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Informal agreements and quasi-legal mechanisms in EU-Africa cooperation on migration: how the EU takes advantage of the GCM commitments

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Soft law plays an increasing role in EU external migration law, particularly in the context of EU-Africa cooperation on migration. A legal-analytical inquiry into the formats and functions of soft law, based on the example of EU-Africa cooperation on migration, reveals that the EU preference for soft law is functional to achieve the EU's own migration objectives in Africa, namely preventing and containing irregular migration, rather than facilitating mobility, as envisaged in the UN Global Compact for Migration. This article presents and discusses the formats of soft law in EU-Africa cooperation, distinguishing between informal agreements and quasi-legal mechanisms for cooperation, and their respective para-law and pre-law functions. It then suggests that while informal agreements set the broad objectives of international cooperation and prepare the ground for legal changes in third countries, quasi-legal mechanisms for cooperation guarantee their implementation. Their combined effects ignite broader processes of domestic reforms in the African States through a technique of legal influence.

KEYWORDS

soft law, external dimension of EU migration law, global compact for migration, GCM, informal agreements, informalization, capacity-building, EU Trust Fund for Africa

1. Introduction

Most of the international cooperation on migration has mainly been informal, through inter-governmental dialogues and processes with rare phases of formalization which characterize the segmentation of international migration law.[1] The process that led to the adoption of the UN Global Compact for Safe, Orderly and Regular Migration (GCM) created

1 As Chetail notes, "the current international legal framework governing migration consists of an eclectic set of superimposed norms that are scattered throughout a vast number of overlapping fields" (Chetail, 2020, p. 6). Within the UN framework, the UN conventions concern refugees, migrant workers and trafficked or smuggled migrants. He also notes that "the rapid growth of multilateralism in an area that has long been associated with domestic jurisdiction has been possible through the proliferation of non-binding instruments and consultative processes during the last three decades [...]. Although its influence is not free from ambiguities, the unprecedented expansion of soft law has been decisive in building confidence and creating a routine of intergovernmental dialogue" (Chetail, 2020, p. 283).

an opportunity for developing a fairer global migration framework and offered a renewed impetus for more formal cooperation. While the adoption of the New York Declaration of 2016 represented a tremendous multilateral achievement, the soft nature of the GCM and its implementation show its limitations in undertaking new multilateral commitments.

The GCM also generated momentum for studies on the functions and evolution of soft law in global migration governance (Gammeltoft-Hansen et al., 2017; Panizzon and Vitiello, 2019; Chetail, 2020; Panizzon et al., 2022). The European Union's role in the GCM negotiations has also been documented (Sarolea et al., 2020; Melin, 2021). Thanks to the granting of a standing status to the EU as a regional organization, the European Commission could express a unified EU position through coordinated statements during the GCM negotiations. However, this unity deflated when some EU Member States opposed the GCM (Melin, 2019). While the EU is committed to rules-based multilateralism, it failed to demonstrate leadership in pursuing a truly global normative agenda in multilateral migration governance.

The role of the European Union could have been inspired by Article 3(5) TEU, which establishes that "in its relations with the wider world, the Union shall uphold and promote its values and interests" but also "the strict observance and development of international law". The development of international migration law is currently not a priority of the European Union, which, despite its external values, remains focused on advancing its own internal migration agenda rather than a global one. Concerning the EU's willingness to impose its own regional objectives in the GCM by elevating the EU standards on migration to the global level, Molnár argues that "the EU has been the most successful advocate of the interests and priorities of the Global North [...] in an attempt to redraw the lines of multilateral migration governance" (Molnár, 2020, p. 336). Similarly, Spijkerboer argues that "European migration policy makers have succeeded in 'uploading' their agenda to the UN level [...] and they also instrumentalise European development agencies to implement migration policy transfer" (Spijkerboer, 2022, p. 2983).

This article submits that this process of legal influence on migration by the European Union in its external environment is well evidenced in the day-to-day migration cooperation of the European Union with the African States. In particular, the case of EU-Africa cooperation on migration stands out as an example of the role of soft law in public international law, which takes two main formats and two main functions that will be discussed in this Article. The empirical observation of the instruments of the external dimension of EU migration law shows that, in its relations with third countries, informal agreements are mushrooming, and the use of quasi-legal mechanisms for cooperation is widespread, to the detriment of the development of international law.

Theoretical framework and terminology

The category of "soft law" is usually useful in the discussion of two distinct legal issues. The first relates to *sources* of law (the format) while the second to the *legal effects* (the functions).

Formats of soft law

The first legal issue focuses on the softness of the law-making process, indicating that the legal source itself "lacks something". This idea is exemplified by the preference expressed by some scholars for the term "de-formalization" of international law-making instead of "informalization".[2] However, informalization and soft law are not synonyms. As a normative transformation, informalization describes the process that concerns law-making, while soft law refers to the output of the informalization process. In the EU context, if informalization is pursued in bilateral relations between the EU and third countries, its outcomes may be informal international agreements. These are often legally binding international agreements which are adopted bypassing substantive or procedural rules. Cassarino was the first scholar to acknowledge the importance of informal cooperation in the EU readmission policy (Cassarino, 2007). In this research, the distinction between informal agreements and quasi-legal mechanisms for cooperation refers to the quality of the legal source.

Informal agreements mimic international agreements, but lack something that characterizes formal agreements. The European Union and the African States concluded a series of *informal agreements* whose degree of normativity is controversial. Normativity can be understood as what determines the threshold between legal and non-legal/political instruments and can be seen as "gradual" or "graduated", as a spectrum in which the normative force of an instrument can be hard or soft, with varied intensity in-between, beyond the binding/non-binding divide (Pauwelyn et al., 2012). However, even though the form and/or explicit non-legally binding character of informal agreements question their legal value, their implementation can have legal implications (Vitiello, 2022). Cardwell and Dickson (2023) identify this type of agreement as "formal informality" "resembling familiar or established tools, but lacking the procedural safeguards, transparency and classification provided by law and legal processes" (Cardwell and Dickson, 2023, p. 2). Informality does not necessarily imply the instrument's lack of legally binding character, as informal agreements can be binding or non-binding. Chetail stresses the importance of the distinction between an instrument's form and substance. He notes that

> "in many cases, both the form and substance [of soft law instruments] are devoid of legal value. [...] However, in other circumstances, the non-binding form of an instrument does not necessarily prejudice its binding content and *vice-versa*" (Chetail, 2020, p. 284).

Next to informal agreements, the EU mobilizes *quasi-legal mechanisms* to obtain cooperation from third countries, such as political and diplomatic approaches, technical support to third countries through development cooperation, as well as conditionality mechanisms. This concept refers to soft instruments that are difficult to apprehend in legal terms, as they conceal legal elements in political, technical and financial instruments. This affects the legal categories, which would make it possible to identify and determine the legal value of these mechanisms. Despite

2 In many words of Latin derivation, the prefix "de" indicates removal (e.g., deportation) or deprivation (e.g., deterrence), and it has mainly a negative value (e.g., decreasing). According to Vitiello, the term proves more accurate than "in-formalization" (Vitiello, 2020, p. 130).

their non-legal forms in terms of source-like quality, quasi-legal mechanisms can produce widespread legal effects. Moreno-Lax refers to these as the "hard implications of soft law" (Moreno-Lax, 2023). Fahey regard this as "hyper-legislation", meaning "a surge in the incidence of the creation of law-like instruments, soft law, hard law, legal instruments with legal effects and the general generation of rules and other norms in a field, with legal or law-related components" while "legalization" means "attribut[ing] legal effects and legal qualities to EU migration policies not previously existing, in a diversity of ways which are extreme" (Fahey, 2019, p. 123). This articles suggests that, while quasi-legal mechanisms cannot be considered law as such, they bear legal consequences. The prefix "quasi", a Latin loan word, means "as if" and describes measures that are often deemed merely "technical" or "political" as opposed to "legal". When cooperation is classified as merely "technical", this reference is meant to neutralize its political and discretionary charge and to shield its content by escaping legal formalities. However, looking in-depth at their content, they appear legally relevant.

Distinguishing between informal agreements and quasi-legal mechanisms for cooperation and clarifying how these two soft categories are interlinked allows one to understand the complexity of the different international cooperation instruments through which legal objectives are pursued.

Functions of soft law

Even when migration cooperation is presented as merely technical or political, it fulfills critical legal functions due to the migration control objectives carried out. The second legal issue relates to the functions of soft law, meaning the legal consequences they produce in the international order. Drawing on Peters and Pagotto's theoretical framework on pre-law, law-plus and para-law functions of soft law as "a new mode of governance" (2006), which, in turn, builds upon framework Senden's (2004), this article tests this theoretical framework against the backdrop of the EU-Africa cooperation on migration.[3] Peters and Pagotto distinguish among soft law with *pre-law* functions, which consists of those acts which serve as an impulse for hard legislation; soft law with *law-plus* functions that serve the objective of interpreting existing hard law; soft law with *para-law* functions is when hard law is not available, because of divergencies on the desirability of hard law (Peters and Pagotto, 2006).

This article refocuses the law's role in international cooperation between the European Union and the African States. After a short review of the salience of soft law in the EU international cooperation with third countries (Section 2), the article first presents and discusses the *formats* of soft law in EU-Africa cooperation, making a distinction between the different informal agreements and quasi-legal mechanisms for cooperation (Section 3). Then, it engages with *para-* and *pre-law functions* of soft law (Section 4). The combined effects of informal agreements and quasi-legal mechanisms put in place by the EU show that the Union ignites broader domestic processes of reforms in the African States through a technique of legal influence. This article suggests that while informal agreements set the broad objectives of international cooperation and prepare the ground for legal changes in third countries, quasi-legal mechanisms for cooperation guarantee their implementation. It reveals the increasing role of soft law in international law-making on migration and the reasons behind the EU's preference for soft law in its relations with the African States, namely preventing and containing irregular migration, rather than facilitating mobility, as envisaged in the UN Global Compact for Migration.

2. Soft law in the external dimension of EU migration law

Soft law, a concept at the interplay between law and policy and "a special kind of law" (Peters and Pagotto, 2006, p. 4), is a highly debated doctrinal category with which different authors engage with different outcomes (Abbott and Snidal, 2000). Scholars' views on soft law are primarily influenced by their views on the law: some authors reject the concept as not pertaining to the legal sphere, assuming that normativity has no degree (Klabbers, 1996). Others consider normativity as "gradual," that the "hardness" of law is relative and defend that norms can carry a variety of different impacts and legal effects (Peters and Pagotto, 2006; Terpan, 2015). Pauwelyn considers an international agreement informal when "it dispenses with certain formalities traditionally linked to international law", such as the output, the process or the actors involved in law-making (Pauwelyn, 2012, p. 15).

Even though soft law does not create rights and obligations, its legal effects can create legitimate expectations upon the parties to comply, in the application of the good faith principle in international relations (Chinkin, 2000; Chetail, 2020). Soft law "may not, strictly speaking, be part of law but merely have legal effects or fit in the context of a broader legal or normative process" (Pauwelyn, 2012, p. 21). Moreover, due to the *suis generis* nature of the EU as an international organization, debates on the spectrum of soft law concern both the legitimacy of the use of soft law as a matter of EU law, both for internal and external soft law (Senden, 2004; Eliantonio and Stefan, 2018; Larik and Wessel, 2020; Yurttagül, 2020; Slominski and Trauner, 2021), and the legitimacy of the use of soft law as a matter of public international law (Ellis, 2012; Pauwelyn et al., 2012; Boyle, 2018).

In studies about the external dimension of EU migration law, the proliferation of soft law instruments is now acknowledged as a fact and often criticized (ex multis: Cardwell, 2016; García Andrade, 2018; Casolari, 2019; Ott, 2020; Fahey, 2021; Wessel, 2021), in particular, because of the circumvention of the rule of law principles and its impact on the human rights of migrants, contributing to a weakening of international protection standards (Ryan, 2019; Roman, 2022). EU law scholars have raised issues related to EU competence (García Andrade, 2018; Poli, 2020), EU principles (Molinari, 2022) and institutional challenges (Ott, 2020). The controversial adoption of the EU-Turkey Statement in 2016—an informal agreement concluded by the EU Member

3 Senden's work was the first systematic investigation of the uses of soft law in EU law and includes a tripartite framework on functions of soft law instruments as preparatory and informative, interpretative and decisional, and formal and non-formal steering instruments (Senden, 2004).

States and Turkey—and the defective jurisprudence over its legality have sparked a growing interest in the study of the instruments of EU migration cooperation with third countries and their legal value among legal scholars (Corten and Dony, 2016; Cannizzaro, 2017; Spijkerboer, 2018a). In the wake of this controversy, many EU and international law scholars engaged with the concept of soft law as a means to explain the informalization trend in EU international law-making on migration (Carrera et al., 2019a; Saurugger and Terpan, 2021; Kassoti and Idriz, 2022). The trend is mostly deemed a negative trend (Santos Varas, 2019; Vitiello, 2020; Kassoti and Idriz, 2022) that could make the European Union lose its characteristic as "an integrated regional organization based on integration through law" (Terpan and Saurugger, 2022, p. 1242).

3. Formats of soft law in EU-Africa cooperation on migration

EU-African cooperation became a fertile ground for softer forms of international law-making, including adapting "programming in terms of bilateral relations and funding to achieve [the EU's] objectives" (European Commission, 2016, p. 5). The relative lack of effectiveness of EU external migration law and the unwillingness of the African States to conclude international agreements on migration with the Union (in particular: readmission agreements) makes that informal agreements and quasi-legal mechanisms for cooperation are the preferred (if not the only) way to obtain cooperation from third countries. Spijkerboer, argues that the EU "incentives third country to implement European policy objectives" (Spijkerboer, 2022, p. 2903). In doing so, the Union promotes and diffuses EU migration law objectives in the international legal order through a complex web of instruments, mechanisms and operations which combine (or conceal) legal elements with political, technical and financial elements.

At first glance, informal agreements and quasi-legal mechanisms for cooperation might be dismissed as non-legal, as they cannot be considered legal sources of public international law. Nevertheless, they carry various impacts and legal effects. As Peters and Pagotto argue, "legal analysis should be informed by the empirical observation that acts which at least *prima facie* do not fit into the traditional categories of purely legal or purely political acts are being adopted in abundance" (Peters and Pagotto, 2006, p. 7). This is the case in EU-Africa cooperation on migration, where the proliferation of informal instruments and the wide use of quasi-legal mechanisms for cooperation make it challenging to establish the legal instruments in force, their legal value and what effects they produce.

Attempts to map out EU migration cooperation instruments have been numerous (García Andrade, 2015; Moreno-Lax, 2020; Moreno-Lax et al., 2022) and different typologies of international agreements have been proposed (Trauner and Wolff, 2014; Carrera et al., 2015; Tan and Vedsted-Hansen, 2021). The fragmentation of cooperation instruments makes a mapping exercise necessary. However, the need for systematization is, in itself, indicative of an issue that characterizes EU migration cooperation on migration, namely legal uncertainty. The main difficulty is delimiting what acts belong to the EU external migration law field and their degree of normativity beyond the binding/non-binding divide. Often, despite their proclaimed non-binding character, EU-Africa migration cooperation instruments have substantial legal impacts that include introducing changes in the domestic legislation of third countries, building the capacity of law enforcers through the provision of training, equipment and technology, exchange of personal data for migration control purposes, and more.

Informal agreements

The EU and the African States concluded a series of informal agreements whose degree of normativity is controversial, such as Mobility Partnerships (with Cape Verde, 2008; Morocco, 2013; 2014; Tunisia), Migration Compacts (European Commission, 2016, p. 3, footnote 7), Common Agendas on Migration and Mobility (with Nigeria, 2015 and Ethiopia, 2015) and informal readmission agreements (EU-Guinea, 2017 and Ethiopia, 2018; the Ivory Coast, 2018; with The Gambia, 2018). The EU Agency Frontex has been playing an active role in international cooperation through the conclusion of Working Arrangements with the authorities of third countries. Working Arrangements with African countries, such as Egypt, Libya, Mauritania, Morocco, Senegal and Tunisia, are still under negotiation. Lately, the EU has announced a new kind of informal agreement with third countries, Talent Partnership, expected to be "launched" "with North African partners, in particular Egypt, Morocco and Tunisia, for their implementation to start by the end of 2022" (European Commission, 2022, p. 14). However, as of September 2023, Talent Partnerships have yet to be adopted between the European Union and a third country.[4]

Agreements with atypical names, such as "working arrangements", "migration compacts", or "standards operating procedures", are not signed following the procedure enshrined in Article 218 TFEU for the conclusion of international agreements by the Union. Fahey identifies this as a case of "de-legalization", meaning "the practice of putting issues, laws, practices and litigation beyond the scope of genuine and meaningful judicial review" (Fahey, 2019, p. 124). The purposefully introduced legal uncertainty of informal agreements unveils a process of ongoing informalization of law-making on migration to which the EU participates.

The form of these agreements "precludes a strict (hard) legal quality" (Peters and Pagotto, 2006, p. 5), but their implementation is full of legal implications and mainly concerns third countries' law enforcement (Tittel-Mosser, 2018a). For instance, such agreements envisage the development of activities in the field of information exchange related to border control or the identification and

4 On the 16th July 2023, the EU and Tunisia have signed yet another informal agreement – a Memorandum of Understanding (MoU) – whose analysis goes beyond the scope of this paper. However, in the MoU, it is written that "The two Parties agree to work toward the implementation of a Talent Partnership to promote legal migration, in their common interest, in line with the mutual needs of Tunisia and the EU Member States, to the benefit of sectors of activity and occupations jointly identified".

return of persons irregularly staying in the European Union and training related to maintaining or improving third countries' border management, asylum policies and readmission obligations. In the field of readmission, the Standard Operating Procedures (SOPs) between the EU and Mali provide an example of this kind of informal agreement. It is stated that the SOPs "do not create new legal obligations" (p. 3), but the language used in the text requires technical cooperation between the Malian authorities and the EU Member States authorities, similar to that of a readmission agreement. It can be argued that, in practice, they fulfill the same function as an EU readmission agreement without providing the same guarantees.

Quasi-legal mechanisms for cooperation

Quasi-legal mechanisms include political and diplomatic approaches, technical support to third countries through development cooperation projects, as well as conditionality mechanisms. The use of quasi-legal mechanisms as a legitimate form of international cooperation has been institutionalized in the functioning of the EU's external relations. Now formally coordinated under a specific Operational Coordination Mechanism for the External Dimension of Migration (the MOCADEM, 2022), these different mechanisms contribute to the attainment of the EU's (internal) objectives in its (external) relations with third countries. Article 2 of the Council implementing decision establishing the MOCADEM defines as an "operational action":

> "any action the implementation of which is likely to contribute to the attainment of the objectives of the Union in its relations with a third country in the field of migration, including: [1] a political or diplomatic approach; [2] an action in support of the third country concerned, including in the area of capacity building or development cooperation; [3] the mobilization of any available leverage, for example financial support, or the tools of visa policy or any other policy, and [4] the development of targeted communication strategies".

The MOCADEM's list of operational actions can be understood in legal terms. In order to understand the legal impact of these actions, it is necessary to recall that the political and financial scope of the EU's external action on migration in Africa has dramatically expanded over time and that, despite not being new, its links with development cooperation have been strengthened to make migration control objectives central. The focus on "the attainment of the objectives of the Union" shows that the Union mainly uses operational actions for advancing its own migration agenda rather than the global one. Since in the whereas of the Council implementing decision establishing the MOCADEM there is no explicit reference to Article 3(5) TEU, it can be argued that the objectives mentioned are those of the EU external migration policy and not the general objectives of the Union "in its relations with the wider world" laid down in Article 3(5) TEU. The GCM includes the "facilitation of mobility" as well as adapting "options and pathways for regular migration" (Crépeau, 2018). To the contrary, the EU's migration agenda in its relations with the African States is grounded on paradigms of differentiation and containment (Costello, 2016).

The European Union, therefore, takes advantage of the political commitments undertaken by EU Member States in the GCM to amplify and justify the practices it pursues with the African States, driven by the desire to curb irregular migration from the African continent without enabling options and pathways for regular migration (Zanker, 2019; Pastore and Roman, 2020). Indeed, the EU

> "precondition[s] limited labor opportunities, largely for skilled migrants, and the promise of visa liberalization/facilitation for citizens of the partner country, to that country implementing repressive measures that would reduce irregular migration flows transiting through its territory on their way to the EU territory, a *quid pro quo* which effectively operates to externalize migration control" (Crépeau and Atak, 2016, p. 139).

Political and diplomatic approaches

For a long time, migration featured as one of the main objectives of EU-Africa relations, as evidenced in inter-continental frameworks for cooperation between the EU and African States, such as the Cotonou international agreement (2000, now extended until 30 June 2023), the EU-Africa Strategy (2007) and the new (Bisong, 2019; EU-Africa Strategy, 2020; Haastrup, 2021). The oldest and most developed Euro-African relations on migration are the Euro-Mediterranean, which led to the conclusion of association agreements which contain migration clauses (with Tunisia, 1998; Morocco, 2000) and readmission agreements (with Cape Verde, 2013) and now come under the EU Neighborhood Policy (2004).[5]

At the sub-regional level, inter-continental cooperation on migration has been operationalised through existing inter-governmental dialogues and processes, such as the Rabat and Khartoum processes. Such international and regional fora mainly serve "to disseminate the agenda and practices of Western countries in the Global South" (Chetail, 2020, p. 304). Regional dialogues established by the EU "appear to be used as a means for the EU to pursue further its agenda of strengthening border controls" (Crépeau and Atak, 2016, p. 139). They result in a great complexity of political engagements and non-binding acts with gradual normativity.

The political salience of migration as a matter of inter-continental cooperation finds its culmination in the Valletta Political Declaration and Action Plan (2015). Since then, EU-Africa cooperation on migration underwent a change of scale with an increasing number of countries involved in advanced bilateral forms of cooperation on migration with the EU, now amounting to

5 EU-Africa relations are intertwined with bilateral relations between the EU Member States and the African States which have concluded both formal and informal agreements on readmission and border control.

26 African States. At the same time, the EU multiplied its presence on the African territory through *ad hoc* high-level visits from EU high-ranking officials and the secondment of personnel from the EU institutions and the EU Member States in third countries. This also translates into the deployment of EU immigration liaison officers, of members of the EU Agencies, such as Frontex and the EUAA, as well as of EU civilian, humanitarian and military operations, such as the EU Border Assistance Mission in Libya (EUBAM Libya), the European Union mission in Niger (EUCAP Sahel Niger) and the EU Military Partnership Mission Niger (EUMPM Niger). The involvement of the EU and Member States' high-ranking diplomatic and EU personnel on migration testifies to the importance of migration as a matter of international relations, as well as the salience of cooperation on migration and security. These increased political efforts are also functional in achieving legal objectives in third countries. The technical support given by the Union to third countries, often framed as capacity-building, aims at bringing about legal changes in the domestic legal orders of the African States and more effective law enforcement.

Development cooperation for migration control

If it is true that the Valletta Action Plan "sowed the seeds for enhanced migration cooperation with African countries" (Valletta Action Plan, p. 12), its commitments will be devoid of legal effects if a conspicuous amount of funding from the EU did not accompany them. While EU Official Development Aid has been used for migration control objectives through the geographical re-allocation of aid (Davitti and La Chimia, 2017), EU external funding for migration has multiplied. This is shown by the increasing use of emergency funding, such as the EU Trust Fund for Africa (EUTFA, 2016), and by the flexible budget lines of the new Neighborhood, Development and International Cooperation Instrument (NDICI) from the Multiannual Financial Framework (2021–2027). Indeed, 10 per cent of this financial envelope is earmarked for migration projects in third countries (Goldner Lang, 2022). This trend is in itself problematic. The objectives of development cooperation and migration cooperation become blurred, with migration control objectives often prevailing over development cooperation objectives, such as the eradication of poverty (Poli, 2020; García Andrade, 2023).

While integrating migration objectives into development cooperation "through financial and technical assistance to developing countries, especially to African countries" is in line with the objectives of the GCM (Progress Declaration of the International Migration Review Forum, point 69), the Union mainly uses development cooperation for advancing its own migration control agenda. Just as political and diplomatic approaches, the disbursement of EU external funds is functional to achieve legal changes in third countries through the so-called action projects funded by the EU and implemented in African countries.

The EU Trust Fund for Africa (EUTFA) shows that the EU legal influence over the African States on migration aims at "migration prevention in the guise of development" (Carlier et al., 2020, p. 48). It was formally constituted to

> "fulfill the objectives and implement the Valletta Action Plan and complement[s] financial instruments available for cooperation with African partners by the EU, its Member States and associated countries" (Annex IV to the Agreement establishing the EUTFA, p. 3).

Trust funds are only established and implemented if there is an added value to the Union intervention when the use of the existing financing instruments is not sufficient to achieve EU policy objectives or if they bring clear political visibility for the EU, managerial advantages as well as better control of donors' contributions. In this regard, The EU Trust Fund for Africa is a great showcase for the European Union's role as an international actor in development cooperation on migration. Besides the way the funding has been approved, which is in itself the subject of criticisms due to the poor justification based on an actual existing "migration emergency" in Africa (Spijkerboer and Steyger, 2019), the organizational elements of the EUTFA reveal that the EU is the factual leader of the Trust Fund and of its normative content (Castillejo, 2016).[6] The partnership element diminishes in establishing the Trust Fund (Spijkerboer, 2019). The focus shifted from a joint action (the Valletta Political Declaration and Action Plan), in which the EU and the African States are on an equal footing, to the EU's actions and priorities. The African States participate in the EUTFA as observers, with very little decision-making power on the content of the actions approved, even though these actions directly concern their legal systems, institutions and populations. The majority of African States with whom the EU cooperates on migration are—in general—middle or low-income countries. This means that they all are potential recipients of development aid while some of them are aid-dependent. When third countries interact with the Union through development cooperation, they often take the status of "beneficiaries" or funds "recipients". In general, under development aid, the legal relationship between the donor and the recipient is not one of equals as the donor has power over the recipient in deciding when the funds will be allocated, to what purpose, to whom and how they will be allocated (Clemens and Postel, 2018).

Conditionality mechanisms

The EU has considerably developed conditionality mechanisms in migration in recent years. Negative conditionality mechanisms now coexist with "traditional" forms of positive conditionality, primarily used by the EU in its foreign and membership enlargement policy. The more successful migration cooperation is, the greater the benefits the cooperating third countries will receive from the Union (i.e. better trade conditions or increased development aid). However, the main objective of positive conditionality—to offer better external relations in exchange for

6 As compared to other EU funding instruments, Trust Funds do not follow the EU's rigid budgetary rules and they reintroduce inter-governmental dynamics in the functioning of EU funding. They follow more flexible and less bureaucratic rules and are provided with a Commission-driven management structure. For instance, the European Parliament only has a right to scrutiny over the Trust Fund constitutive agreement.

engagement in democratization processes and respect for human rights—is now being overshadowed by negative conditionality. The latter mainly consists of sanctioning countries that do not cooperate sufficiently with the EU (Strik, 2017). As early as 2002, the European Council identified a need for a "systematic assessment of relations with third countries which do not cooperate in combating illegal migration" (European Council Seville Conclusions, 2002, point 35). Today, assessments mechanisms have been incorporated (in the EU visa code) or could be incorporated (in the proposal for a regulation on tariff preferences) into EU law (Vigdal, 2023). From a legal perspective, there is an attempt by the European Union to formalize informal (soft) coercive mechanisms to obtain cooperation from third countries in the search for the effectiveness of EU migration law. If a third country does not cooperate sufficiently in the EU's migration control and prevention objectives, it will be sanctioned in other aspects of EU external relations law, such as visa policy or trade.

The instrumentalization of the EU visa policy as a leverage for readmission cooperation illustrates these new conditionality mechanisms. In the field of readmission, any form of conditionality is used to compensate for the lack of effectiveness of formal readmission obligations (in the case of formal readmission agreements), as well as informal commitments (in the case of informal readmission agreements) through the use of "a fine balance of incentives and pressures" (European Council, 2015, p. 1). Now formalized into Union law in Article 25 *bis* of the EU Visa Code, a negative conditionality mechanism takes the form of a sanction applied unilaterally by the Union based on the evaluation of the level of cooperation of a third country "in the field of readmission and the overall relations of the Union with this third country, including in the field of migration". The functioning of the EU visa policy—already subject to a sizeable discretionary power of the Member States' authorities—is modulated according to the degree of cooperation of a country. Suppose a third country does not cooperate sufficiently with the Union. In that case, several articles of the Visa Code "do not apply to [visa] applicants" (nationals of that third country) while stricter rules apply. These are Article 14(6) on supporting documents, Article 16(1) and (5)(b) on visa fees, Article 23(1) on delays for a decision on the visa application and Article 24(2) and (2)(c) on multiple-entry visa. In practice, individuals face higher visa costs and longer procedures. The disapplication of these articles gives the Member States greater discretion in processing visa applications, allowing them, for example, not to process the visa applications in the order in which they are received and, thus, defer the application's processing based on the applicant's nationality.

This type of conditionality, far from the political conditionality of the Union's external relations, which should foster democracy and respect for the rule of law and human rights, is a form of punitive conditionality. Moreover, "this policy is not only counterintuitive, it may also constitute discrimination on grounds of nationality within the class of States which are on the EU's visa black list" (Guild and Grundler, 2023). The EU Visa Code, as well as other instruments involved in the EU visa policy implementation (carrier sanctions, visa representation agreements, etc.), institutionalize forms of discrimination which, although not explicitly based on nationality, are indirectly modeled on criteria of race, religion and the socio-economic status of the visa applicant (Den Heijer, 2018; Nicolosi, 2020; Kochenov and Ganty, 2023). In addition, the mechanism described directly affects individuals who have to bear the consequences of their government's lack of (or insufficient) cooperation with the Union. Due to its vague wording in terms of the evaluation of "the overall relations of the Union with this third country, including in the field of migration", problems of legal certainty arise in an area—EU visa policy—already characterized by opaque procedures and discretionary decision-making. The price of insufficient cooperation is borne by individuals who, theoretically, should be protected from arbitrariness by EU law, provided they meet the visa application requirements. The decision to refuse a Schengen visa must always be justified and the applicant has the right to appeal against the refusal, as provided for in Article 32 of the EU Visa Code read in the light of Article 47 of the EU Charter of Fundamental Rights. These procedural guarantees have been the subject of limited but important case law from the Court of Justice of the European Union, in which the Court specified that if the applicant fulfills the conditions for obtaining a Schengen visa, the national authorities may only refuse to issue it on the grounds exhaustively listed in the Visa Code.

Niemann and Zaun argue that "the EU often uses conditionality to either force or incentivise third countries to alter their own approach to migration" (Niemann and Zaun, 2023, p. 2976). The MOCADEM makes negative conditionality a key aspect of the external dimension of EU migration policy and, therefore, of EU international cooperation with third countries. As stated in Article 3(2) of the decision, by envisaging reactive actions based on the "means and leverages to be mobilized to implement the Union's objectives [in the field of migration] for each third country concerned", the EU does not contribute to multilateral efforts in migration governance but instead promotes forms of co-option rather that cooperation.

4. Functions of soft law in EU-Africa cooperation on migration

Both informal agreements and quasi-legal mechanisms for cooperation contribute to promoting and disseminating EU migration law objectives and interests outside the European Union while increasing EU migration law effectiveness beyond the EU borders. The EU's political priority is to end irregular migration from the African continent without offering valuable regular migration opportunities. The more third countries cooperate with the Union, the more effective EU migration law will be in terms of migration prevention and containment. The Union focuses on the link between asylum, border control and return policy (mainly EU internal policies) and international cooperation with third countries (an EU external policy), particularly building readmission, asylum and border control capacity of third States. In the words of the European Commission, "working closely with partners has a direct impact on the effectiveness of policies inside the EU" (European Commission, 2020, p. 1).

By "persuading (finding new incentives) for non-EU countries to enter into agreements, policy instruments, information exchange, projects of cooperation mechanisms and regional process in various migration-related issues" (Carrera et al., 2019b, p. 12), the Union pressures African States to conform to the EU migration agenda and legal standards. If taken individually, each instrument does not reveal much about the functions of (soft) law in EU-Africa migration cooperation. However, the empirical reality of migration cooperation and the combined effects of the different instruments, mechanisms and operations put in place by the EU and its Member States shows that the Union ignites broader domestic processes of reform in the African States through a technique, which I refer to as legal influence.

Cremona and Rijpma refer to this phenomenon as "the promotion, by the EU, of its own *acquis* toward third countries, and their adoption of that *acquis* into their own domestic legal orders" (Cremona and Rijpma, 2007, p. 15). According to Rapoport, the EU's legal influence over third countries can result in third countries adopting rules identical to the rules of the European Union in a given policy field as a unilateral sign of normative alignment with the Union (Rapoport, 2021, p. 21). However, the EU's legal influence on migration over the African States goes beyond EU membership and formal cooperation and does not happen in a vacuum. It is the outcome of the increasing use of quasi-legal mechanisms for cooperation deployed. Capacity-building is widely promoted in the GCM and is often used as a synonym for "technical support" to third countries' domestic institutions. Translated into legal terms and applied to the EU-Africa cooperation context, capacity-building is the process whereby the EU supports (and pays for) third countries' adoption of new migration laws or more vigorous enforcement of existing ones. Many EU-funded projects targeting "improved migration management" envisage the development or review of legislation and policy documents by the African States (Bisong, 2019).

The EU's legal influence over the African States is fostered by informality "as a policy laboratory that frames ideas, sets agendas, serves as a resource and generates tests and promotes practical policy in an opaque way" (Oelgemöller, 2011). While informal agreements set the objectives of cooperation and prepare the ground for legal changes in third countries (i.e., Mobility Partnership, Migration Compacts, Common Agendas on Migration and Mobility and the Valletta Action Plan), quasi-legal mechanisms for cooperation guarantee their implementation, giving rise to their legal effects. Quasi-legal mechanisms for cooperation, as a format of (soft) law, make the EU's migration control objectives go unnoticed and their legal effects underestimated. This is often because the control element is hidden behind the development and "tackling the root causes of migration" narratives.

Global institutions that belong to the United Nations play an important role in supporting the African States in drafting and adopting new laws or reforming existing ones. International organizations such as the IOM, the UNCHR and the UNODC are the leading actors responsible for capacity-building projects in third countries funded by the European Union. As such, they contribute to the diffusion of norms, values and doctrines in international migration law with a view to foster EU migration law effectiveness outside the EU territory (Dini, 2018; Van Dessel, 2019; Salvati, 2021; Micinski and Bourbeau, 2023; Robinson, 2023). This partial understanding of international migration law is likely to shape third-country legal orders and societies if they are translated, as a result of the use of informal agreements and quasi-legal mechanisms, into hard law.

Reverting to soft law theory can help clarify the functions of soft law in EU-Africa cooperation on migration. Different approaches to soft law, whose characteristics prevent the attribution of its origin to formal sources, have been developed by legal scholars. A functional classification which became popular in EU soft law theory is the distinction among "pre-law", "law-plus" and "para-law" functions of soft law, from Senden (2004), expanded by Peters and Pagotto (2006). According to this framework, soft law with *pre-law functions* consists of those acts which serve as an impulse for hard legislation. *Law-plus functions* of soft law serve the objective of completing the interpretation of existing hard law. Finally, soft law assumes *para-law functions* as a substitute for non-available hard law, because of divergencies of views on the desirability of hard law and its content.

An analysis of the formats and functions of the different EU informal agreements and quasi-legal mechanisms for EU-Africa migration cooperation reveals the increasing role played by soft law in international law-making on migration. While informal agreements mainly fulfill para-law functions, quasi-legal mechanisms perform pre-law functions with respect to legal changes in the domestic legal orders of the African States.

Para-law functions of informal agreements

In sensitive fields such as migration, States are more likely to revert to soft law because they want to avoid a loss of sovereignty represented by hard obligations (Terpan, 2015). Without entering into hard legal obligations with African States, the EU legally (as well as financially and materially) equips them to perform migration control functions for its benefit. At the same time, the African States are also uninterested in entering into hard legal obligations with the Union obligations through fully-fledged international agreements (Cassarino, 2007; Tittel-Mosser, 2018b). Therefore, informal agreements fulfill a "para-law" function. In the absence of a hard law alternative, the African States and the EU conclude informal agreements as substitute for unavailable hard law.

Suppose the African States fail to fulfill their cooperation commitments. In that case, the EU is confronted with a paradox that characterizes the EU's external action on migration: the lack of formalization of third countries' commitments (and thus the absence of international law) backfires on the Union when the third country—unilaterally—refuses to cooperate. Reliance on soft commitments can be weakened by contextual diplomatic crises, as demonstrated by border diplomacy events such as those between the EU, Turkey and Greece in March 2020 (Spagnolo, 2021) or between the EU, Spain and Morocco in May 2021 (Cassarino, 2022; Ferrer-Gallardo and Gabrielli, 2022). This highlights the legal paradox that characterizes informality in the external action of the Union in the field of migration: the lack of formalization of

commitments (and thus the apparent absence of international law) backfires on the Union when the third country unilaterally refuses to cooperate. This is where negative conditionality comes into play. As for the case of the EU visa policy described above, it is significant that the EU "uses" it to persuade third countries to cooperate.

Pre-law functions of quasi-legal mechanisms for cooperation

The European Commission and the EEAS reported that "[i]n the space of 1 year [2016–2017], several African partner countries have adopted or reviewed migration management strategies and legislation, in cooperation with the EU" (European Commission, 2017, p. 1). Micinski and Bourbeau defend that "capacity-building" has been used extensively to influence the migration policy of States in the Global South as a form of intervention-lite by the Global North impacting on third States' sovereignty. They argue that "capacity-building attempts to depoliticise essentially political intervention" while "re-enfroc[ing] the long-stand power dynamics in which [migrant] destination countries dictate policy preferences to that [migrant] sending countries in ways that are hard to contest" (Micinski and Bourbeau, 2023, p. 2, 8). It is debatable if the content of actions projects, the choice over the allocation of funding and the objectives pursued with the European Union while offering African States "technical support" are the result of actual ownership and consent from the third countries involved or are, instead, the outcomes of solid bargaining based on power dynamics (Moreno-Lax and Giuffré, 2019).

Quasi-legal mechanisms for cooperation, therefore, fulfill a "pre-law" function and stimulate changes in the domestic legal order of the African States by promoting the development of hard law. Some examples, drawn from the technical content of the action projects funded under the EU Trust Fund for Africa and other financial instruments, illustrate how the EU promotes third countries' compliance with EU and international law standards in fields as varied as refugee law, the law of the sea, anti-smuggling and anti-trafficking law, as well as international security, through the provision of advisory service, training programmes, equipment and technology as well as the requests for data, studies, evaluations and monitoring activities. These few examples of the normative content of the EU external action on migration offer the empirical basis for reflecting on the functions of informal law-making in EU migration law as regard to the global framework for cooperation enshrined in the GCM.

Since the signing of the EU-Morocco Mobility Partnership agreement (2013), the EU has supported Morocco's implementation of its National Strategy on Migration and Asylum (Tittel-Mosser, 2018a). Under the project "Support for integrated border and migration management in Morocco" (action project identification number T05-EUTF-NOA-MA-05), launched in 2018, among the objectives envisaged are the strengthening of the institutional and procedural framework in the field of irregular migration, in particular for the fight against migrant smuggling and human trafficking, including through effective coordination and cooperation mechanisms at the regional and trans-regional levels. Similarly, the project "Promoting the implementation of Tunisia's national migration strategy" (T05-EUTF-NOA-TN-01), launched in 2016, supports the reinforcement of the capacities of the Tunisian institutions for the finalization, operationalization and monitoring of the National Migration Strategy.

In the field of anti-smuggling and anti-trafficking law, the Union influences the adoption and enforcement of laws in line with the UN Palermo Protocols against smuggling and trafficking in human beings, in order to extend the territorial reach of EU border controls the law, as the African States will contain irregular migrants on the African States' territory (Stoyanova, 2020). For instance, under the regional programme (Horn of Africa) "better migration management (Khartoum process)" (T05-EUTF-HoA-REG-09), it is stated that one of the main activities is capacity-building support "in drafting national legislation and policies on migration and border management, including transposition of the UN Convention on Transnational Organized Crime and its protocols into national legislation […] [and in the] measures to harmonize legislation and protocols throughout the region, and to ensure that discrepancies between legislation and practice are addressed". The expected outcome of this support is that "national legislation [is] developed in coherence with international standards; accession to the UN Palermo Protocols; national plans and strategies on migration, and in particular against smuggling and trafficking, developed and fully implemented". The European Commission and the EEAS explain that "[e]nhancing border control as well as anti-smuggling and migration management capabilities in countries of origin and transit contributes to dismantling smugglers networks, reducing outflows and enhancing security and stability" (European Commission, 2017, p. 11). While this project seems in line with the GCM's objectives 9 and 10, it is mainly centered upon capacity-building (border management, improved data collection, provision of equipment) rather than on the effective protection of and assistance to victims of trafficking and vulnerable smuggled migrants.

In the field of the law of the sea, the Union has been closely involved the development of Search and Rescue capacities in third countries, such as Tunisia and Libya, capacities institutionalized, for instance, by way of the official notification of Search and Rescue region to the International Maritime Organization and the set-up a Maritime Rescue Coordination Center. The project "Support to Integrated Border and Migration Management in Libya" (T05-EUTF-NOA-LY-07), launched first in 2017 and then in 2018, aims at strengthening the Libyan Coast Guard and the General Administration for Coastal Security's capacity for search and rescue activities and the fight against trafficking in human beings and the smuggling of migrants "in line with Libya's international SAR obligations". While this could seem in line with objective 8 of the GCM "Save lives and establish coordinated international efforts on missing migrants", it cannot be argued that the "primary objective" of this action project is that of "protecting migrants, uphold the prohibition of collective expulsion, […] enhance reception and assistance capacities" (GCM, objective 8, para 24, *sub* a). Libya's "well-documented inability to respond to distress calls, to conduct safe rescues and to provide a place of safety for disembarkation" is notorious and migrants intercepted by the Libyan Coast Guard

are systematically exposed to human rights violations (Council of Europe Commissioner for Human Rights, 2019, p. 11).

Frontex is a crucial actor in enhancing the border control capacities of eight African States (Ivory Coast, The Gambia, Ghana, Mauritania, Niger, Nigeria, Senegal and Togo). Thanks to the project "Strengthening of the Africa-Frontex Intelligence Community as an instrument to fight serious cross-border crimes affecting Africa and the EU", launched in 2017, Frontex has trained third-countries' border police analysts, based on the "risk analysis" model developed by Frontex and exported to third countries authorities. Risk analyses aim to collect and analyse data on cross-border crime and other border security threats affecting African countries and the EU. Data from partner countries are collected by Frontex "with the aim of creating a picture of the situation at the EU's external borders and the key factors influencing and driving it". Frontex' capacity building for third countries is functional to EU's risk analysis, provided that Africa is one of the regions "where threats and challenges for the EU external border originate" (Frontex website). Again, while this could seem in line with objective 11 of the GCM "Manage borders in an integrated, secure and coordinated manner", the GCM also establishes that integrated border management procedures should respect "the right to privacy and protecting personal data" (GCM, objective 11, para. 27, *sub* b). It has been shown that Frontex cooperation with third country raises issues in terms of transparency, accountability and respect for fundamental rights, in particular the right to privacy (Marin, 2020).

In the field of legal migration, the EU has promoted the adoption of Talent Partnerships with third countries. However, no Talent Partnership have been concluded so far. Much like the Mobility Partnerships, it seems that the EU would perform an "umbrella" role in the Talent Partnerships. At the same time, the Member States remain free to take part in the partnership with a given third country, with the consequence that their participation rates will be variable. In the meantime, the EU has funded several pilot projects on legal migration under the "Mobility Partnership Facility", run by ICMPD. The African countries involved are Cape Verde, Egypt, Ethiopia, Tunisia, Morocco, Senegal, Nigeria and Libya. Only a handful of Member States participate in these projects. Pilot projects on legal migration have also been implemented by the IOM within the project "Match—Hiring African Talents Toward a Holistic Approach to Labor Migration Governance" (2020–2023), funded by the European Union's Asylum, Migration and Integration Fund (AMIF), and by ENABEL, GIZ and the IOM within the project "Labor Mobility in North Africa" (EUTF-NOA-REG-06, 2018–2023), funded by the EUTFA. While the objectives of the Talent Partnerships seem more in line with the GCM's objectives, the limited competence of the EU in the field of labor migration and the extremely limited scope of the pilot projects explain why "achievements have been limited which undermine the reputation and the credibility of the EU on the international stage" (Farcy and Sarolea, 2022, p. 279).

5. Conclusion

By exercising its legal influence over the African States, the EU pursues soft cooperation, as shown by the proliferation of informal agreements and the increasing use of quasi-legal mechanisms for cooperation. These measures are deeply connected with the African States' capacity to reform laws and implement policies that appear in compliance with international law, but are sought and paid for by the EU and its Member States primarily for the EU's own benefit, namely preventing irregular migration from the African continent. In fact, both informal agreements and quasi-legal mechanisms for cooperation serve legal purposes.

Distinguishing between informal agreements and quasi-legal mechanisms for cooperation helps to understand their impact in third countries' legal order as a result of their combined effects. Informal agreements, due to their proclaimed non-legally binding form, resemble poor copies of international agreements. They often spell out commitments to be undertaken by the EU and the African States counterpart. To the contrary, quasi-legal mechanisms can be placed in the softer side of the spectrum between hard and soft law, as they are non-legal instruments. However, by setting the objectives for cooperation in informal agreements and complementing these with technical support, conditionality or other means of persuasion, the Union induces the African states to develop and review their laws and policy in line with EU law objectives. As such, the EU affirms itself as an international legal actor for migration while this normative international agenda is carefully protected behind the shield of soft law. In other words, the shield of soft law serves to hide the very legal objectives it aims to achieve.

As such, the EU's external action on migration undermines the commitment of the GCM to *facilitate mobility*, by promoting measures containing irregular migrants in African States before they reach the EU's borders. The combined effects of soft law work as a catalyst to achieve the EU objectives in the African region, namely preventing irregular migration from the African continent. From a global perspective, EU migration law fuels the inequalities characterizing migrants' access to the so-called Global Mobility Infrastructure (Spijkerboer, 2018b).[7] The external dimension of EU migration law is deemed to contribute to and even reproduce the exclusion and subordination of undesired migrants and the dangers they face in migration (Moreno-Lax and Lemberg-Pedersen, 2019). In this context of increasing inequalities in international migration, the EU promotes its own regional interests when cooperating with third countries on migration.

Regardless of the proclaimed goals of migration policy, what matters in legal terms are precisely the effects produced in the domestic legal orders of the African countries, that the Union's cooperation and funding are vigorously helping to create. Those reforms reveal the true substance of the Union's external action on migration. When looking at the substance, it appears that the EU approach runs counter to the objectives of the GCM, because

7 Depending on the nationality and socio-economic status of international migrants, EU border controls are carried out in radically different ways, and, for some international migrants, regular migration opportunities are significantly restricted by a series of practical and legal obstacles. While all EU citizens can visit the majority of the African States without arranging a visa prior to travel, all African States figure on the EU common list of countries whose citizens must secure a visa to travel to an EU Member State for a short stay, the so-called Schengen visa.

it does not consider "the interests and needs" of African States and citizens. One of the principles of the GCM, is instead a common understanding of migration, in which the production of knowledge on migration and the analysis of migration should be a joint effort. Carlier, Crépeau and Purkey argued that "the only solutions possible will be those that emerge through a shared intellectual framework based on common interests" (Carlier et al., 2020, p. 70). Similarly, Cardwell notes that "the implications of the shift to informality have serious consequences and considerations for the EU, its neighbors, global migration governance and our approaches to understanding" (Cardwell and Dickson, 2023, p. 14).

Behind a concept at first sight neutral, such as capacity-building, lies an international normative agenda of migration control and prevention. The concept of the "EU"s legal influence' on migration captures the combined effects of the different instruments and techniques used for cooperation in the EU's external action on migration, that has global implications in open contradiction to the GCM. The EU's political, diplomatic and financial efforts are functional in achieving legal objectives in third countries and the technical support given by the Union to third countries aims to bring about legal changes in the domestic legal orders of the African States and support institutional and enforcement capacity of national migration authorities.

Rather than an effective multilateral approach based on solidarity, human rights and a rules-based international legal order, international cooperation on migration is often instrumentalised by the EU to affirm its own (regional) migration law's objectives—grounded on paradigms of differentiation and containment—to the detriment of the progressive development of international migration law. In doing so, the EU heavily contributes to the informalization of law-making on migration trend.

Data availability statement

The original contributions presented in the study are included in the article/supplementary material, further inquiries can be directed to the corresponding author.

Author contributions

The author confirms being the sole contributor of this work and has approved it for publication.

Conflict of interest

The author declares that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

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