, 2018 and 2019 (Ombudsman Decision in case 640/2019/TE on the transparency of the Council of the EU's decision-making process leading to the adoption of annual regulations setting fishing quotas).

at large, but also to the migrants themselves - should be disclosed even if they are not considered to be legislative in nature.

5. CONCLUSION

The legal and factual analysis provided above aims at illustrating the existence of the binding nature of the EU - The Gambia agreement. In particular, the return procedures have been effectively implemented after the entry into force of the treaty showing respectively the existence of obligations arising from the agreement and the suspension of the commitments. This was also confirmed by the return procedures reimplemented by the EU after the lifting of the moratorium and once again the suspension of the commitments between the EU and the country under the second moratorium imposed by The Gambia in April 2021. Indeed, the subsequent penalties imposed by the Council, under the Visa Code, on The Gambia due to insufficient cooperation between the EU and The Gambia confirm the existence of such obligations under a binding agreement. Therefore, we claim that, in accordance with EU primary law and international law, the 2018 EU-The Gambia Good Practices Procedures on Identification and Return is a treaty, even without being formally designated as such, and should be published in the Official Journal of the European Union.

However, even if the Agreement were deemed not to be a treaty, it should be published due to its potential interference with the migrants' human rights. This is necessary in order to comply with substantial and procedural standards.

For all the foregoing considerations, we request the European Ombudsman to solicit full disclosure of the EU - The Gambia Good Practices Procedures on Identification and Return based on maladministration grounds by the European Commission.