CHAPTER 9

From Political to Migration-Based Conditionality in EU Development Policy

'Plus ça change, plus c'est la même chose'

JANINE SILGA

9.1 INTRODUCTION

The notion of conditionality transcends the European Union (EU) context as it is inherent in development aid. Before conditionality emerged as 'political conditionality' in the EU, this concept was rooted in macro-financial assistance and the structural adjustment of developing countries' economic policies. What can be labelled as 'policy conditionality' emerged in the so-called 'Bretton Woods Institutions' (World Bank and International Monetary Fund) imposing structural adjustment on debt-ridden developing countries in the early 1980s.[1] Structural adjustment aimed at reducing public spending drastically by privatizing several public sectors and even some public services. It is now clear that this policy, which was then redirected towards the eradication of poverty, did not lead to the expected prosperity. On the contrary, it left several 'developing' countries worse off than before, especially in Africa.[2]

Political conditionality emerged from policy conditionality, with a refocus on the promotion of democracy, human rights and the rule of

In the course of its elaboration, this chapter has benefitted from the generous feedback of many people. Among them, I would like to thank especially: Veronica Corcodel, Gráinne de Búrca, Hanna Eklund, Nicola Hargreaves, Ivana Isailović, Jan Orbie and Eva Połońska-Kimunguyi. All remaining errors or omissions are mine alone.

[1] T. Killick, 'Principals, Agents and the Failings of Conditionality' (1997) 9 *Journal of International Development* 483–495 at 483 and 487.

[2] With respect to African countries, see: W. Brown, *The European Union and Africa: The Restructuring of North-South Relations* (London: I. B. Tauris & Co Ltd, 2002), p. 79.

https://doi.org/10.1017/9781009508490.010 Published online by Cambridge University Press

law and preventing attacks on these values. This initiated the rights-based approach to development which was later confirmed by the adoption of the Maastricht Treaty in 1992.[3]

In the context of migration, the notion of conditionality can be broadly defined as the EU's leverage of different instruments, whether political, economic or financial, to lead third countries to comply with certain norms on migration management. In the context of migration, these norms are mostly related to the readmission of nationals (or non-nationals), assistance with returned nationals, the prevention of irregular migration or the respect of international protection. While migration-based conditionality might appear as a deviation from what would be a more 'righteous' and legitimate form of (political) conditionality, this chapter argues that this is incorrect. On the contrary, this chapter contends that migration-based conditionality stems from political conditionality and the asymmetric power relations on which it relies. While this chapter focuses on the use of conditionality in the relations between the EU and 'developing' countries, especially ACP (African, Caribbean and Pacific) countries, it is important to note that conditionality is also used in the context of the accession process to the EU or more recently with respect to compliance with the rule of law.[4]

In this sense and beyond its specific application, conditionality can be broadly described as a 'methodology' used in the context of international relations by one more powerful party to influence and constrain the choices and actions of another less powerful party.[5] Adopting a 'methodological' understanding of conditionality allows one to better understand its shift across time.

[3] See former Article 130U(2) of the Treaty establishing the European Community.

[4] V. Viță, 'Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality' (2017) 19 *Cambridge Yearbook of European Legal Studies* 116–143.

[5] In the context of this chapter, the understanding that ACP countries are 'less powerful' than the EU is to be understood in relation to their level of 'aid dependency' on the latter. This echoes the observation by Brecht Lein whereby '[b]ecause aid conditionality uses international financial assistance as a lever for progress or reform, it assumes a relationship of dependency between donor and beneficiary'. B. Lein, 'Human Rights in EU Development Cooperation' in J. Wouters, M. Nowak, A.-L. Chané and N. Hachez (eds.), *The European Union and Human Rights: Law and Policy* (Oxford: Oxford University Press, 2020), p. 397.

https://doi.org/10.1017/9781009508490.010 Published online by Cambridge University Press

This chapter will start by providing the background to this study by briefly highlighting how EU development policy emerged within a European colonial and postcolonial context that was inevitably imbued by racism. While this often fails to be clearly addressed, racism is key to understanding how EU development policy has been structured and has been functioning to this day, reflecting asymmetric power relations between former colonies and former (European) colonial empires. Racism also appears as the 'missing' (or 'implicit') link that connects the colonial legacies in EU development policy and the introduction of mechanisms such as migration-based conditionality to curtail migration from the 'darker' parts of the world.[6] Keeping this background in mind, this chapter will critically examine political conditionality. Finally, it will review the different steps in the emergence of migration-based conditionality in the context of the external dimension of EU migration policy, before focusing on the way in which it has found its latest expression in the last iteration of the cooperation framework between the EU and ACP countries.

9.2 THE COLONIAL ROOTS OF EU DEVELOPMENT POLICY: UNEARTHING RACISM

The colonial origins of EU development policy are beyond doubt. However, the racism that lies at the root of the colonial project has yet to be clearly highlighted in the relevant scholarship. This criticism can be generalized to the whole field of development studies as mentioned by authors such as Uma Kothari who, echoing Sarah White,[7] questioned the 'invisibility' or 'silence' around race in development.[8]

[6] E. Tendayi Achiume explains how the Schengen visa regime 'mainly excludes the predominantly nonwhite world from [it] […] while including the predominantly white world'. E. T. Achiume, 'Racial Borders' (2022) 110 *The Georgetown Law Journal* 445–508 at 470. For a more extensive analysis, read: 468–476.

[7] S. White, 'Thinking Race, Thinking Development' (2002) 23 *Third World Quarterly* 407. This author mentions how '[t]alking about race in development is like breaking a taboo' and how '[t]he virtual absence of discussion of race in development makes "breaking the silence" a daunting prospect'. Respectively, at 407 and 408.

[8] U. Kothari, 'Critiquing "race" and Racism in Development Discourse and Practice' (2006) 6 *Progress in Development Studies* 1.

https://doi.org/10.1017/9781009508490.010 Published online by Cambridge University Press

In an article written in 2006, Kothari wondered whether this silence or invisibility might be explained by the fact that 'within a discourse framed around humanitarianism, cooperation, and aid, raising "race" is too distracting, disrupting and demanding?'[9] 'Or [she went on to ask] does the silence of "race" conceal the complicity of development with racialized projects?'[10] To this question, she replied that: 'Significantly, this concealment is founded upon the assumption that development takes place in non-racialized spaces and outside of racialized histories. Furthermore, the silence about "race", the concealment of its effects and the complicity of development with racialized projects are intimately connected.'[11]

The colonial origins of EU development policy have been consistently emphasized and increasingly reaffirmed by scholars.[12] In 1993 Enzo Grilli observed that '[i]t was the weight of colonial inheritance that forced the European nations, engaged in the late 1950s in the creation of the European Community (EC), to deal in a common fashion with the diverse "countries and territories" still under their national jurisdiction'.[13] Marjorie Lister also showed how '[t]he legacies of colonialism, particularly French colonialism, were crucial in shaping the relationship between the European Economic Community […] and the ACP states'.[14] To be more precise, what became the 'association' of European colonies to the European Economic Community (EEC) originated from the French insistence on duplicating its own internal constitutional structure established after the Second World War to renew its relationship with its colonies.[15] The reference to the French post-war endeavour

[9] Ibid., at 2.

[10] Ibid.

[11] U. Kothari, 'An Agenda for Thinking about "Race" in Development' (2006) 6 *Progress in Development Studies* 9.

[12] Among others, see: Brown, *The European Union and Africa*, pp. 39–43; V. Dimier, *The Invention of a European Development Aid Bureaucracy – Recycling Empire* (New York: Palgrave Macmillan, 2014); E. R. Grilli, *The European Community and the Developing Countries* (Cambridge: Cambridge University Press, 1993), pp. 1–14 and M. Lister, *The European Community and the Developing World* (Aldershot: Avebury, 1988), pp. 1–18.

[13] Grilli, *The European Community and the Developing Countries*, p. 1.

[14] Lister, *The European Community and the Developing World*, p. 12.

[15] Quoting Gerard and Victoria Curzon, Marjorie Lister has described how the association stemming from the Treaty of Rome was imposed on former colonies 'in a fashion

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is also important in connection to the 'concealment' of racism as part of colonialism and therefore development. In this respect, Emily Marker has scrutinized how after the Second World War metropolitan French policy makers framed '"colonialist racism" as fundamentally un-French' in an effort to 'obscur[e] the way [in which] race actually worked in post-war Greater France by encouraging the perception that race lived in individual hearts and minds rather than in institutions, everyday practice and social relations'.[16]

Rather than an 'act of friendship and cooperation',[17] the 'association' also has to be located in the context of the so-called 'Eurafrica' materializing a form of common management of European possessions in Africa.[18] Guy Martin summarized this ideology as: 'a body of thought, originating in the colonial period, according to which the fate of Europe and Africa is seen as being naturally and inextricably linked at the political, economic, social, and cultural levels'.[19] Underpinned by the supposed 'interdependence' and 'complementarity' between the European and African continents,[20] resort to this ideology has justified and allowed asymmetric relationships stemming from colonialism to exist beyond the acquisition of formal independence. The acclaimed work by Peo Hansen and Stefan Jonsson has also shown how this ideology was a crucial (albeit neglected) dimension of European integration.[21] In this respect, Véronique Dimier has also highlighted

which could not have been more colonial in spirit'. Lister, *The European Community and the Developing World*, p. 14. On the asymmetry of 'association', read also: H. Eklund, 'Peoples, Inhabitants and Workers: Colonialism in the Treaty of Rome' (2023) 34 *The European Journal of International Law* 831–854 at 837–840. For a more precise account of this process, see especially: Dimier, *The Invention of a European Development Aid Bureaucracy*, pp. 10–21 and p. 53; and Brown, *The European Union and Africa*, pp. 39–40.

[16] E. Marker, 'Obscuring Race: Franco-African Conversations about Colonial Reform and Racism after World War II and the Making of Colorblind France, 1945–1950' (2015) 33 *French Politics, Culture & Society* 1–23 at 16.

[17] Dimier, *The Invention of a European Development Aid Bureaucracy*, pp. 53–54.

[18] See especially: G. Martin, 'Africa and the Ideology of Eurafrica: Neo-colonialism or Pan-Africanism?' (1982) 20 *The Journal of Modern African Studies* 221.

[19] Ibid., at 222.

[20] Ibid.

[21] P. Hansen and S. Jonsson, *Eurafrica – The Untold History of European Integration and Colonialism* (London, New York: Bloomsbury Academic, 2014).

https://doi.org/10.1017/9781009508490.010 Published online by Cambridge University Press

how the creation of EU development policy consisted of a 'survival' strategy not only for colonial rule but perhaps most importantly for the colonial administration itself.[22]

More recently, we can mention works by Rahel Weldeab Sebhatu or Olivia Umurerwa Rutazibwa and their pressing calls for an epistemic post- and anti-colonial deconstruction of the notion of development going beyond theoretical investigations to have a tangible effect on institutions.[23]

In spite of the long acknowledgement of the colonial origins of EU development policy and – one might argue – its ongoing postcolonial existence, the relevant scholarship does not usually feature racism in a straightforward way, although there are some exceptions.[24] This may be because for some racism is an intrinsic part of European colonialism and therefore always an implicit component thereof. Or it may also simply be because of a reluctance to address it head-on.

When looking at EU migration policy and EU development policy simultaneously, racism becomes an evident part of the equation. What can be at best implicit when examining EU development policy, becomes obvious in EU migration policy. Criticisms about how racism exists in migration policies

[22] Dimier, *The Invention of a European Development Aid Bureaucracy*.

[23] R. W. Sebhatu, 'Applying Postcolonial Approaches to Studies of Africa-EU Relations' in T. Haastrup, L. Mah and N. Duggan (eds.), *The Routledge Handbook of EU-Africa Relations* (Abingdon, New York: Routledge, 2021), pp. 38–50; and O. U. Rutazibwa, 'On Babies and Bathwater – Decolonizing International Development Studies' in S. de Jong, R. Icaza and O. U. Rutazibwa (eds.), *Decolonization and Feminisms in Global Teaching and Learning* (London: Routledge, 2018), pp. 158–180.

[24] Apart from Uma Kothari and Sarah White mentioned earlier, Kalpana Wilson is a notable exception: K. Wilson, *Race, Racism and Development – Interrogating History, Discourse and Practice* (London, New York: Zed Books, 2012). For direct references to racism as part of EU development policy and/or its colonial origins, read the analyses by Hanna Eklund about the ubiquity of racial considerations when it comes to the status and treatment of colonial subjects as part of the 'association': Eklund, 'Peoples, Inhabitants and Workers', 843–846. More broadly in relation to development studies, see: S. J. Ndlovu-Gatsheni, 'Coloniality of Power in Development Studies and the Impact of Global Imperial Designs on Africa' (2012) 33 *Australasian Review of African Studies* 48 (and the inaugural lecture of the same title delivered at the University of South Africa, Senate Hall on 16 October 2012). For a critical analysis of the 'normative power' of the EU as reflected in political conditionality in relation to colonialism and its racist ramifications, see also: U. Staeger, 'Africa-EU Relations and Normative Power Europe: A Decolonial Pan-African Critique?' (2016) 54 *Journal of Common Market Studies* 981.

https://doi.org/10.1017/9781009508490.010 Published online by Cambridge University Press

in general and in EU migration policy in particular have been increasingly voiced by scholars.[25] These more recent analyses echo John Torpey's early observations whereby '[o]ne of the most important consequences of regional integration in Europe has been a heightened attentiveness to racial distinctions, at least on the part of the guardians of the borders'.[26]

Before looking at how racism operates in EU development policy through an analysis of 'migration-based conditionality', it may be useful to provide some terminological precision about the concept of 'racism'.[27] Racism is a debated notion as it relies on the unscientific but socially constructed (and therefore socially alive) notion of 'race'. This chapter focuses on one aspect of racism, which consists in the way in which racism always postulates a human hierarchy. In other words, while it is true that racism means that some humans are considered to be inferior to others, it is unclear whether this inferiority is a permanent state or where exactly on the human hierarchy one may be. This dimension of hierarchy that is at the heart of racism is particularly clear in the way in which EU migration policy has been evolving over time as a way of ordering humans' access to mobility and rights.[28] In development, this hierarchy exists between countries that are defined according to their supposed level of 'development', which mirrors the

[25] See especially: Achiume, 'Racial Borders'; M.-B. Dembour, 'Still Silencing the Racism Suffered by Migrants… The Limits of Current Developments under Article 14 ECHR' (2009) 11 *European Journal of Migration and Law* 221; N. El-Enany, *(B)ordering Britain – Law, Race and Empire* (Manchester: Manchester University Press, 2020); T. Spijkerboer, 'The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control' (2018) 20 *European Journal of Migration and Law* 452. See also V. Corcodel in Chapter 8 of this volume.

[26] J. Torpey, *The Invention of the Passport – Surveillance, Citizenship and the State* (Cambridge: Cambridge University Press, 2000), p. 154.

[27] Both notions of 'race' and 'racism' have been closely and extensively analysed by a wide range of scholars across many disciplines. For the purpose of clarity, this chapter relies especially on the following analyses of both concepts: E. Bonilla-Silva, 'Rethinking Racism: Towards a Structural Interpretation' (1996) 62 *American Sociological Review* 465; D. T. Goldberg, *The Threat of Racism – Reflections on Racial Neoliberalism* (Malden, Oxford, Carlton: Blackwell, 2009); and Wilson, *Race, Racism and Development*.

[28] For a more detailed analysis of the extension of the colonial order into EU migration policy, read especially: El-Enany, *(B)ordering Britain*, pp. 175–218. In the context of the EU asylum regime, see also: C. Costello and M. Foster, '(Some) Refugees Welcome: When Is Differentiating between Refugees Unlawful Discrimination?' (2022) 22 *International Journal of Discrimination and the Law* 244.

https://doi.org/10.1017/9781009508490.010 Published online by Cambridge University Press

notion of 'civilization' that was used as a justification for the colonial project.[29] In light of this, it is not surprising that most of the 'Least Developed Countries' (LDCs) are African countries that used to be European colonies.[30]

Understood thus as the establishment of a hierarchy of humans (both individually and collectively), racism entails an asymmetry which is reflected not only in the allocation of individual rights, such as free movement across international borders, but also in power relations between states. The following section will examine how political conditionality especially reflects the latter.

9.3 POLITICAL CONDITIONALITY AND ITS DISCONTENTS

As already mentioned, political conditionality can be perceived as the continuity of policy conditionality.[31] In other words, political conditionality can be considered as the political extension of liberalism beyond the economic realm. As William Brown puts it, '[p]olitical conditionalities, at their most extensive, entail donors placing a model of a liberal democratic capitalist state alongside the orthodox economic policies of adjustment'.[32] This continuity from policy to political conditionality has been most palpable in the cooperation between the EU and ACP countries.[33] While several geopolitical and economic factors have certainly contributed to this shift and as a consequence a strengthening of conditionality, the fundamental reason for its existence consists in the original asymmetric power structure

[29] Among others, see: El-Enany, *(B)ordering Britain*, pp. 183–189; and J. Silga, 'The Ambiguity of the Migration and Development Nexus Policy Discourse: Perpetuating the Colonial Legacy?' (2020) 24 *UCLA Journal of International Law and Foreign Affairs* 163–200 at 185–191. More generally, see: Wilson, *Race, Racism and Development*.

[30] For a list, see: www.un.org/ohrlls/content/list-ldcs.

[31] For a detailed analysis of the shift from support to structural adjustment to the introduction of political conditionality in the EU–ACP cooperation framework, see especially: W. Brown, 'From Uniqueness to Uniformity? An Assessment of EU Development Aid Policies' in K. Arts and A. Dickson (eds.), *EU Development Cooperation – From Model to Symbol* (Manchester: Manchester University Press, 2004), pp. 17–41. For further details on this process, read also: Brown, *The European Union and Africa*, pp. 115–137.

[32] Brown, *The European Union and Africa*, p. 124.

[33] Ibid., pp. 94–113.

https://doi.org/10.1017/9781009508490.010 Published online by Cambridge University Press

between EU and ACP countries and the persistence of this structure over time.[34]

As a variation of the conditionality 'methodology', political conditionality may be described as a way for the EU to enforce specific political norms and values in non-EU states and to fashion their political values and institutions. These political norms usually relate to human rights, democracy and good governance. In the specific context of EU development policy, Brecht Lein defines conditionality as 'the allocation and use of financial resources to sanction or reward recipients in order to promote democratic governance and human rights'.[35]

Political conditionality has been said to rely on a 'carrot-and-stick' approach,[36] in that it can be defined in both 'positive' and 'negative' terms. On the one hand, 'positive' conditionality aims to promote compliance from third countries, mainly by providing financial and technical assistance.[37] On the other hand, 'negative' conditionality aims to 'punish' violations of political norms by imposing economic sanctions or suspending specific economic or financial benefits. The EU has developed different tools to enforce political conditionality.

The first (and best known) tool consists of the insertion of so-called 'human rights' clauses in international agreements. This practice stems from the 1969 Vienna Convention on the Law of Treaties and in particular its Article 60. Human rights clauses were first introduced by the EU in the early to mid nineties. These clauses have subsequently been fleshed out from being more lenient to explicitly making respect for human rights an essential element of the agreements concerned.

[34] Read especially: O. Engström, 'Lomé and Post-Lomé: Asymmetric Negotiations and the Impact of Norms' (2000) 5 *European Foreign Affairs Review* 175; and J. Mackie, *Lomé to Cotonou and Beyond: What Happened to the 'Spirit of Lomé' in EU Development Cooperation*, EU Diplomacy Papers 7/21 (Bruges, Natolin: College of Europe, 2021).

[35] Lein, 'Human Rights in EU Development Cooperation', p. 389. This definition is borrowed from N. Molenaers, N. Dellepiane and J. Faust, 'Political Conditionality and Foreign Aid' (2015) 75 *World Development* 2–12 at 2.

[36] L. Bartels, *Human Rights Conditionality in the EU's International Agreements* (Oxford: Oxford University Press, 2005), p. 1.

[37] For a more detailed analysis, see: B. Simma, J. B. Aschenbrenner and C. Schulte, 'Human Rights Considerations in the Development Co-operation Activities of the EEC' in P. Alston with M. Bustelo and J. Heenan (eds.), *The EU and Human Rights* (Oxford: Oxford University Press, 1999), pp. 571–626.

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In the EU context, the first 'human rights clause' was introduced in Article 5 of the Fourth Lomé Convention on the partnership between the EU and the 'African, Caribbean and Pacific' countries.[38] This clause was then strengthened by the adoption of the so-called Lomé IV bis Agreement,[39] which clearly established that: 'Respect for human rights, democratic principles and the rule of law, which underpins relations between the ACP States and the Community and all provisions of the Convention […] shall constitute an essential element of this Convention.'

In addition to inserting an essential elements clause as part of human rights conditionality, international agreements may also contain a 'non-execution clause', which formalizes the condition that each party must take 'appropriate measures' in relation to a breach of the human rights clause by the other party and after consulting that party. These measures could include the suspension of any benefits granted under the agreement. The first one of its kind was also the outcome of the mid-term of the Lomé IV Convention, as part of the Lomé IV bis Agreement (former Article 366a). This clause was further developed in Article 96 of the 2000 Cotonou ACP–EU Partnership Agreement.[40]

Human rights clauses have been subject to intense criticism ranging from vagueness and lack of effectiveness to inconsistency and double standards.[41] In this latter respect, it is notable that most aid

[38] Fourth ACP-EEC Convention signed at Lomé on 15 December 1989, OJ 1989 L 229/3.

[39] Agreement amending the fourth ACP-EC Convention of Lomé signed in Mauritius on 4 November 1995, OJ 1995 L 156/3.

[40] Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, OJ 2000 L 317/3.

[41] Among others, see Lein, 'Human Rights in EU Development Cooperation', pp. 395–397; G. Crawford and S. Kacarska, 'Aid Sanctions and Political Conditionality: Continuity and Change' (2019) 22 *Journal of International Relations and Development* 184; K. Del Biondo, 'EU Aid Conditionality in ACP Countries: Explaining Inconsistency in EU Sanction Practice' (2011) 7 *Journal of Contemporary European Research* 380; P. Leino, 'European Universalism? – The EU and Human Rights Conditionality' (2005) 24 *Yearbook of European Law* 329; E. Shaver Duquette, 'Human Rights in the European Union: Internal Versus External Objectives' (2001) 34 *Cornell International Law Journal* 363; K. E. Smith, 'The EU, Human Rights and Relations with Third Countries: "Foreign Policy" with an Ethical Dimension?' in K. E. Smith and M. Light (eds.), *Ethics and Foreign*

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suspensions have kept 'target[ing] low income, aid-dependent countries in Sub-Saharan Africa'.[42] Admittedly, economic sanctions (including individual sanctions) often based on United Nations (UN) resolutions may be regarded as a complementary and perhaps a more efficient way to enforce political norms but this does not explain why the essential elements clause should be implemented more towards African countries than elsewhere.[43]

In addition to human rights clauses, conditionality may also be used in direct connection with trade preferences. This is the case in the EU Generalised System of Preferences (GSP) programme and in particular the so-called 'GSP+' scheme.[44] The latter aims at granting additional trade preferences to the World Trade Organization most favoured nation rate to 'developing' countries which comply with human rights, social and environmental norms. Three types of trade benefits currently exist under the EU GSP programme: the standard GSP or 'General Arrangement', which provides for reduction or suspension of tariff duties on a number of products for all beneficiary countries and territories; the GSP+ or 'Special Incentive Arrangement for Sustainable Development and Good Governance' provides for additional benefits for 'vulnerable' beneficiaries of the General Arrangement which have ratified and effectively implemented twenty-seven international conventions on human rights and sustainable development; last, the special arrangement for the LDCs also known as the 'Everything But Arms' initiative provides for duty-free and quota-free access for all products except arms and armaments to the EU market. In practice, as virtually no LDC produces arms or

Policy (Cambridge: Cambridge University Press, 2001), pp. 185–203 (on the inconsistency of EU political conditionality, see especially pp. 193–202).

[42] Lein, 'Human Rights in EU Development Cooperation', p. 395. This is clearly echoed by Gordon Crawford and Simonida Kacarska who find that '[s]ub-Saharan Africa stands out as the region with the highest frequency of aid sanctions, implemented both by the EU and the US'. Crawford and Kacarska, 'Aid Sanctions and Political Conditionality', 190.

[43] Crawford and Kacarska, 'Aid Sanctions and Political Conditionality', 205–206.

[44] Regulation (EU) No. 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No. 732/2008, OJ 2012 L 303/1.

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armaments, this title is symbolic. As a vehicle for political conditionality, the GSP programme has faced roughly the same criticisms as human rights clauses.[45]

As briefly examined, there is a 'symbiotic' relation between the notion of 'conditionality' and political norms and values in the EU. In this sense, political conditionality appears to be tightly connected to the protection and promotion of human rights worldwide. While these political norms and values generally appear to be intrinsically desirable, their use as part of a conditional development 'cooperation' has been contested as instruments of power and domination. When it comes to development cooperation with ACP countries, the very existence of aid conditionality appears to contradict the idea of a 'partnership' of equals.[46] As abundantly shown, the roots of this asymmetric relationship are to be found to a large extent in the colonial origins of EU development policy itself built on asymmetric power relations between the EU and its 'partners'.[47] While the development of colonized overseas territories was mentioned in the 1950 Schuman Declaration, its finality was unclear at the time. This was especially so, in light of its entanglement with the notion of 'Eurafrica' and its very hierarchical understanding of 'development', as reflected in the 'association' between the EEC and its colonies.[48]

It is only with the independence of former colonies, the emergence of the 'Third World' and its demands for a fairer New International Economic Order that the initial colonial conception of EU cooperation

[45] For a general review of the EU GSP with respect to political conditionality, read: N. Hachez and A. Marx, 'EU Trade Policy and Human Rights' in J. Wouters, M. Nowak, A.-L. Chané and N. Hachez (eds.), *The European Union and Human Rights: Law and Policy* (Oxford: Oxford University Press, 2020), pp. 378–384.

[46] S. R. Hurt, 'Co-operation and Coercion? The Cotonou Agreement between the European Union and ACP States and the End of the Lomé Convention' (2003) 24 *Third World Quarterly* 161–176 at 171–172.

[47] Among others, see: W. Brown, 'Restructuring North-South Relations: ACP-EU Development Co-operation in a Liberal International Order' (2000) 85 *Review of African Political Economy* 267; and M. van Reisen, 'The Enlarged European Union and the Developing World: What Future?' in A. Mold (ed.), *EU Development Policy in a Changing World – Challenges for the 21st Century* (Amsterdam: Amsterdam University Press, 2007), pp. 29–65. For further developments, see also Section 9.2 of this chapter.

[48] Eklund, 'Peoples, Inhabitants and Workers', 836.

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for development has started to yield. This was best reflected in the first Lomé Convention marked by non-reciprocity and non-conditionality.[49] However, this moment was isolated and rather exceptional as it quickly paved the way for another 'development' narrative building on conditionality.[50]

Although they do not seem to fulfil the same objectives, the asymmetry that underpins the EU development cooperation as reflected in political conditionality is equally (if not more) visible in migration-based conditionality. The EU has developed an external dimension to its migration policy since the early 1990s. So far, this external dimension has covered several policy concepts, such as the 'migration–development nexus', the 'Global Approach to Migration and Mobility', 'mobility partnerships' and more recently the 'New Migration Partnership Framework'. Since the inception of EU migration policy, international migration has been consistently perceived as a potential threat to European security and the 'fight against irregular immigration' has remained a central element of its external dimension.[51]

This is clear when looking at the recent evolution in the use of EU financial instruments within the context of migration management.[52] In this sense, the way in which 'conditionality' is being used in the external dimension of EU migration policy deserves close attention.[53] The next section highlights the main steps in the process of how access to development funding has been increasingly made conditional upon the compliance by third-country partners with EU norms on migration management and especially readmission.

[49] See also M. Cremona's Chapter 2 in this volume on the predecessor Yaoundé Convention.

[50] Generally, see: Brown, *The European Union and Africa*; and Dimier, *The Invention of a European Development Aid Bureaucracy*, pp. 160–174.

[51] For a recent example, see: Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions *on a New Pact on Migration and Asylum*, COM(2020) 609 final, 23.09.2020.

[52] See Section 9.5 of this chapter.

[53] On the issue of conditionality in the field of international migration management generally, read: N. El Qadim, 'Lutte contre l'immigration irrégulière et conditionnalité de l'aide au développement' (2018) 171 *Migrations Société* 109.

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9.4 THE EVOLUTION OF CONDITIONALITY IN THE EXTERNAL DIMENSION OF EU MIGRATION POLICY

9.4.1 FROM A SUBTLE TO AN OPEN USE OF CONDITIONALITY.

The initial phase of the use of conditionality in the context of EU migration policy evolution was marked by more subtle and scarce references to conditionality that did not follow a consistent approach. This was explained by a strong institutional resistance to the use of conditionality (in particular, negative conditionality) in the cooperation with third countries on migration. Initially, the European Commission rejected the attempt of the European Council to 'retaliate' against third countries unwilling to comply with specific migration management norms and in particular readmission.

In the early 2000s, security concerns started to take over the external cooperation of the EU on migration. The European Council meeting in Laeken on 14 and 15 December 2001 adopted a more control-oriented tone as to what could be demanded of third-country partners in terms of migration management.[54] While clearly supporting the integration of migration into the EU foreign policy, the European Council insisted that readmission agreements *had* to be concluded with third countries. The 2002 conclusions of the European Council meeting at Seville were even more explicit as regards controlling immigration and they clearly mentioned negative conditionality by advocating sanctioning the lack of willingness of third countries to cooperate with the EU on border management.[55] This proposition was not followed by the Commission, which firmly rejected the use of conditionality (at least in its negative formulation) in the EU cooperation with third countries as regards migration.[56]

The Global Approach to Migration, which in 2011 became the Global Approach to Migration and Mobility (GAMM), was launched in 2005 against the background of the dramatic situation in the Mediterranean Sea and especially in the aftermath of the tragic events in Ceuta and

[54] See paragraph 35 of Presidency conclusions, European Council meeting in Laeken, 14 and 15 December 2001, SN 300/1/01/REV.

[55] Conclusions of the Seville European Council 21 and 22 June 2002, Bull. EU 6-2002, point. I.1 onwards.

[56] Communication from the Commission to the Council and the European Parliament, *Integrating migration issues in the European Union's relations with third countries*, COM(2002) 703 final, 03.12.2002, p. 4.

https://doi.org/10.1017/9781009508490.010 Published online by Cambridge University Press

Melilla in September 2005.[57] The GAMM was envisioned as the new policy framework of the external dimension to the European migration policy. As part of it, the notion of conditionality was initially incentive-based reflecting a rather 'positive' (understood as 'promotional') version of this concept in the 'more-for-more' principle, mostly applied towards southern Mediterranean countries, especially in the aftermath of the 'Arab Spring'.[58] It is therefore not surprising that in its 2012 conclusions on the GAMM, the Council evoked the 'more-for-more' principle in the context of the EU cooperation with third countries on migration. In this sense, it insisted that 'visa facilitation agreements should only be considered in parallel with EU readmission agreements'.[59] While not mentioning conditionality explicitly, the 'more-for-more' principle indirectly meant the intention to only offer 'closer' cooperation (often taking the shape of financial incentives) to partners willing to cooperate on readmission.

9.4.2 THE 'MIGRATION CRISIS' AND ITS AFTERMATH: AN OPEN USE OF CONDITIONALITY. The 'more-for-more' principle initiated the use of a subtle form of conditionality by the EU in its cooperation with third countries on migration management. This was formulated as a tool for 'promoting' EU norms on migration management and for rewarding their endorsement by third countries, rather than as a way to 'punish' those that would not abide by them.

However, the situation shifted after the European Agenda on Migration was adopted in the aftermath of the so-called 'migration crisis' starting in 2015.[60] Launched on 13 May 2015, the European Agenda on Migration includes four pillars to 'better manage migration'. The first one aims at

[57] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *The Global Approach to Migration and Mobility*, COM(2011) 743 final, 18.11.2011. For further details on the situation in Ceuta and Melilla, read: E. Blanchard and A.-S. Wender (eds.), *Guerre aux migrants. Le livre noir de Ceuta et Melilla* (Paris: Syllepse, 2007).

[58] COM(2011) 743 final, *The Global Approach to Migration and Mobility*, p. 2.

[59] Council conclusions on the Global Approach to Migration and Mobility, 3 May 2012, 9417/12, point 42.

[60] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A European Agenda on Migration*, COM(2015) 240 final, 13.05.2015.

https://doi.org/10.1017/9781009508490.010 Published online by Cambridge University Press

reducing the 'incentives for irregular migration' in 'partnership' with third countries.[61] In this respect, the Agenda referred to the need to address 'the root causes of irregular migration and forced displacement in third countries' highlighting the key role of development aid.[62] The second pillar of the European Agenda on Migration consisted of 'saving lives and securing external borders' through strengthening border management.[63] Its third pillar reaffirmed Europe's duty to protect those in need of asylum through a 'strong common policy on asylum',[64] while its last pillar sketched out the EU's 'new policy on legal migration'.[65]

Throughout this communication, the Commission referred to cooperation with third countries as being crucial to reaching these objectives. However, it did not provide many details about the level of commitment expected from 'partners'. The Commission was more explicit about the concrete implications of this cooperation in the subsequent New Partnership Framework (NPF). While being a dimension of the European Agenda on Migration, the NPF is a follow-up both to the EU–Africa Summit on Migration in Valletta that took place on 11 and 12 November 2015, and which led to the creation of the EU Emergency Trust Fund for Stability and Addressing the Root Causes of Irregular Migration and Displaced Persons in Africa (EUTR for Africa), and to the adoption of the EU–Turkey Statement on 18 March 2016.[66] In its communication 'establishing a New Partnership Framework with third countries under the European Agenda on Migration',[67] the Commission

[61] Ibid., pp. 7–10.

[62] As the Commission clearly states: 'With a budget allocation of EUR 96.8 billion for the 2014–2020 period, EU external cooperation assistance, and in particular development cooperation, plays an important role in tackling global issues like poverty, insecurity, inequality and unemployment which are among the main root causes of irregular and forced migration. This includes support in regions of Africa, Asia and Eastern Europe where most of the migrants reaching Europe originate from.' Ibid. at p. 8.

[63] Ibid., pp. 10–12.

[64] Ibid., pp. 12–14.

[65] Ibid., pp. 14–17.

[66] www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/.

[67] Communication from the Commission to the European Parliament, the European Council, the Council and the European Investment Bank *on establishing a new Partnership Framework with third countries under the European Agenda on Migration*, COM(2016) 385 final, 07.06.2016.

https://doi.org/10.1017/9781009508490.010 Published online by Cambridge University Press

mentioned the NPF as a 'new comprehensive cooperation with third countries on migration'.[68] In terms of conditionality, the NPF explicitly stated that under this new policy framework, the EU stood 'ready to provide greater support to those partner countries which make the greatest efforts […], *without shying away from negative incentives*'.[69]

In using these terms, the Commission went beyond the 'promotional' approach of the 'more-for-more' principle to potentially include negative conditionality as part of its policy strategy. Endorsing the position of the Commission, the tone of the European Council also started to change after the NPF came into existence. In particular, in its conclusions of June 2021, the European Council clearly mentioned the intensification of 'mutually beneficial partnerships and cooperation with countries of origin and transit […] as an integral part of the European Union's external action'.[70] The 'pragmatic, flexible and tailor-made' approach should make use 'of all available EU and Member States' instruments and incentives'.[71]

To reach its objectives, the NPF foresaw the creation of 'migration compacts' targeting especially African countries along the Central Mediterranean route and in particular the following five priority countries: Niger, Nigeria, Senegal, Mali and Ethiopia.[72] Critical of this notion, the non-governmental organization CONCORD rather defined migration compacts as partnership frameworks 'introducing […] conditionalities regarding cooperation with third countries in the field of migration and strengthening the externalisation of EU migration policy'.[73]

[68] Ibid., p. 5.

[69] Communication from the Commission to the European Parliament, the European Council, the Council and the European Investment Bank *on establishing a new Partnership Framework with third countries under the European Agenda on Migration*, p. 2 (emphasis added).

[70] *European Council meeting (24 and 25 June 2021) – Conclusions*, EUCO 7/21, 25.06.2021, point 12.

[71] Ibid.

[72] On the prioritization of the Central Mediterranean route see: *Malta Declaration by the Members of the European Council on the external aspects of migration: Addressing the Central Mediterranean route*, 3 February 2017 and more recently, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions *on the Report on Migration and Asylum*, COM(2021) 590 final, 29.09.2021, p. 2.

[73] CONCORD, *Partnerships or Conditionality? – Monitoring the Migration Compacts and the EU Trust Fund for Africa* (Brussels: CONCORD-Europe, 2018), p. 6.

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9.5 MIGRATION-BASED CONDITIONALITY AND POSTCOLONIAL REMINISCENCE

The anchoring of conditionality in the external dimension of EU migration policy was first formalized through the creation of financial instruments aiming at giving incentives to non-EU 'partners' to adopt EU norms on migration management. So far this 'promotional' version of migration-based conditionality remains dominant. This promotion relies on financial 'assistance' to third countries. This was especially the case of the EUTF for Africa. However, resort to 'negative' conditionality has significantly increased. It first formally appeared in the 2019 reform of the Community Code on Visas (Visa Code). This approach was then confirmed both in the New Pact on Migration and Asylum and in the 'Post-Cotonou' Agreement of 15 November 2023. As further developed in this section, the inclusion of migration-based conditionality in the cooperation framework between the EU and the ACP countries, in which political conditionality also originates, confirms the enduring postcolonial asymmetry of the EU development 'cooperation'.

9.5.1 THE EU EMERGENCY TRUST FUND FOR AFRICA: THE 'POSITIVE' SIDE OF MIGRATION-BASED CONDITIONALITY?.

In its 2016 communication on the NPF, the Commission mentioned three financial instruments especially relevant in the field of cooperation on migration: the EU Regional Trust Fund in Response to the Syrian Crisis (the so-called 'Madad Fund'), the EU Facility for Refugees in Turkey and the EUTF for Africa.[74] Of these three financial mechanisms, two are trust funds. A trust fund consists of 'a development tool that pools resources from different donors in order to enable a quick, flexible, complementary, transparent and collective response by the EU to the different dimensions of an emergency situation'.[75] This section will focus

[74] For a critical overview of these instruments from an institutional perspective, see: R. Crowe, 'The European Budgetary Galaxy' (2017) 13 *European Constitutional Law Review* 428–452 at 442–444.

[75] European Parliament resolution of 13 September 2016 *on the EU Trust Fund for Africa: the implications for development and humanitarian aid* (2015/2341(INI)), OJ 2018 C 204/68, point D.

https://doi.org/10.1017/9781009508490.010 Published online by Cambridge University Press

on the last instrument, namely the EUTF for Africa, to highlight its main (controversial) characteristics.

The EUTF for Africa was adopted in the context of the 2015 'migration crisis', at the EU–Africa Valletta Summit on Migration taking place on 11 and 12 November 2015. In their political declaration and 'guided by the principles of solidarity, partnership and shared responsibility', the participants expressed their commitment to 'allocate appropriate resources to the implementation of […] concrete actions using all existing instruments, along with the newly set up EU Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa'.[76] Like other trust funds, the EUTF for Africa is legally based on a Commission Decision and on its Constitutive Agreement between the EU Commission and the donors signed in Valletta on 12 November 2015.[77] This trust fund has gathered over 4.5 billion euros, with over 89 per cent coming from the EU and around 11 per cent from EU Member States and other donors.[78] The EUTF for Africa focused on twenty-six African countries,[79] corresponding to three 'windows of investment': The Sahel region and Lake Chad area (Window A), the Horn of Africa (Window B) and the North of Africa (Window C).[80] The Constitutive Agreement of the EUTF for Africa provides that this instrument should '[s]upport all aspects of stability and contributes to better migration management as well as addressing the root causes of destabilisation, forced displacement and irregular migration, in particular by promoting resilience, economic and equal opportunities, security and development and addressing human rights abuses'.[81]

[76] Valletta Summit, Political Declaration, 11–12 November 2015.

[77] Commission Decision of 20.10.2015 *on the establishment of a European Union Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa*, C(2015) 7293 final, 20.10.2015. Initially, the EUTF for Africa was to last until 31 December 2020. However, this duration was extended until 31 December 2021.

[78] EUTF for Africa – North of Africa Window, *Improving Migration Management in the North of Africa Region*.

[79] These countries cover the whole African continent. The following countries are concerned in Northern Africa: Morocco, Algeria, Tunisia, Libya and Egypt; in the Sahel and Lake Chad area: Burkina Faso, Cameroon, Chad, Côte d'Ivoire, the Gambia, Ghana, Guinea, Mali, Mauritania, Niger, Nigeria and Senegal; and lastly in the Horn of Africa: Djibouti, Eritrea, Ethiopia, Kenya, Somalia, South Sudan, Sudan, Tanzania and Uganda.

[80] Article 3(2)(2)(d) of the Constitutive Agreement.

[81] Article 2(1) of the Constitutive Agreement.

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In the 2018 *Annual Report on the EU Trust Fund for Africa*, the Commission noted that as of 31 December 2018, the resources allocated to this EUTF amounted to approximately 4,200 million euros.[82] Two years later this figure had risen to 5,058.2 million euros.[83] This included 3,385.6 million euros from the former European Development Fund (EDF), 1,052 million euros from the EU budget including EU financial cooperation instruments and 619.7 million euros from EU Member States and other donors (United Kingdom, Switzerland and Norway).[84] These figures show that the most overwhelming contribution comes from the EDF, which was until its integration into the EU budget the main financial instrument for cooperation between the EU and ACP countries. This has raised important concerns and criticisms on the lack of partnership and ownership of the EUTF for Africa as the extent to which the use of the EDF in this context followed the principles of partnership and ownership of the EU–ACP cooperation framework remains unclear.[85]

Migration management constitutes the strategic priority receiving most funding from the EUTF for Africa (31 per cent), followed – in declining order – by strengthening community resilience (27.1 per cent), the development of economic opportunities (18.9 per cent), governance and conflict prevention (21.4 per cent) and other/cross-cutting issues (1.5 per cent).[86] This latter category may include the funding of 'cross-window' actions such as the promotion of academic exchanges,[87] which could have deserved more attention from a development perspective.

The EUTF for Africa has been widely criticized.[88] The European Parliament warned 'against the serious risk of misuse of EU development

[82] EUTF for Africa, '2018 Annual Report' (March 2019), at 15.

[83] EUTF for Africa, '2020 Annual Report' (March 2021), at 13.

[84] Ibid.

[85] V. Hauch, A. Knoll and A. Herrero Cangas, *EU Trust Funds – Shaping More Comprehensive External Action?* (Maastricht: European Centre for Development Policy Management (ECDPM)), Briefing Note no. 81, November 2015, pp. 10–11.

[86] EUTF for Africa, '2020 Annual Report' (March 2021), at 15.

[87] EUTF for Africa, '2018 Annual Report' (March 2019), at 21.

[88] For institutional criticisms, read among others: S. Carrera, L. Den Hertog, J. Núñez Ferrer, R. Musmeci, L. Vosyliūtė and M. Pilati, 'Oversight and Management of the EU Trust Funds – Democratic Accountability Challenges and Promising Practices' (2018) Study for the Policy Department for Budgetary Affairs of the European Parliament; H. Temprano Arroyo, *Using Aid to Address the Root Causes of Migration and Refugee*

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aid, in particular in conflict-affected countries where security, migration and development issues are closely interconnected' and it has emphasized that 'the projects covered by the EUTF, which have been created using sources mainly devoted in principle to development purposes, must have development objectives'.[89] In spite of its 'promotional' coating, the EUTF for Africa announced a looming negative conditionality towards 'non-cooperative' non-EU states. As Clare Castillejo clearly expressed, 'once conditionalities are introduced, this can be a slippery slope'.[90] This is especially true in light of the adoption of the new Article 25a of the EU Visa Code in 2019.

9.5.2 THE REFORM OF THE VISA CODE AND THE EMERGENCE OF NEGATIVE CONDITIONALITY IN THE SAMOA ('POST-COTONOU') AGREEMENT. Although initially unclear that it would be used towards a third country, negative conditionality made its appearance after the revision of the Visa Code and the adoption of a new Article 25a.[91] Under this new provision, some provisions of the Visa Code which are favourable to visa applicants will not apply to nationals of a third country that is deemed not to cooperate sufficiently '[d]epending on the level of cooperation with Member States on the readmission of irregular migrants assessed on the basis of relevant and objective data'.[92]

The relevant provisions of the Visa Code are the following: Article 14(6), which waives the requirement to provide a number of documents in support of a visa application; Article 16(1) providing for the payment of a visa fee of 80 euros rather than 120 or 140 euros; Article 16(5)b waiving the visa fee for holders of diplomatic and service passports; Article

Flows (Fiesole: European University Institute, 2019), pp. 29–30; Special Report of the European Court of Auditors, 'European Union Emergency Trust Fund for Africa: Flexible but Lacking Focus' (2018), at 8–9.

[89] European Parliament resolution of 13 September 2016 on the EU Trust Fund for Africa: the implications for development and humanitarian aid, point 18.

[90] C. Castillejo, *The European Union Trust Fund for Africa: A Glimpse of the Future for EU Development Cooperation* (Bonn: Deutsches Institut für Entwicklungspolitik/German Development Institute, 2016) Discussion Paper, p. 27.

[91] Regulation (EU) 2019/1155 of the European Parliament and of the Council of 20 June 2019 amending Regulation (EC) No 810/2009 establishing a Community Code on Visas (Visa Code), OJ 2019 L 188/25.

[92] Article 25a(1) of the Visa Code.

https://doi.org/10.1017/9781009508490.010 Published online by Cambridge University Press

23(1) setting out the time limit of fifteen days for making a decision on an admissible visa application; and last, Article 24(2) and (2)c on the possibility to be granted multiple-entry visas.

The Commission is in charge of assessing the level of third countries' cooperation on readmission at least once a year.[93] In doing so, it has to take into account the following indicators: the number of return decisions issued to nationals of the third country concerned; the number of actual forced returns; the number of readmission requests per Member State accepted by the third country as a percentage of the number of such requests submitted to it; and the level of practical cooperation with regard to return.[94] Practical cooperation is illustrated by the following: providing assistance in identifying persons staying irregularly in the EU and the 'timely' issuance of travel documents; the acceptance of the European travel document for the return of irregularly staying third-country nationals or *laissez-passer*; accepting the readmission of the legally returned persons and as a consequence, accepting the return flights and operations.[95] When the Commission establishes that a third country is not sufficiently 'cooperative', it may submit a proposal to the Council to adopt an implementing decision leading to the suspension of the application of certain provisions of the Visa Code with respect to this country.[96]

As part of the New Pact on Migration and Asylum launched in 2020, the Commission has confirmed its intention *not to shy away* from imposing sanctions (or 'negative incentives'). It clearly stated that: 'Action by Member States in the field of returns needs to go hand in hand with a new drive to improve cooperation on readmission with third countries, complemented by cooperation on reintegration to ensure the sustainability of returns.'[97] While this has to primarily rely on 'the full and effective implementation of the twenty-four EU agreements and arrangements on readmission with third countries' as well as the completion or launch of new negotiations

[93] Article 25a(2) of the Visa Code.

[94] Article 25a(2) points (a), (b) (c) and (d) of the Visa Code.

[95] Regulation (EU) 2016/1953 of the European Parliament and of the Council of 26 October 2016 on the establishment of a European travel document for the return of illegally staying third-country nationals, on repealing the Council Recommendation of 30 November 1994, OJ 2016 L 331/13.

[96] Article 25a(5) of the Visa Code.

[97] *New Pact on Migration and Asylum*, p. 21.

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to enter into new such agreements – or arrangements – the Commission added that: 'These discussions should be seen in the context of the full range of EU's and Member States' policies, tools and instruments, which can be pulled together in a strategic way.'[98] In this sense, the Commission mentions that a 'first step was made by introducing a link between cooperation on readmission and visa issuance in the Visa Code'.[99]

This approach was further confirmed in Article 7 of the proposal for a regulation on asylum and migration management as part of the New Pact on Migration and Asylum.[100] While this provision has disappeared in the final instrument,[101] (probably under the influence of the European Parliament),[102] the negative dimension of migration conditionality has proved to 'have teeth' as it was first implemented towards the Gambia in 2021. Following a proposal from the Commission of July 2021,[103] the Council quickly adopted the decision in October of the same year to suspend all the provisions mentioned in Article 25a of the Visa Code, except Article 16(1).[104] The Gambia has now been followed by Ethiopia.[105] While it is important to mention that proposals for a similar suspension

[98] Ibid.

[99] Ibid.

[100] Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund], COM(2020) 610 final, 23.09.2020.

[101] Regulation (EU) 2024/1351 of the European Parliament and of the Council of 14 May 2024 on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No. 604/2013, OJ 2024 L 2024/1351.

[102] Draft European Parliament legislative resolution on the proposal for a regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund] in (COM(2020)0610 – C9-0309/2020 – 2020/0279(COD)), 11.10.2021, 38–39.

[103] 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 of The Gambia, COM(2020) 413 final, 15.07.2021.

[104] Council Implementing Decision (EU) 2021/1781 of 7 October 2021 on the suspension of certain provisions of Regulation (EC) No. 810/2009 of the European Parliament and of the Council with respect to The Gambia, OJ 2021 L 360/124.

[105] Council Implementing Decision (EU) 2024/1341 of 29 April 2024 on the suspension of certain provisions of Regulation (EC) No. 810/2009 of the European Parliament and of the Council in respect of Ethiopia, OJ 2024 L 2024/1341.

https://doi.org/10.1017/9781009508490.010 Published online by Cambridge University Press

were also put forward towards Bangladesh[106] and Iraq in 2021,[107] and Senegal in 2022,[108] so far negative conditionality has been concretely implemented only towards two African countries, in a way that is very similar to what has been happening in relation to political conditionality.

The visa conditionality mechanism has been criticized by scholars as 'unlikely to contribute to good international relations'.[109] Or as adding to the already discriminatory EU visa regime by reflecting 'a paradigm shift from a "more for more" to a "less for less" approach resulting in a more restrictive and discriminatory system'.[110] The least that can be said is that this 'new turn of the screw to *cooperation* on readmission' does not bode well for the EU to establish mutually satisfying partnership on migration in the future.[111]

In spite of its relatively low level of application so far, negative migration-based conditionality seems to have entered into the 'Post-Cotonou' Agreement (or the 'Samoa Agreement') and especially its rather cryptic Article 74(4),[112] and Annex I,[113] which provide for the possibility for one party to take some 'proportionate measures' when the other party is considered not to have respected its obligations for the readmission of its nationals. It is important to note that Article 74 of the

[106] 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 Bangladesh, COM(2021) 412 final, 15.07.2021.

[107] 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 Iraq, COM(2021) 414 final, 15.07.2021.

[108] 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 Senegal, COM(2022) 631 final, 09.11.2022.

[109] E. Guild, 'Negotiating with Third Countries under the New Pact: Carrots and Sticks?', EU Migration Blog, 27 November 2020.

[110] F. S. Nicolosi, 'Refashioning the EU Visa Policy – A New Turn of the Screw to Cooperation on Readmission and Discrimination?' (2020) 22 *European Journal of Migration and Law* 467–491 at 483.

[111] Ibid. (emphasis added).

[112] As this provision reads '[I]f a Party considers that another Party has failed to respect the time limit referred to in Annex I in line with Standard 5.26 of Chapter 5 of Annex 9 to the Convention on International Civil Aviation, it shall notify the other Party accordingly. If that other Party continues to fail to comply with those obligations, the notifying Party may take proportionate measures starting as from 30 days of the notification.'

[113] Annex I 'Return and Readmission Processes'.

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Samoa Agreement that is explicitly on 'return and readmission' opens with a first paragraph in which both parties 'reaffirm their right to return illegally staying migrants and reaffirm [their] legal obligation […] to readmit their own nationals illegally present on the[ir] territories […], without conditionality and without further formalities'. The insistence on an obligation to readmit nationals 'without conditionality' sounds slightly ironic considering the extensive use of conditionalities (including migration-based) towards ACP countries within and outside the framework of this agreement.

9.6 CONCLUSION

In relation to Article 74(1) and the obligation to readmit nationals 'without conditionality', Maurizio Carbone has noted that: 'The choice of the term "conditionality" in th[e] context [of the Samoa Agreement] may be misleading as this generally refers to conditions that donors attach to aid disbursement.'[114] A central contention of this chapter is that there is nothing misleading in the choice of this term as it reflects – albeit somewhat ironically – the long existence of conditionality in the context of EU development policy.

As readmission and return of third-country nationals staying irregularly in the EU has become a priority (if not *the* priority) of the external dimension of EU migration policy, migration-based conditionality has emerged as a way of inciting and coercing non-EU countries into following the same logic.

This chapter has investigated how migration-based conditionality can be located within the broader context of European postcolonialism. It argues that migration-based conditionality constitutes a legacy of the hierarchical human order stemming from colonial racism. Relying on the same asymmetric power relations at the heart of the EU development cooperation, migration-based conditionality appears as an extension of political conditionality. This analysis is further supported by the

[114] M. Carbone, 'Double Two-Level Games and International Negotiations: Making Sense of Migration Governance in EU-Africa Relations' (2022) 30 *Journal of Contemporary European Studies* 750–762 at 760.

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pervasiveness of migration-based conditionality in EU external relations, as illustrated by the Proposal of the Commission to reform the GSP system,[115] which could extend it to the GSP system and potentially more aspects of the EU external relations. Paying more attention to the EU's colonial past might be the only way to prevent this 'slippery slope' from taking us into a place of irretrievable disgrace.

[115] Proposal for a Regulation of the European Parliament and of the Council on applying a generalised scheme of tariff preferences and repealing Regulation (EU) No. 978/2012 of the European Parliament and of the Council, COM(2021) 579 final, 22.09.2021. See especially p. 3 and pp. 19–20. For a critical analysis of the GSP through the lens of post-development, read especially: J. Orbie, A. Salvador, M. Alcazar III and T. Sioen, 'A Post-Development Perspective on the EU's Generalized Scheme of Preferences' (2022) 10 *Politics and Governance* 68–78.

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