The AFRICAN UNION: A VALUABLE PARTNER FOR THE EU?

Case Study: The Fight against Irregular Immigration

Masterproef van de opleiding ‘Master in de rechten’
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List of Abbreviations

ACP: African, Caribbean, and Pacific Countries
AFSJ: Area of Freedom, Security, and Justice
ACHPR: African Commission on Human and People’s Rights
AfCHPR: African Court on Human and People’s Rights
AU: African Union
EEAS: European External Action Service
ESS: Europe Security Strategy
ECOWAS: Economic Community of West African States
ECHR… The European Convention for the Protection of Human Rights and Fundamental Freedoms
ENP: European Neighbourhood Policy
EPAs: Economic Partnership Agreements
ECTHR: European Court of Human Rights
EU: European Union
EURAS: European Readmission Agreements
IOM: International Organisation for Migration
JAES: Joint Africa-EU Strategy
MMEP: The Africa-EU Migration, Mobility and Employment Partnership
OAU: Organization of African Unity
PAP: Pan-African Parliament
RECs: Regional Economics communities
SSA: Sub-Saharan African States
TEU: Treaty on European Union
TFEU: Treaty on the Functioning of the European Union
UDHR: Universal Declaration of Human Rights
UN: United Nations
UNHCR: United Nations High Commissioner for Refugees
Abstract
Ever since the Amsterdam Treaty, the EU has gained extended competences to deal with the issue of irregular immigration and has chosen to enlist the help of African partners, be they migrant-sending or transit countries, to tackle the phenomenon as close to home as possible. However, some of the instruments at its disposal (the externalisation of border controls, readmission agreements) cannot deliver their full potential for a number of reasons, ranging from resistance from partner countries to a lack of capabilities in their implementation or gross human rights violations of irregular migrants. In face of all these difficulties, the EU is exploring new avenues to allow it to mitigate the negative effects of its policy instruments. One of these avenues is to tackle the issue of irregular migration through its strategic partnership with the African Union. This contribution has two purposes: the first is to assess the AU’s potential as a strategic partner on migration issues. The second is to determine whether the EU-African Union strategic partnership on migration issues (MMEP), underpinned by soft law instruments and involving a wide range of actors, could be a suitable framework to help address some of the drawbacks of the current cooperation frameworks in the fight against irregular immigration among which are bilateral partnerships and the landmark article 13 entailed in the Cotonou Partnership Agreement.

Keywords: African Union, European Union, irregular immigration, regional strategies, inter-continental cooperation
Introduction

1. The Joint Africa/EU Strategy: A proper strategic partnership?
   
   1.1. History of Africa-EU relations
   
   Ever since the independence era that began in the 1960s, the European Community (later the European Union) and African countries have been involved in various cooperation schemes covering issues as diverse as trade, counter-terrorism, or development. A number of cooperation frameworks have been created, from the Yaoundé conventions in 1962\(^1\) to the landmark Cotonou Partnership agreement concluded in 2000\(^2\).

   1.2. The involvement of the AU and the JAES
   
   In 2002, the African Union was established replacing the Organisation of African Unity\(^3\), which had been lambasted as being a weak and out of touch organisation. The establishment of this pan-African institution marks a milestone in the contemporary history of the African continent and in world affairs in general. Its stated aims were to foster African unity, to guarantee peace and prosperity on the African continent, and to bolster Africa’s influence in world affairs.

   In 2007, a new cooperation framework – the Joint Africa/EU Strategy (JAES) – in which African and European countries expressed their ambition to “go beyond the donor-recipient relationship of the past and reflect a political relationship of equals”\(^4\) was officially established at the EU/Africa Lisbon Summit. This policy framework was described by Conrad Rein as ‘a continent to continent partnership with the EU and the AU as its stakeholders’\(^5\). The cooperation framework is mostly governed by soft law instruments (summits and action plans), and involves a wide range of actors, including not only politicians but also economic operators, NGO’s, and members of the civil society. What is remarkable is that it signals the first time that the AU was designated as the EU’s main interlocutor on Africa/EU relations.\(^6\)

   The Africa-EU strategic partnership is structured around eight thematic areas of common interest for both continents, ranging from human rights issues to technology or

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\(^5\) C. Rein “EU-AU Interregional Relations and the Role of the EU?,” Volume 1; Number 4, 22 June 2015., at p.2

counterterrorism. One of the eight key thematic areas of the JAES concerns mobility, migration, and employment issues (MMEP), and within this framework one of the main objectives is the fight against irregular immigration coming from Africa to Europe.

2. Case Study- The EU/AU strategic partnership in the fight against irregular immigration

2.1. The co-optation of African states in EU’s fight against irregular migration

For many Africans, Europe is seen as a sort of “El Dorado.” Jack Mangala explains that Europe is “a natural outlet for millions of Africans, especially the youth seeking a better future.” Each year, many of them risk their lives trying to enter the European continent illegally by crossing the Mediterranean. Tragic events in Ceuta and Melilla, where irregular migrants died at sea while trying to reach the European continent, have put the issue of migration flows stemming from Africa (North and Sub-Saharan Africa) at the forefront of the EU’s external agenda. Over the years, the EU and its Member States have chosen to involve African countries (be they migrant-sending or transit countries) more actively in its fight against illegal immigration. This phenomenon, called the externalisation of the EU migration policies, involves Mediterranean and Sub-Saharan countries who, through the surveillance of their own borders or the readmission of unwanted migrants into their own territory, would help the EU in its objectives.

2.2. The failings of current cooperation frameworks

2.2.1. Bilateral agreements

For decades, the EU and its member states have embarked on bilateral cooperation agreements with individual African countries in order to curb these migratory flows. These bilateral agreements either take the form of readmission agreements or enhanced border controls in the transit and migrant-sending countries. These bilateral agreements are either concluded with migrant-sending or transit countries. The transit countries have the particularity of belonging to the EU’s ‘neighbourhood,’ and to enjoy special relations with the EU enjoys long-lasting cooperation through the policy framework of the Euro-Med Partnership or the European Neighbourhood Policies. In spite of the relative geographical and political closeness of the EU with these North African countries, the implementation of these agreements is far from optimal for several reasons.

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First, the externalisation of the migration policy to African countries sometimes has deleterious consequences for the irregular migrants. Each year, thousands of irregular migrants are either injured or killed as a result of the externalisation of border controls or the implementation of readmission agreements. Gross violations of human rights have also been registered in lands such as Libya, Algeria, or Morocco were irregular migrants have endured hurtful treatment by law enforcement authorities and stigmatisation from local populations.9 This state of affairs puts the EU’s commitment to promoting human rights and democracy abroad, as proclaimed in Article 21 of the TEU, into question. Carole Billet pointedly remarks that since the EU “promotes Human Rights in its external relations, the question of the guarantee of the rights of the migrants is a central one.”10 These irregular migrants do not benefit from the protective regime of the EU which is subject to human rights instruments such as the European Convention on Human Rights and the European Charter for Fundamental Rights.

Second, these bilateral agreements are underpinned by an unequal relationship between the partners. To reach their objectives, EU member states often exert considerable pressure on African countries to comply with its agenda on migration. This in turn has caused resentment and rejection from the African side and worsen their ties with the EU.

2.2.2. Article 13 of the Cotonou Partnership Agreement

Over the years, attempts have been made by the EU to address this issue in a more multilateral fashion. The most emblematic illustration of this multilateral approach is the inclusion of a readmission clause in the Cotonou Partnership agreement governing relations between the EU and ACP countries. In the CPA, article 13(5) (c) enjoins each signatory party (the ACP and the EU) to readmit their own nationals if they reside illegally on the territory of one of the partners. This policy framework exhibits many structural shortcomings, including among other things the inability of migrant-sending countries to identify their nationals and provide them with travel documents.”11 Another major shortcoming of the Cotonou Partnership Agreement concerns its geographical scope: the framework includes sub-Saharan countries but not North African countries despite


these countries having been identified by the EU as key stakeholders in the fight against irregular migration. countries, while North-African countries are used by these migrants as transit routes to the EU. A lack of cooperation between North African and Sub-Saharan is often presented as a hindrance to the efficiency of the EU’s migration policies.

2.3. An intercontinental approach to address the failings of other cooperation frameworks?

2.3.1. A more appropriate geographical scope

The EU’s policies towards the African continent have often been criticised by analysts for their fragmentation. One of the purposes of the JAES was to address this problem by offering a continent-wide approach. By dealing directly with the African Union, the EU is dealing with an organisation representing the interests of fifty-five countries. An EU/AU partnership on migration issues therefore allows the EU to interact with North African and Sub-Saharan countries within the same framework that other cooperation schemes such as Cotonou or the Euro-Med partnership do not allow.

2.3.2. A value-based partner

In the fifteen years of its existence, the African Union has, through the formulation and implementation of several legal instruments on human rights, democracy, and the rule of law, along with the creation of specialised institutions to enforce them, demonstrated that it is a value-based actor and that it shares some of the EU’s core values. For this reason, the AU can prove its value as a partner for the EU in the preservation of its fundamental values on the external front, as set out by article 3(5) and Article 21 of the TEU by mitigating the human rights implications of the externalisation of EU immigration policies on the African continent.

2.3.3 Foster ownership of EU migration policies in African Countries

As has previously been explained, the current cooperation frameworks between the EU and Africa are predicated on an inequality of powers, which consequently causes resentment and rejection in African countries. An African-EU partnership based on the principles of equality and ownership might address this difficulty.

First, by presenting the AU as its equal, the EU signals that their partnership will serve the pursuit of mutual interests, and that no partner will dominate the other. The agreements emanating from the partnership will therefore be more easily endorsed by African countries.

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Second, by involving a variety of stakeholders, among which include economic operators and members of civil society, in the definition and implementation of policies, the JAES breaks with past patterns where heads of states were the sole stakeholders and where decisions were forcefully imposed on societies without their consent or involvement.

II. RESEARCH QUESTIONS AND HYPOTHESIS

This study aims at yielding insights into the potentialities and limitations of the partnership between the European Union and the African Union, and more specifically on the potential of the African Union as a strategic partner in the fight against irregular migration.

Research Question

a) To what extent can the African Union be considered as a proper strategic partner for the EU in the fight against irregular immigration?

Sub-Research Question

b) Compared to the Cotonou – ACP framework, to what extent is the Africa – EU strategic partnership a more appropriate framework for the fight against irregular immigration?

c) Which aspects of the African Union’s integration should the EU promote in order to obtain positive outcomes from its fight against irregular immigration?

Main Research Hypothesis

To investigate this topic, several hypotheses will be tested throughout this thesis.

Hypothesis 1: The African Union has both gained the legitimacy and developed the capabilities to be a proper strategic partner for the EU in the implementation of its objectives on irregular immigration.

Hypothesis 2: The AU/EU Strategic Partnerships is merely a political framework which cannot produce deliverable outcomes in the fight against irregular immigration.

Hypothesis 3: An inter-continental partnership in the tackling of irregular migration can help mitigate the problems arising from bilateral agreements between the EU and third states in Africa.

Hypothesis 4: The African Union can serve as a facilitator between the EU and African countries in their relations on migration issues.

III. AIMS OF THE STUDY

1. Analysis of the African Union Legal System

To test these hypotheses, an analysis of the African Union legal system will be conducted. This analysis will assess the strengths and limitations of the AU as a legal entity, as well as its
conceptualisation of human rights, democracy, and rule of law. The analysis will serve three specific purposes.

1.1 The evaluation of a partner’s values and institutional stability
In an assessment of the EU’s partnerships on the African continent, which she calls the EU’s broader neighbourhood, the scholar Tressia Hobeika explained that the EU’s external action was hampered by the institutional weakness of its partners who were unable to assist the EU efficiently in the pursuit of its objectives as they were disorganised, poorly resourced, and evolving in volatile environments.13 The African Union is Africa’s most important regional organisation and represents the continent in many international and multilateral settings. Evaluating its institutional stability is therefore relevant, as the stability of an institution is not only reliant on the financial and military means at its disposal, but is also connected with its ability to pursue its objectives and protect its core principles. For this reason, an assessment of how the AU formulates its foundational values and objectives, translates them into norms, and enforces them through the creation of specific institutions might shed light on its structural strengths and weaknesses.

1.2 The understanding of a political and legal system
This contribution will provide an overview of how the African Union as a legal and political system operates. The AU suffers from two major lacunae. First, it is a fledgling organisation whose functioning still requires consolidation. Many of its institutions and much of its legislation is not fully deployed yet, and could therefore not demonstrate their efficiency. Second, as an international organisation working on an intergovernmental basis, the African Union is often limited by the will of its member states. It has not yet reached the level of integration of its European counterpart and is therefore constrained in its actions, especially if these interfere with the interests of one of its member states.

1.3 Development of common concepts and common understandings between partners
In a seminal policy document, the European Security Strategy, the EU Council asserted that “Partnerships could be envisaged with all those who share the Union’s interests and values.”14 In addition to common objectives, it is necessary that the partners share some kind of normative or political proximity. This aspect is particularly important for the EU, which is

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legally bound by its founding values (democracy, human rights, rule of law) both in its
domestic and external action. This state of affairs prompts the EU to look for partners that
share those same core principles. The analysis of the African Union legal system will be
focused on the way it formulates and enforces the values it shares with the EU. This study is
of particular significance, since contrary to the EU which composed of countries where these
values are already deeply embedded, the African Union is made of countries where the values
of democracy, rule of law, and democracy are for the great part imposed from the outside and
far from consolidated. The study of the AU law system will not only focus on the formulation
of these values but also on their enforcement, sometimes against the will of its member states.

2. Case study on the fight against irregular immigration
The study will examine the role that the African Union, as Africa’s main regional institution,
can play in helping the EU to address the shortcomings of its external migration policy on the
African continent. The EU is exploring many options to curb the number of irregular migrants
in its territory. One of these options is the endorsement of an inter-continental policy framework
through dialogues at the multilateral level and through the JAES. The study will through a
thorough analysis of these frameworks identify their strengths and limitations, especially in
comparison with other frameworks such as Cotonou or the bilateral agreements between
individual states.

IV. LIMITATIONS
This study does not purport to provide a comprehensive understanding of the African Union’s
and European Union’s legal systems, nor does it purport to cover all aspects of their
interactions. As the relationships between the African Union and the European Union cover
many issues varying from climate change to counter-terrorism, it is evident that the question of
the EU/AU partnership would be too broad to be tackled in a single master’s thesis.
Other fundamental aspects of the EU’s migration policy such as visa agreements and mobility
partnerships, will not be studied in detail. Budgetary issues will also for the most part be left
out of the essay. Finally, the EU Asylum policy, which is a fundamental topic of study, will
also not be addressed here.

IV. ADDED VALUE AND ACADEMIC RELEVANCE
i. The evolution of the African Union’s legal system
Most legal analyses devoted to regional integration processes revolve around the European model, but very few are centred on non-western regional actors.\footnote{See A. Acharya and A. I. Johnston (eds), “Crafting Cooperation. Regional International Institutions in Comparative Perspective,” Cambridge: Cambridge University Press, pp. 244-278.} The legal analysis of the African Union, which is a “non-western” regional institution, therefore offers new perspectives on the study of regional integration.

Moreover, the way the AU as Africa’s major international organisation asserts the principles and values that are considered universal, accommodates them with the competing interests of its member states, and translates them into legal provisions, not only sheds light on its legal capabilities but is also informative about the underlying political dynamics that influence its order.

\textbf{ii. The EU’s cooperation with the African Union on irregular migration issues}

An important body of academic research is devoted to the management of the EU’s migration flows coming from Sub-Saharan Africa, although very few conduct theirs through the lens of the AU/EU partnership. Studies focused on the added value of an intercontinental partnership on a contentious but pressing issue might offer perspectives on policy-making.

\textbf{V. METHODOLOGY}

To explore the opportunities of an EU/AU partnership, an analysis of the AU’s legal and political system will be conducted. This analysis revolves around the conceptualisation, upholding, and enforcement of values which are presented as fundamental for the African Union, but also for the EU: human rights, the rule of law, and democracy. In doing so, legal instruments, policy papers as well as academic contributions will be studied to identify the current dynamics of the AU and the principles that structure its legal order and the way it conceptualises these principles. Comparisons with the EU will be scarce and will only aim to evaluate the AU’s institutional capacity and subsequently its ability to actually implement the commitments made within the framework of the EU/AU partnership.

For the case study, the master’s thesis will be based on the analysis of policy papers, political declarations, and on the academic contributions devoted to the topic of irregular migration and AU/EU relations.

Due to time constraints, no interviews with relevant stakeholders have been conducted, even though the author acknowledges that the methodology might offer fruitful insights.

\textbf{VI. THEORETICAL PREMISES}

First premise. The EU tries to Export its Model of Integration to Africa
Over the years, the European Union has proclaimed its ambitions several different times to turn its own regional integration process into a model for other regional entities. Many academic contributions have been written on the topic and this ambition has also been acknowledged by the EU itself. In a Communication, the European Commission explained that “In these efforts, the EU can rely on the fact that its own successful model of integration has led to the establishment of a single internal market and common policies, which respect the diversity of its Member States.”

Academics and EU policymakers hold the view that regional cooperation arrangements are sometimes the best method for addressing some sensitive issues. They are considered to be the best operational field in terms of capacity building, local knowledge, and also as forums for discussion and exchange of knowledge.

Even though some analysts such as Gilbert Khadiagala argue that ‘through its own integrative architecture, Europe has contributed ideas and resources to strengthening the basis for Africa’s regionalism,’ one must be careful before assuming replicability between the EU and other regional models.

Ernst Haas, a pioneer in comparative regionalist research, warned against the fallacy of assuming that other non-western regional groupings could easily emulate the European model. He claimed that these non-western regional groups “were driven by different functional pursuits’ and responded to ‘a different set of converging interests’ than the European institution. He concluded by saying that these major differences rendered as de facto impossible “a universal law of integration deduced from the European example.”

Second Premise: The African legal system is crippled by its capability-expectation gap

The phenomenon of the capability-expectation gap is often presented as an explanation of African countries’ inability to implement the agreements concluded with their international partners. This concept, brought into the mainstream by the EU scholar Christopher Hill, refers to the failure of a state or non-state actors to attain their stated objectives due to a lack of

18 G. Khadiagala, supra note 6, at p. 235.
19 A. Acharya (2012) “Comparative Regionalism: A Field whose time has Come?” The International Spectator, Volume 1 March 5-6,p.3-15, at p.6.
20 Ibid.
economic, political, or technological means. African countries’ weak institutional structures and their lack of resources are named as the main reasons for this state of affairs. In that domain, the African Union does not seem to be perform better than its member states. Paul D Williams remarks that the AU’s “practical achievements fell short of its grandiose declarations of intent.” This expectation-capability gap must be taken into account during the analysis of the AU legal system, as legal provisions do not necessarily lead to efficient enforcement or grant efficient protection.

VII. OUTLINE OF THE MASTER’S THESIS

The first part of the thesis will be divided into two big chapters. The first will be an analysis of the AU’s legal system. This analysis seeks to demonstrate that the African regional institution has managed to develop its own understanding of the principles of rule of law, democracy, and human rights, adapted to the African continent specificities. Chapter I will also shed light on the difficulties encountered by the AU in enforcing its legislations on these issues, namely a capability-expectation gap fed by under-resourcing and its member states’ reluctance to abandon sovereignty and embrace any form of supranationality.

Chapter II of the master’s thesis, will analyse cooperation patterns between the EU and its African partners starting from the Yaoundé conventions in 1962, going through to the landmark Cotonou Partnership agreement, and ending with the JAES.

The second part of the master’s thesis will be devoted to the case study, and is divided into three parts. The first one will be a presentation of the EU’s policy choices for curbing the migratory pressures from Africa. Chapter II will present the immigration policies devised within the AU and will insist on the institution’s ability to enforce them. Chapter III will deal with the interactions between the EU and the AU in the fight against irregular migration. It will analyse landmark summits, declarations, and action plans. Finally, the thesis will end with concluding remarks and a few policy recommendations.

Part I. The African Union as a Strategic Partner for the European Union

Chapter I. The African Union: An Analysis of the Main Institutional and Legal Features

This chapter pursues two objectives. First, it seeks to situate Africa’s regional integration processes in a historical perspective. Second, it seeks to present the elements bolstering and impeding the African Union’s regional integration.

Section I. The genesis and main characteristics of the African Union

§1. Historical Background: From the OAU to the AU

A. The Organisation of African Unity: The AU predecessor

The Organisation for African Unity was created on 25 May 1963 in Addis Ababa. It was the first successful attempt at establishing an African international organisation acting on a continental scale.

The idea of a pan-African organisation was championed at the beginning of the twentieth century by African political leaders and intellectuals who were calling for the creation of an organisation representing the interests of all Africans and individuals of African origin (such as Afro-Americans). Later, in the wake of the era of decolonisation in the 1960s, two schools of competing thought argued over the kind of regional organisation that the Africans needed:

- The Casablanca group pushed for the creation of an intergovernmental structure in which independent African states would unite to achieve specific goals. The organisation would be based on regional cooperation between the newly independent African states.

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The Monrovia group advocated for a more supranational approach to the regional organisation, and called for the creation of an organisation with far-reaching competences in many domains, powerful institutions, and even a common army. Finally, through the creation of the OAU, the Casablanca group won the battle, as the OAU was very much an intergovernmental organisation in which the member states retained most of their prerogatives and who rejected firmly foreign interventions, including those coming from other African states.

Zeray Yihdego lays out the driving factors behind the creation of the OAU as “the widely-accepted aspirations and principles pertaining to independence, peaceful coexistence, self-determination, regional cooperation and the bans on the use of force and interference in internal affairs.”

**B. The establishment of the African Union**

The OAU was an intergovernmental organisation whose powers were strongly limited by the principles of state sovereignty and non-interference in a country’s domestic affairs. The strong emphasis put on these principles was a major hindrance for the achievement of an efficient pan-African organisation, with African leaders even committing gross human rights abuses and engaging in all sorts of undemocratic practices while shielding themselves behind these principles. The inefficiency of the OAU in promoting democracy and in protecting African citizens against human rights abuses practiced by the public authorities, coupled with changing international dynamics in which emerging powers were competing for influence, prompted African heads of state to call for a profound reform of the organisation.

The African Union was established when twenty-five head of states signed an agreement, the African Union Act, on May 26th, 2001; this AU Act effectively replaced the Organisation of the African Unity on 9 July 2002.

Tiyanjana Maluwa explains that the AU:

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25 *ibid.*


was born out of the perceived need to strengthen the continental organisation and to rekindle the aspirations of the African people for further unity, solidarity, and cohesion in a larger community transcending linguistic, ideological, ethnic, and national differences.  

C. The African Union in International Public Law

Wubie and Tsegaw characterise the organisation as ‘a public, open, and general international organisation which has increasing supranational characteristics.’

Contrary to its predecessor, the OAU Charter, the African Union Act does not specifically endow the African Union with a legal personality. This personality is necessary for the Organisation to act as an entity independent of the member states which compose it. Wubie and Tsegaw remark that the legal personality of the AU might be inferred from Article 4(h) of the Constitutive Act which grants it the power to intervene in the internal affairs of a member state in case of gross human rights violations such as genocide. Since the AU would not require the agreement of the concerned state to intervene as an independent entity and perform legal acts affecting this state, one might conclude that the AU is granted with an international legal personality.

§2. The main drivers behind the establishment of the African Union

Analysts, whether in policy circles, academia, or in the civil society, overwhelmingly agree that the change from the OAU to the African Union was much needed. Jack Mangala sums up the AU’s main drivers as follows:

The establishment of the AU in 2002 underscored a new phase in regional integration and an increased assertiveness on the part of AU members to formulate pan-African answers and solutions to the challenges facing the continent, and enhance African ownership of the processes stemming from international cooperation.

A. The realisation of Pan-Africanism

One of the drivers behind the creation of the African Union is the concretisation of the principle of Pan-Africanism. This aspirational principle implies that in spite of ethnic, religious, and

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29 H. Wubie, Z. Tsegaw supra note 24, at p. 53.
30 Ibid., at p. 42.
geographical differences, Africans share a common identity and ought to possess a common sense of belonging. The Pan-Africanist project finds its roots in the African American emancipation movements of the nineteenth and twentieth centuries, described by Tim Murithi as “the struggle for social and political equality and the freedom from economic exploitation and racial discrimination.”

Toni Haastrop explains that the origin of pan-Africanism “in part at least explains the distinctiveness of African regionalism in that it attaches an emancipatory discourse to the concept.”

B. Address contemporary economic and political challenges

The establishment of the African Union was also borne out of the realisation that regional and sub-regional cooperation was needed to face the economic challenges posed by globalisation. The principle of the absolute independence of African member states underpinning the OAU was growing increasingly incompatible with the level of regional integration required to compete efficiently in the new world economy. One of the African Union’s overarching objectives is the stimulation of regional economic integration on the African continent.

This endeavour manifests itself through the creation and promotion of the eight Regional Economic Communities (RECs), the establishment of the Economic, Social, and Cultural Council (ECOSOCC) in 2004, and the growing involvement of the private sector and civil society in pan-African governance.

C. Raise its profile on the international stage

Regional integration in Africa is motivated by a desire to gain more visibility and influence in world affairs. The African Union is also trying to capitalise on the growth rate of its member states by fostering economic partnerships with economic superpowers such as the EU, the US, India, and/or China.

§3. The Governing Principles of the African Union: Human Rights, Rule of Law and Democracy

A. Preliminary remarks

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Ever since its creation, the European Union, which is viewed by many analysts as a model for the African Union, has presented its governing principles as being the rule of law, democracy, and human rights. These internal and structural values both guide its internal and external actions.

In the preamble of the African Union Constitutive Act, rule of law, human rights, and democracy are also named as the structural principles of the institutions to which all members adhere. In this section, the way the African Union safeguards these governing principles, sometimes in the face of resistance from its member states, will be examined. This analysis will allow the identification of the main institutional and legal powers of the African Union.

**B. Human rights**

1. **Background**

The fact that human rights are a foundational principle of liberal democratic societies is almost universally acknowledged. However, the fact that human rights are inherent (or even compatible) to non-western and non-liberal societies is not as established. A great deal of legal scholarship is devoted to the study of the permeability of human rights in non-liberal and non-western societies and the accommodation of these rights with non-western cultural and legal traditions.

After the decolonisation-era of the 1960’s, human rights principles were still considered to be an exogenous concept for African countries. Their enshrinement in Africa’s domestic and regional legislation was for a large part imposed from the outside, in particular from Europe (the EEC and its member states) and the UN.

2. **Legal instruments**

2.1. **The Constitutive Act of the Union**

The Constitutive Act of the union, which is heralded as the “founding legal instrument” of the regional organisation, contains major provisions on human rights. In its article 4, it is stated that the AU is “determined to promote and protect human and peoples’ rights.”

2.2. **The African Charter on Human and People’s Rights**

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35 See Article 2 TEU.

36 AU Act, supra note 3, pmbl.

37 A more detailed description of the African Union’s institutions and their functioning can be found in annex I.


39 Z. Yihdego, *supra* note 26, at p. 580

Also nicknamed the Banjul Charter, the African Charter on Human and People’s rights is the ‘supreme’ human rights instrument of the Africa Union. It was conceived and adopted under the aegis of the OAU in 1981 and came into force in 1986. As of today, all AU member states have ratified it. It drew its inspiration from other international human rights instruments, especially the European Human Rights Convention. It contains rights for the first, the second and the third generation such as the right to life, freedom of assembly, and freedom of religion, and serves as interpretative tool for the African Human Rights Commission and the African Court of Human Rights. The Charter’s influence is not confined to the African continent, but has in fact become an internationally recognised human rights instrument.

The Charter foresees sanctions in cases of grave violations of human rights. However, to be enforced, sanctions require at least a quorum of 2/3 of the Assembly of Heads of State. This threshold is often impossible to reach since most current AU heads of state either came to power through unconstitutional means, or remained in power by resorting to dishonest constitutional changes. This solidarity among Africa’s heads of state on these issues is nicknamed the ‘club syndrome.’ André Mbata Mangu explains that “Arguably, the ‘club syndrome’ survived the OAU and prevails within the AU where solidarity or mutual support among African leaders remains.”

This major shortcoming of the Charter would be adverted of the institution tasked with the only enforcement of sanctions was a judicial body such as the African Court of Human Rights and not the AU Assembly of Heads of States which is a political institution.

2.3. Specific legislations

The African Union has already issued more specific, sectorial pieces of legislation on human rights such as The African Chart on the Welfare of the Child or the Solemn Declaration Gender Equality in Africa. These specific legislations do not always have equivalents in other parts of the world and are therefore purely ‘African-specific’. Joseph M. Isanga explains that these specific instruments are adopted because of Africa’s peculiarities. He posits that: “A developing
C. The adherence to democracy and the rule of law

1. Rationale

After the decolonisation era of the 1960’s, the African continent has been plagued with a considerable number of military coups coupled with mass atrocities. This state of affairs has prompted the OAU to revise its doctrine of absolute sovereignty and contemplate some degree of exterior intervention in its states’ internal affairs. The African Union has been much more forceful in its defence of peace, democracy, and the rule of law. It has issued a host of instruments to safeguard these core principles on the African continent.

2. Legal instruments

2.1. The Lomé Declaration

In July 2000, in face of numerous military coups and other forms of unconstitutional access to power, the OAU issued the Lomé Declaration. This declaration sets out the principles that the African organisation considered as essential such as democratic constitution, separation of powers, political pluralism, organisation of free elections.

The main merit of this declaration is that it lends substance to the notion of unconstitutional change of government by setting out criteria for identification:

(i.) A military coup d’état against a democratically elected government
(ii.) An intervention by mercenaries to replace a democratically elected government
(iii.) The replacement of a democratically elected government by armed dissident groups and rebel movements
(iv.) The refusal by an incumbent government to relinquish power to the winning party after free, fair, and regular elections.
Even though the declaration is a non-legally binding instrument, sanctions are foreseen in case of non-compliance with these rules. These sanctions range from condemnation to suspension from participation in the policy organs of the OAU. Other types of sanctions such as “visa denial, trade restrictions, and restrictions of intergovernmental contact” are also set out by the Lomé Declaration. 49

2.2. The African Union Constitutive Act

2.2.1. Presentation

The AU Constitutive Act contains major provisions indicating that the African Union’s adherence to democracy and the rule of law is a core principle of the organisation. In Article 3(g), the Constitutive Act provides that the organisation will “promote democratic principles and institutions, popular participation and good governance”. Regarding the defence of rule of law, the AU contains a long-term objective in its Article 4(d), which covers the development of a common defence policy for the Union.

2.2.2. Sanctions

It also contains sanctions for the member states that do not comply with them. In Article 2b, the African Union is granted the legal capability to sanction a member state whose “head of state accessed to power through unconstitutional means.” 50 Article 30 reads that “Governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union.”

In Article 4(h) the AU is vested with “a right to intervene in Member States pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide, and crimes against humanity”.

2.2.3. The African Charter on Democracy, Elections, and Governance

The African Charter on Democracy, Elections and Governance which was adopted on the 30th of January 2007 in Addis Ababa, came into force in 2012. 51 According to Michèle E Olivier its overarching goal is: “to foster a political culture of change of power based on regular, free, and fair elections.” She also holds that this charter has a lot of merit to it, as it ‘sets out an AU understanding of democracy.’ 52

49 ibid.
50 For example, in 2009 the Mauritanian state was briefly suspended from the AU after its elected president was overthrown by a military coup.
51 Available at <http://www.achpr.org/instruments/charter-democracy/> last accessed 24/05/2017
In reality, the provision of substantive criteria for democracy on the African continent was long overdue. A major point of contention between African and Western countries concerned their divergence on the understanding of democracy and good governance. African heads of state often stand accused of leading regimes that are democratic ‘in name only.’ The situation is framed pointedly by André Mbata Mangu when he explains that elections and democracy have become virtually synonymous in Western political thought and analysis. Yet, the experience in many African countries has shown that authoritarianism may well and often does tie the knot with multipartyism.  

2.2.2. Main dispositions of the charter

A major disposition of the Charter is Article 10 which, by enjoining Member States to “entrench the principle of the supremacy of the constitution in the political organization of the State,” signals the AU’s commitment to the principle of constitutionalism. Article 10 also enjoins member states to “protect the right to equality before the law and equal protection by the law as a fundamental precondition for a just and democratic society” signalling that for the African Union democracy and fundamental rights are interwoven principles. This Charter foresees the intervention of the AU’s Peace and Security Council in case of an unconstitutional change of power. The PSC “shall exercise its responsibilities in order to maintain the constitutional order in accordance with relevant provisions of the Protocol.” In its Article 25, the Charter foresees a wide range of sanctions for those who violate its dispositions, be they heads of state, civilians, or even member states who would foment or support undemocratic practices in another African Union member state. It is the AU’s Assembly of Heads of State which is vested with the power of issuing sanctions for violations of the Charter’s provisions. These sanctions are outlined in Article 25 of the Charter and range from “punitive economic measures” to “extradition” and “criminal prosecution”.

3. Cooperation with exterior stakeholders

In order to preserve the rule of law and democratic principles on the African continent, the AU has embarked on partnerships with external stakeholders in bilateral or multilateral settings. The EU, which is the largest donor to the AU peacekeeping missions, has been funding the

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54 For a more detailed analysis of the PSC, see the Annex I.
55 Art. 24.
56 Art.25(3)
African Union’s Peace Fund. It has also established an African Peace Facility in 2004 which aims to prevent armed conflicts throughout the conflict-prone continent.

Section II. The current limitations of the African Union

From the analysis of the African Union’s functioning conducted in this chapter, one can point to two major obstacles for the attainment of its objectives. The first obstacle is the prominence of the principles of state sovereignty and non-interference in a state’s domestic affairs, which renders member states independent, powerful, and able to block any legislation or decisions interfering with their interests. The second major obstacle is a consequence of the first, namely the prominence of soft-law provisions in its legal arsenal as hard law provisions are difficult to attain.

§1. The issue of state sovereignty

A. Strict adherence to state sovereignty and non-intervention under the OAU.

The OAU is an organisation which Leila Farmer characterises as being entirely “state-centric” and sets “the protection of sovereignty and non-interference in domestic affairs” of African countries as ‘its primary goal.’ The legal scholar David Held provides an authoritative definition of the principle of state sovereignty. He calls it ‘a quality that political societies possess in relationship to one another; it is associated with the aspiration of a community to determine its own direction and politics without undue interference from other powers.’

Within the OAU, the principles of state-sovereignty and non-interference were considered as cardinal principles to govern African member state’s relations. In its Article 2(3), the founding Charter of the OAU stipulated that member states had the duty to ‘defend their sovereignty, their territorial integrity, and their independence.’ This emphasis on sovereignty and territorial integrity can be partially explained as a “post-colonial trauma” felt by African

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57 Ibid.
countries and partially as a general reluctance for any unwanted foreign intervention in African affairs.\(^60\)

**B. The AU’s paradigmatic shift**

This strict adherence to the principle of state sovereignty has had egregious consequences for African citizens. Toni Haastrup explains that “non-intervention has left many African head of states with the space to violate the human rights of citizens and flaunt the rule of law.”\(^61\)

In addition to other drivers explained above such as the realisation of pan-Africanism or the economic integration of the continent, African leaders wished, by creating the African Union, to correct the OAU’s political weakness by granting more interventionist powers to its institutions. Article 4(h) and Article 4(j) of the Constitutive Act are two major provisions that foresee the deployment of peace support missions and the permission of a right of intervention in case of conflict or genocide, and provide a telling illustration of this paradigm shift. The creation of the PSC and the empowerment of the African Court of Human and People’s Rights has served similar purposes.

However, even if the rigorist approach embraced by the OAU has been toned down, the African Union remains an intergovernmental body whose room to manoeuvre is limited by the reluctance of its member states to abandon part of their state’s sovereignty. While the EU, which is the most integrated regional organisation in the world, functions on a supranational basis in an increasing number of areas, the African Union has a lot of difficulty in imposing decisions or enact sanctions on its member states. The Assembly of the AU is the most powerful organ of the organisation and is used to ignore many breaches of the AU Constitutional Act because of the so-called 'club syndrome.' The legal scholar Zeray Yihdego pointedly remarks that “the continent has not yet built supranational and national institutions that are capable (and willing) to implement its values”\(^62\)

**§2. The predominance of soft law in African Union legal system**

**A. Definitions**

As with most international organisations, the African Union mostly relies on soft law to guide the behaviour of its member states. Dinah Shelton explains that “international organisations in which much of the modern standard-setting takes place generally do not have the power to

\(^60\) Z. Yihdego, supra note 26, at p. 573.
\(^62\) Z. Yihdego supra note 26, at p. 569.
The EU, with its autonomous law system and its far-reaching competences in many domains, is a major exception in terms of the prerogatives enjoyed by regional or international organisations. Finding a single, authoritative definition for soft law is an arduous if not impossible task. Some point out that in soft law the term “law” is in reality treacherous given the overwhelming political nature of the concept. However, others such as Matthias Goldman believe that soft law instruments “function like law because they effectively guide the behaviour of states, international organizations, and private entities.”  

Fabian Terpian notes that ‘soft law is an oft-used concept, which is still given very different meanings as no consensus has emerged in scholarship.’  

Wubie and Tsegaw define soft law as “quasi-legal instruments which do not have any legally binding force, or whose binding force is somewhat weaker than that of the binding force of traditional law”.  

Shaffer and Pollack, try to draw a line between hard law and soft law and provide the criteria to distinguish them. They contend that “[i]the realm of ‘soft law’ begins once legal arrangements are weakened along one or more of the dimensions of obligation, precision, and delegation.”

B. Rationale behind the use of soft law

As explained in the previous sub-section, soft law provisions are the most favoured instruments of regional institutions. They are used more often than legally binding provisions (hard law) for many reasons:

1. Legal constraints

As previously explained, when it comes to the actions of international organisations, soft law instruments can be seen as the most efficient means to achieve their objectives, and sometimes the only viable one. In that regard, the African Union, which is a regional organisation largely functioning on an intergovernmental basis, often resorts to ‘soft’ instruments such as “condemnations,” “declarations,” or “strong recommendations” in order to prescribe a certain course of action to its member states. The fact that the AU has the possibility of suspending a

66 H.Wubie, Z.Tsegaw, supra note 24, at p. 172.
member in case of a gross violation of human rights is in itself of significance. However, due to the “club syndrome” and the large quorums required to effectively sanction a member state that has engaged in undemocratic practices, make these dispensations largely symbolic. A display of soft power, even though unaccompanied by tangible economic or military sanctions, might prove effective in inducing compliance. An increasing number of scholars assert that *shaming* can prove to be an efficient tool at obtaining compliance, especially if more forceful means are lacking. Membership in the AU is important for its member states. Stef Vandeginste explains that “as the main regional intergovernmental actor, it (the AU) has become an important source of external legitimacy for African regimes.”

For this reason, if the African Union is unable to obtain compliance from a member state through purely legal means can find softer, equally efficient ways to do so.

2. **Set the stage for hard law provision**

Soft law instruments are sometimes necessary devices for the preparation and implementation of legally-binding instruments or legally-binding decisions. One can argue that the OAU, by issuing a soft law instrument such as the *Lomé Declaration* on the safeguarding of democratic principles, has been setting the stage for the embedding of a democratic culture in Africa. This has been followed by more enforceable legal provisions such as Article 4(h) of the Constitutive Act.

3. **Stark heterogeneity among partners**

The African Union is composed of 55 member states who in many respects have competing interests, are driven by different values and objectives, and have asymmetrical administrative and institutional capabilities. This diversity creates difficulty during the negotiation and enforcement of rigid pieces of legislation that would be applicable to all member states. Because of these differences in values, objectives and capabilities, and the overall intergovernmental nature of the pan-African organisation, a high level of flexibility is required in the formulation of common rules and objectives. In Africa, hard law provisions characterised for their rigidity would be more difficult to enforce than soft law provisions known for their flexibility and the relatively large room for manoeuvring they leave to member states to attain its stated objectives.

Section III. Intermediate Conclusion

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68 S. Vandeginste, *supra* note 46, at p.22.
§1. Understanding the African Union legal system

By judging the African Union’s legal corpus on the defence of democracy and human rights, one could conclude that pan-African institutions have placed the primacy of the human being foremost among its priorities and above the principles of non-interference and state sovereignty that were governing past cooperation arrangements on the African continent. However, a closer look at the enforceability of these provisions and the functioning of the institutions tasked with enforcing them indicates profound structural weaknesses in the African Union’s legal system. The African Union’s legal system relies heavily on soft law to protect its citizens and enjoin member states to comply with its rules and principles. The intergovernmental nature of the AU renders the imposition of supranational legally binding norms on its member states difficult and explains why instruments tasked with the safeguarding of foundational values mostly stay within the realm of soft law.

However, the functioning of institutions such as the African Court of Human Rights and the Peace and Security Council, as well as the issuance of legislation such as Articles 4(h) and (j) of the AU Constitutive Act, indicate that this legal system is evolving and that the AU is not entirely averse to supranational law-making.

§2. Identifying normative convergences between the EU and the AU

Even though Toni Haastrup sees a form of ‘organisational mirroring’ of the EU in the African Union’s institutional setup69 (many institutions have similar names and supposedly the same functions in the AU and in the EU), a closer look at the regional organisations’ functioning sheds light on the major differences between the two regional entities. The African Union does not have the same level of legal integration as the EU which has been recognised as a fully-fledged autonomous legal order and whose legal order supersedes the legal order of its member states in many domains.70 Yet, both the EU and the AU have named the principles of rule of law, democracy, and human rights as their governing principles.

In the Lisbon Treaty, the EU proclaims its attachment to the adherence of the rule of law, democracy and human rights internally and their promotion externally. 71

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69 T. Haastrup supra note 33, at p.789.
71 Article 2 TEU.
In the preamble to this Constitutional Act as well as in Article 4 and in many policy instruments and solemn declarations, the AU has proclaimed its ambition for the development and implementation of its policies with respect to the very same principles. This sub-section will take a closer look at the AU’s conceptualisation and safeguarding of these concepts.

**A. Democracy and the rule of law**

While in the EU, discussions regarding the concept of **democratic deficit** revolve around the technocratic nature of the EU institutions and their lack of democratic accountability, the concept of a democratic deficit in Africa is often understood as the non-adherence to the most basic democratic principles by African member states. In the fifteen years of its existence, the African Union has had to deal with unconstitutional changes of government, rigged elections, and the persecutions of political opponents. Its commitment to promoting democracy on the African continent has been further proven by its **non-indifference** approach opposed to the non-intervention of the OAU-era and which implies some degree of the curtailment of sovereignty for its member states when democracy, human security, or fundamental rights are at risk.

Furthermore, it is worth noting that the African Union has developed institutions and legal mechanisms tasked with enforcing the rule of law on the African continent. It has created an organ with far-reaching competences – the PSC – whose prerogatives and authority can supersede the member states. Moreover, the networks it has established with western partners such as the EU or the UN, as well as the constant pressure it has exerted on its member states to respect the principle of constitutionalism, demonstrate an undeniable activism for safeguarding its core values.

Finally, the African Union has shown through **its Charter on Elections, Democracy, and Governance** that it is able to give substance and a legal definition on notions such as an **unconstitutional change of government** and formulate answers to address them accordingly.

Yet, in spite of this undeniable progress, the AU still exhibits many lacunae in its preservation of democratic principles and rule of law in its territory. It has drawn much criticism from academics, NGOs, and the international community for the inefficiency of its sanctioning system and even for allowing among its ranks countries with dismal human rights and democratic records.

**B. Human rights**

The analysis conducted in this chapter on the AU’s objectives, legal instruments, and institutions demonstrate that human rights considerations lie at the core of the AU’s actions.
Unfortunately, most regulations are either nonbinding or poorly implemented by poorly resourced institutions. Within the African Union, human rights occupy a central place but its role is mostly confined to the declaratory level.

Joseph M. Isanga’s remarks come to support this view when he notes that “The AU has been willing to engage in human rights rhetoric and platitudes, but it has been less decisive in following up with concrete action.”  

Yet, in spite of these major limitations, this analysis has also shown that despite the many ills plaguing the African continent, pledges to respect human rights and adherence to the rule of law and democracy were not entirely empty words from the AU. In the fifteen years of its existence, the African Union has made repeated commitments to human rights protection, created specialised institutions and judiciary bodies, and issued regulations in spite of the particularities of the African continent, namely poor enforcement mechanisms, lack of political will, and the principle of state sovereignty.

Chapter II. From the EU-ACP Framework to the Africa-EU Strategic Partnership

Section I. The ACP dimension and the Cotonou Agreement revisions 2005/2010

This section will seek to study some of the underlying dynamics in Africa-EU relations. This study is useful to comprehend why the Africa-EU partnership insists so much on the promotion of ownership and equality. It will begin with a short historical overview and will then focus on the current dynamics.

§1. Historical background: From Yaoundé to the Cotonou revisions

A. The Yaoundé Association Agreements

1.Background

The story of Africa/EU cooperation can be traced back to the Treaty of Rome, when the EEC, then composed of its six founding member states, chose to maintain economic ties with the former French and Belgian colonies through a cooperation agreement – the Yaoundé

72 J. M. Isanga, supra note 46, at 73.
convention. This cooperation agreement was mostly championed by the French, who wished to maintain their influence on their former colonies and who managed to convince the other member states to embark on a common agreement.

2. The First and Second Yaoundé Association Agreements

The Yaoundé agreement (1964-1969), which was signed in Yaoundé, Cameroon on 20th July 1963 and came into force on 1st June 1964, is an association agreement binding the six founding EEC member states and 31 overseas territories, among which included 18 African countries. It consists of granting trade preferences and financial aid to the former colonies, although bilateral cooperation schemes existed before the conclusion of Yaoundé.

A second convention, Yaoundé II (1971-1975), was signed on 29th July 1969 and came into force on 1st January 1971. The second convention deepened trade relations and added two African countries to the arrangement, Madagascar, and Mauritius. Yet in the 1970’s, in view of major international transformations and upheavals, namely the oil crisis and the growing war of influence between the East and the West and the deepening of the EEC’s political and economic integration, the EEC decided to update its relations with overseas territories and adjust them to the new realities of the international order.

B. The creation of the ACP group and the Lomé Conventions

The African, Caribbean, and Pacific group (ACP) was officially created in 1975 with the Georgetown agreements. At the time, the group numbered 60 members, and its creation coincided with the admission of the United Kingdom to the European Community. Article 1 of the agreement imparts on the ACP group a legal personality. Its institutional framework is set out in the third chapter and is composed by the Council of Ministers (Art 4), the Committee of Ambassadors (Art 12), and the ACP General Secretariat (Art 18).

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73 In article 131 of the Rome Treaty, it is stipulated that “the Member States agree to associate with the Community the non-European countries and territories which have special relations with Belgium, France, Italy, the Netherlands and the United Kingdom.” Further it is stipulated that “the purpose of association shall be to promote the economic and social development of the countries and territories and to establish close economic relations between them and the community as a whole.” For the references to the Yaoundé Convention, see supra note 1.


76 By adhering to the EEC in 1973, the UK added some of its previous colonies to the group of overseas partners of the EEC.
The Lomé Convention was signed in 1975 between the EEC and the newly formed ACP group. The scope of the areas of cooperation envisioned in this policy framework were extended with each revision but mostly concerned trade. The agreement provided the ACP countries with preferential access to the European market, mostly for primary commodities. The regime in place was for the preferential but non-reciprocal status for the exports from the ACP to the EEC. The aim was to let the ACP countries develop their economies by favouring their export potentials and protecting their domestic markets. It had been decided that the Lomé Convention would be revised every five years in order to let the cooperation framework, unfold, assess its progress and failures, and re-examine ACP-Europe relations in light of the changes in the international environment. Over a period of twenty-five years, four Lomé conventions have been concluded: Lomé I (1975-1980), Lomé II (1980-1985), and Lomé III (1985-1990). The very last revision, named Lomé IV, has governed ACP-EU relations from 1990 until 2000. Bossuyt, Keijzer, and et al. note that “the partnership evolved from an approach based on non-interference and recipient autonomy into a stronger focus on pursuing shared norms and values.”

C. The European Commission’s Green Paper

In 1995, the European Commission published a Green Paper assessing the successes and failures of the Lomé conventions and laying the ground for future cooperation between Europe and the ACP group. The paper starts illustrating how quickly changes occur in the world, and realises that some of the old EU-ACP cooperation standards such as the non-reciprocal trade preferences were no longer adapted to the dynamics of globalisation. It also acknowledged that within the Lomé framework “dialogue on economic and social policies has proved difficult to put into practice in countries with little institutional capacity and ineffectual public administration.”

82 Commission of the European Communities “Green Paper on relations between the European Union and the ACP countries on the eve of the 21st century - Challenges and options for a new partnership” (20 November 1996) COM (96) 570 final at iv.
83 Ibid.
Moreover, without completely repudiating the value of the Lomé acquis, this policy document identified numerous shortcomings throughout the framework of these conventions, especially in regard to its lack of differentiation among ACP countries and the insufficient monitory mechanisms on the use of financial aid and the progress made on structural reforms.

The ACP countries, instead of increasing their exports to the European market and therefore raising the living standards of their populations, became increasingly poorer and indebted (with the notable exception of a handful of countries that have conducted successful structural reforms, such as Benin or the Ivory Coast), and unable to build administrative and political institutions that could enable them to deal with their European partners on an equal basis.

For the future of ACP-European relations, the Green Paper has recommended among other things to:

(i) Adopt a more differentiated approach, both to poverty alleviation and economic development among the ACP territories.
(ii) Step up the involvement of civil society and the private sector in the development of ACP territories.
(iii) Increase the institutional/administrative capabilities of the ACP territories with the goals of empowering enabling them to conduct efficient policy dialogue and implement structural economic reforms.
(iv) Increase the ACPs’ bargaining power and enhance intra-ACP dialogue opportunities in order to have a partner capable of efficiently defending its interest.

D. The Cotonou Partnership Agreement

Following the conclusions of the Green Paper, the Cotonou Partnership Agreement was signed in Benin on 23rd May 2000 and came into force on 1st April 2003.84 The agreement concluded between the EU member states and seventy-nine African, Caribbean, and Pacific states (ACP) aimed to substitute the Lomé IV and adapt ACP/Europe relations to the new rules of international trade imposed by the WTO and the globalisation of the economy. To comply with the WTO rules which did not permit trade preferences, the EU and ACP states would progressively replace their unilateral trade preferences with Economic Partnership Agreements (EPAs) that would introduce compatible reciprocal free trade agreements.85

84 Cotonou Agreement, supra note 2.
85 G. Khadiagala, supra note 6 at. p. 21.
Another factor leading to the conclusion of the agreement is the strong emphasis put on the notion of “partnership” and “equality between partners.” As Demba Sy explains, “*il fallait réorienter la coopération et aller vers un partenariat d’égal à égal.*”

This partnership was signed for twenty years with a revision planned every five years. As of today, the agreement has undergone two rounds of revision: one in 2005 in Luxembourg (CPA II) and the other one in 2010 in Ouagadougou (CPA III), but no revision has taken place in 2015. Dietmar Nickel explains the rationale behind the five years revision as follows: “*the possibility of a revision within five years provides the needed ability to react to rapid developments in the international environment of ACP-EU relations.*”

### §2. The pillars of the Cotonou Partnership Agreement

The Cotonou Agreement is based upon three pillars, consisting of trade, development, and political cooperation. Article 1 of the Cotonou Partnership Agreement states that the partnership would be driven by ‘*the objective of reducing and eventually eradicating poverty, consistent with the objectives of sustainable development and the gradual integrating of the ACP countries in the world economy*.’

#### A. Trade

**1. General remarks**

Ever since the Yaoundé agreements, the EU has linked trade to development in order to bridge the development gap between the Global North and the South. This trade/development nexus is at the core of the Cotonou Partnership Agreement. The ultimate purpose of the CPA is to fully anchor ACP countries into the world economy, bolster their attractiveness for local and foreign investment, and to render them viable and competitive. Through the agreement, the EU and ACP would progressively replace the non-reciprocal trade preferences regime that had been governing EU-Africa relations until 2000. With the conclusion of these Economic Partnership Agreements (EPAs), the EU and ACP countries would progressively gain access to each other’s markets.

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87 It is noteworthy that with the last revision of the agreement in 2010, contrary to what happened with the first cooperation arrangements between the EEC and the overseas territories, most of current EU members had no previous ties with ACP countries.

2. The protracted negotiations of EPAs.

The ‘trade pillar’ of the Cotonou Partnership Agreement is structured around the Economic Partnership Agreements (EPAs), whose principles are enshrined in Article 36 of the agreement. These EPAs are to supplant the privileged trade preferences granted to ACP countries by the European Union since the Yaoundé agreements and through to the Lomé Conventions, as the rules of the World Trade Organisation forbid them. The ultimate goal of these EPAs is to create free-trade areas which would anchor ACP countries to the world economy. Through the EPAs, the EU and the ACP group would be bound by a contractual relationship.

Even though the principle of the EPAs was laid out in the CPA at the time of its conclusion in 2000 and negotiations with the 75 ACP countries began in 2002, the path to their conclusion has been very bumpy. The Cotonou partners benefited from a waiver from the WTO allowing them to maintain their privileged relationship until December 2007, after which the agreements would have to be concluded. Upon the instigation of the EU, the negotiation of the EPAs occurred at the sub-regional level. A total of seven ACP sub-regions (West Africa, Central Africa, ESA, EAC, SADC, Caribbean CARFORUM, and the Pacific Island Forum) negotiated the EPAs with the EU. However, the CARIFORUM region (15 Caribbean countries) is the only one that met the deadline of 2007 and concluded a comprehensive agreement with the EU.

Most of the sub-Saharan ACP partners formulated severe criticisms to these EPAs pointing to the deleterious consequences that some provisions would have on their economies. Indeed, they argue that opening their markets to European products and services would be detrimental to their local industries and hamper their development. Moreover, the fact that EU farmers benefit from subsidies from the Common Agricultural Policy (CAP) give them a sharp competitive advantage compared with African agricultural products which do not benefit from those same subsidies. Furthermore, some fear for nascent industries on the African continent that would be unable to withstand the flood of manufactured products coming from the EU. John Akokpari believes that there are strong concerns on the African continent that

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89 Article 36(1) of the agreement reads: “In view of the objectives and principles set out above, the Parties agree to take all the necessary measures to ensure the conclusion of new WTO-compatible Economic Partnership Agreements, removing progressively barriers to trade between them and enhancing cooperation in all areas relevant to trade.”
increased exports of industrial and manufactured products from the EU by the EPAs would likely to undermine the emergence of new industries in Africa, while potentially suffocating the countries’ few existing industries, which continue to lack competitiveness.\(^{90}\)

Another problem concerns the ability of the partners of the South to compete on the EU market which phytosanitary regulations that are becoming increasingly severe.\(^{91}\)

In 2011, the EU has decided to grant supplementary time to the ACP to negotiate the agreements and threatened the ACP countries with withdrawing their preferential market access if they did not comply with their part of the agreement and conclude the regional agreements. In the meantime, interim EPAs were concluded with sub-regions (SADC, EAC, Central Africa) or individual countries (Ghana, Cameroon, the Ivory Coast). Finally, a last deadline, in 1 October 2016 was granted to ACP countries to sign these EPAs.\(^{92}\)

**B. Development**

The second pillar of the CPA concerns the economic and social development of ACP countries. Article 19 of the agreement designates “poverty reduction, and ultimately its eradication; sustainable development, and progressive integration of the ACP countries into the world economy” as the agreement’s overarching goals. Development is connected to poverty alleviation in the ACP countries and the raising of living standards for their citizens.” As of today, the ACP bloc numbers 39 of the least developed countries (LDCs).\(^{93}\) Development is underpinned by the allocation of aid money to ACP countries, but also by capacity-building efforts and the financing of specific projects devised nationally or regionally. The allocation of aid was based on a differentiated assessment of the states’ needs and the structural reforms they have to undertake in order to meet the Millennium Development Goals. The European Development Fund (EDF) provides the bulk of funding aid to the ACP countries.

**C. Political dialogue**

1. **Equality among partners**

The principle of a political dialogue between the EU member states and the ACP countries is enshrined in Article 8 of the Cotonou Agreement, which proclaims in its first paragraph “I. The


\(^{92}\) For a stand of play of the EPA’s negotiation see <http://trade.ec.europa.eu/doclib/docs/2009/september/tradoc_144912.pdf>
Parties shall regularly engage in a comprehensive, balanced, and deep political dialogue leading to commitments on both sides.”

The political dialogue between the EU and ACP is partly predicated on the idea of co-ownership and equality. This aspect of the agreement is of importance as there is a real willingness from both sides to break with previous patterns of domination and asymmetrical bargaining powers. Alexandra Bellayer-Roille explains that

Afin de permettre une coïncidence des intérêts respectifs de chacun et d’éviter toute forme d’interventionnisme paternaliste de la part de l’Union européenne ou de toute assimilation à une quelconque forme de néocolonialisme, le dialogue politique doit être appréhendé comme un véritable échange, au service d’objectifs clairs et des intérêts communs.⁹⁴

This idea of political dialogue to serve common interests is not confined solely to EU-ACP matters in a strict sense, but is also directed at the international arena. Indeed, Article 8(3) indicates that these political dialogues “shall facilitate consultation and strengthen cooperation between the parties within international fora, as well as promote and sustain a system of effective multilateralism.”

The underlying idea here would be that the ACP and the EU would be ‘stronger united’ and that political dialogue would help them reach the objective.

2. Human rights, democracy, and the rule of law

Human rights, democracy, and the rule of law are particularly prominent in ACP-EU relations and in the CPA. In the preamble of the CPA, many references are made to international instruments such as the African Charter of Human and Civil Rights or the UN’s Declaration of Human Rights or the European Convention of Human rights. These values are presented by partners as paramount in the conduction of their relationships, especially for the EU that has to conform with its Article 21 when it acts internationally.

Within the framework, the so-called ‘shared values’ of the EU and ACP countries also ought to be the subject of regular dialogue between the partner countries. Paragraph 4 of Article 8 of the agreement proclaims that ‘the dialogue shall also encompass a regular assessment of the developments concerning the respect for human rights, democratic principles, the rule of law and good governance.’ In substance, dialogues should concern progress made by the ACP countries in the upholding and promotion of these values on their territory.

Their overall purpose is to reach common ground on these core values. A dialogue is mostly necessary because ACP states and the EU do not always have the same understanding of what constitutes ‘human rights violations’ or undemocratic state practices. In that regard, Dietmar Nickel argues that the adherence to common values ‘does not eliminate the possibility of the contracting parties interpreting the same concepts in different ways.’

It is noteworthy that dialogue on these ‘shared values’ is mostly directed at the ACP group’s records on human rights and rule of law, and not the EU’s.

3. Economic and social policies

Dialogue between the EU and the ACP are also specifically centred around the economic and social policies conducted by the ACP countries to anchor their economies to the trend of globalisation, attain sustainable development, and raise the living standards of their populations. Similarly, on the shared principles between the EU and the ACP, the dialogues mostly concern the progress and issues in the ACP territories and are therefore unidirectional. In the next subsection, this aspect of the ACP-EU relationship and the political dynamics it covers will be more studied in detailed.

D. Shared values and objectives

1. The EU’s mission as a normative power

In the Treaty of Lisbon, the EU is to be governed by its founding principles of democracy, human rights, and rule of law when it acts internally, but also in its interactions with the rest of the world. The need for coherence between its internal and external actions (and its failings) is emphasised by many EU law scholars and human rights lawyers who insist on the need to uphold the same values both inside and outside of the EU territory and this holds true for the international partnerships they engage in.

2. Shared values as ‘essential elements’ of the partnership

2.1. Article 5 of Lomé IV

Democracy, Human Rights, and the Rule of Law are now presented as essential elements of the contractual relationship between the EU and the ACP countries. In Article 5 of the agreement, the EU and ACP countries legally enshrined what they considered to be their shared

95 D. Nickel, supra note 88. at p.13.
96 Article TEU 2
97 Article TEU21
values and governing principles, namely human rights, the rule of law, and democracy. In 1995, during the review process of the Lomé agreement, Article 5 was revised and became an “essential element” of the contract. 98 Legally, this change meant that gross human rights violations from one of the parties could constitute a breach of the contract. 99

2.2. In the Cotonou Agreement

Under a heading entitled: ‘essential elements regarding human rights, democratic principles and the rule of law, and fundamental elements regarding good governance,’ Article 9 of the CPA sets out these governing principles for both parties. Article 9(1) also reads ‘Cooperation shall be directed towards sustainable development centred on the human person, who is the main protagonist and beneficiary of development; this entails respect for and promotion of all human rights.’ It adds that ‘respect for all human rights and fundamental freedoms, including respect for fundamental social rights, democracy based on the rule of law, and transparent and accountable governance are an integral part of sustainable development.’ The most important provision of the article is contained in Article 9(2) of the agreement which reads “respect for human rights, democratic principles and the rule of law, which underpin the ACP–EU Partnership, shall underpin the domestic and international policies of the Parties and constitute the essential elements of this Agreement.” By enshrining these principles in Article 9 and granting them the status of ‘essential elements’ for ACP/EU contractual relations, both parties signal that all the objectives of the agreement are submitted by the fundamental principles set out in the article.

Article 10 identifies the involvement of ACP national parliaments, local authorities, the private sector, and civil society as paramount actors in the upholding of these values. The second part of the article set out the principles of ‘the social market economy’ as the foundation for democratic societies respectful of human rights.

98 Article 5§1 sub paragraph 3 of the Lomé agreement proclaims, “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, and governs the domestic and international policies of the Contracting Parties, shall constitute an essential element of this Convention. [emphasis added]”
99 Article 5 was the first human rights clause that the EU included in an agreement. Such clauses would be from now on included in all external agreements between the EU and its external partners. See Marise. "Human Rights and Democracy Clauses in the EC’s Trade Agreements." Law & Justice - The Christian Law Review 126 (1995) pp. 105-119.”
The fact that these shared values are presented as ‘essential elements’ of the agreement is of significance, as the contractual relations might be impacted if one of the parties fail to deliver on these elements or disrespect them in the conduct of the agreement.

The CPA contains a long Article 11 (Peace building policies, conflict prevention, response to situations of fragility) setting out the principles necessary to maintain a peaceful society and identifying concrete measures to address the security challenges of the 21st century. (set limits to arms trade, encourage mediation and conciliation and reconciliation efforts.) Two sub-articles 11A and 11B concern the fight against terrorism and ‘the cooperation in countering the proliferation of weapons of mass destruction’ respectively.

In case of breach of one of the ‘essential elements clause’ set out in paragraph 2 of article 9. Article 96 would come into play. The article foresees that a dialogue has taken place in pursuance of article 8100, and that the necessary consultations take place before engaging into sanctions. In pursuance of this article, signatory parties could be sanctioned (suspension of aid until the situation is redressed) or even definitely excluded from the cooperation agreement.101.


E. Promotion of regional integration

1. The EU’s ideology of promoting regional integration

Ever since the 2000s, the EU has chosen to include the promotion of regional integration in its foreign policy doctrine and to embrace interregional and trans-regional cooperation arrangements in an increasing number of areas. The underlying idea is that some issues can be best tackled at the regional or sub-regional regional. In 2003, Commissioner Nelson outlined the EU’s visions on regional integration and extolled its virtues:

The regional groupings may allow for a better integration in the world economy, by providing a learning field, a better bargaining power and increased attraction of foreign investment. …We [also] believe that the creation of regional spaces and markets, more integrated in economic but also political terms, could have a positive impact on reducing violence crisis and conflicts.103

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100 Cotonou Agreement, supra note 2, Art.96(1a).
101 Article 96 emphasises the fact that: “It is understood that suspension would be a measure of last resort.”
In the CPA, the principle of regional organisation is enshrined in Article 2, entitled *fundamental principles*. The article ends by emphasising: “particular emphasis shall be put on regional integration, including at the continental level.” In the article, the term regionalisation is associated with ‘differentiation.’ A differentiation that is necessary in order to address the specificities of each partner according to its level of development.

Article 28 of the CPA refers to the regional integration process and provides that: “cooperation shall provide effective assistance to achieve the objectives and priorities which the ACP states have set themselves in the context of regional and sub-regional cooperation and integration, including inter-regional and intra-ACP cooperation.”

Further regional integration initiatives are presented in Article 35(1) as a building block for trade and economic cooperation between the EU and the ACP states.

The EU has chosen to champion regional integration among the ACP states believing that it could help address some of the difficulties that the EU encounters in dealing with states with limited administrative and technical capabilities. The European Commission has once explained that by promoting regional integration on the African continent, the EU aims to “help the ACP countries integrate with their regional neighbours as a step towards global integration, and to help them build institutional capacities and apply principles of good governance.”

However, the ACP bloc does not possess the characteristics of a ‘region’ *per se*, be it a ‘sub-region’ or a ‘macro-region.’ In the CPA, the African Union is named as an actor of cooperation, a participant in the political dialogue set out in Article 8, a major stakeholder in peacebuilding activities, and a potential recipient for financial support.

2. The issue of the EPA regional groupings

Regional integration was also championed through the negotiations on the EPAs. As indicated above, the EPAs were negotiated on a sub-regional level, even though these sub-regions (with the exception of the ECOWAS) are different from those acknowledged by the African Union. P.H. Katjavivi notes that ‘this is problematic because it compromises Africa’s ability to own its...’

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105 Cotonou Agreement, supra note 2, Article 6 (1) b.
106 Cotonou Agreement, supra note 2, Article 8(5).
107 Cotonou Agreement, supra note 2, Article 11(1).
108 Cotonou Agreement, supra note 2, Article 58 (1)(b).
development agenda and policy space, and the continent’s flexibility to make decisions that prioritise African concerns."\(^{109}\)

In the CPA, the African Union is named as an actor of cooperation\(^{110}\), a participant in the political dialogue set out in article 8\(^{111}\) a major stakeholder in peacebuilding activities\(^{112}\) and a potential recipient for financial support.\(^{113}\)

2. The issue of the EPAs regional groupings

Regional integration was also championed through the negotiations on EPAs. Article 36(2) indicates that the Economic Partnership agreements would “make full use of the potential of regional integration and South-South trade.” The EPAs are negotiated on a sub-regional level, even though these sub-regions (with the exception of the ECOWAS) are not the same as the Regional Economic Communities recognised by the African Union.\(^{114}\) P.H. Katjavivi views this state of affairs as ‘is problematic because it compromises Africa’s ability to own its development agenda and policy space, and the continent’s flexibility to make decisions that prioritise African concerns.’\(^{115}\) He believes that by concluding these EPAs with regions other than those recognised by the AU, the EU is causing great damage to Africa’s regional integration.

Like Katjavivi, many analysts believe that this factor also contributed to the protracted negotiations of these EPAs, and some ACP countries, especially in Africa, accused the EU of hampering their own regional economic integration.

EU’s orientations prompts John Akokpari to wonder: “how do you create a custom union, a common market and a single monetary union if your member states have different trade arrangements with third parties?”\(^{116}\).

F. Migration issues


\(^{110}\) Cotonou Agreement, supra note 2, Article 6 (1) b.

\(^{111}\) Cotonou Agreement, supra note 2, Article 8(5).

\(^{112}\) Cotonou Agreement, supra note 2 Article 11(1).

\(^{113}\) Cotonou Agreement, supra note 2, Article 58 (1)(b).

\(^{114}\) For the negotiations of the EPAs, the ACPs are divided into seven regional groupings: “West Africa, Central Africa, Eastern Africa and Southern Africa, the east African Community (EAC), the Southern African Development Community EPA group, the Caribbean and the Pacific.

\(^{115}\) P.H. Katjavivi, supra note 109, at p.144.

\(^{116}\) J. Akokpari, supra note 90., at p.62.
1. Presentation of Article 13

The CPA contains a provision on migration issues, Article 13, which is a major bone of contention between the partners. This lengthy and comprehensive article aims to deal with the issue of migration in all its aspects.

On the one hand, Article 13 formulates the ‘strategies aiming at reducing poverty, improving living, and working conditions, creating employment and developing training contribute in the long term to normalising migration flows.’

On the other hand, this article entails a readmission clause enjoining the contracting parties to readmit their own nationals if these nationals happen to reside/stay illegally on the territory of another contracting party.

Even though this provision concerns both EU and ACP citizens equally, it is undisputed that the readmission clauses overwhelmingly serve the interests of the EU as migration flows usually occur from the South to the North. This article has been called ‘ambiguous’ with “an unclear legal value.” It is at any rate not self-executive and requires that bilateral agreements be signed between the parties. Article 13 is consistent with the policy approach embraced by the EU at the Tampere Council, which consisted of including readmission clauses in any future global trade agreements.

During the negotiations at Cotonou, the clause on readmission was included at the instigation of the EU ministers of home affairs. Originally, they wanted the ACP parties to not only accept their own nationals back, but also the illegal immigrants who transited through their territory to reach the EU. The ACP member states refused to accept the ‘third-nationals’ clause’ citing the incredible burden that such a clause would represent for them and arguing that contrary to readmission clauses sensu stricto, the readmission of third country nationals had no grounds in international law.

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117 Cotonou Agreement, supra note 2, Article 13 (4).
118 Article 13 reads that (i) “— each Member State of the European Union shall accept the return of and readmission of any of its nationals who are illegally present on the territory of an ACP State, at that state’s request and without further formalities” and that “each of the ACP States shall accept the return of and readmission of any of its nationals who are illegally present on the territory of a Member State of the European Union, at that Member State’s request and without further formalities.”
120 A.Knoll supra note 11., at p.236.
In addition to the readmission of illegal migrants, Article 13 is in line with the general spirit of the CPA as it encourages “in-depth” dialogues on the issue and identifies capacity-building as a preliminary step to an efficient policy.

In sum, in line with the whole spirit of the Cotonou Agreement, this provision tackles migration issues in a comprehensive fashion linking migration and development, it also covers the legal channels of migration and the readmission of irregular migrants and fosters sustained dialogue between the EU and the ACP partners.

2. The failed revision of Article 13

The contentious nature of the provision is illustrated by the fact that the ACP states refused to renegotiate this provision during the revision rounds of 2005 and 2010. As Klavers and van Seters point out: “out of the issues being discussed in the ACP-EU dialogue on migration, readmission is the biggest priority for the Europeans.”

During the negotiations, EU countries were pressing the ACP countries to accept the readmission clause contained in Article 13 making it self-executive, meaning that therefore no corollary bilateral agreements would be necessary. The ACP countries objected to that, citing their lack of administrative capabilities to issue travel and identification documents, and also lambasting the EU for providing too few opportunities for legal migration. Consequently, no revisions of Article 13 occurred during the 2010 revision round of Cotonou.

3. The ACP-EU dialogues on migration

Article 13 of the CPA begins with a provision stating that “The issue of migration shall be the subject of in-depth dialogue in the framework of the ACP-EU Partnership”.

The organisation of formal and informal dialogues is a soft law instrument par excellence and can be very useful on delicate matters such as migration issues. Thomas Renard notes that “political” or sectoral dialogues are very useful and that they, “create the framework and dynamic from which actual cooperation can eventually emerge.” Additionally, regular dialogue can lead to benchmarking, the sharing of best practices, and negative field experiences, and especially to an exchange of views on such a contentious and pressing issue.

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The ACP-EU dialogues on migration exist along other regional ones, such as for example the Mobility, Migration, and Employment dialogues within the JAES framework. In the almost fifteen years of its existence, Article 13 has led to the holding of several ACP-EU dialogues on migration where the partners expressed their agreements and differences on a wide range of issues:

3.1 The Migration-Development Nexus

As indicated earlier, the EU and the ACP share the view that “reducing poverty, improving living, and working conditions, creating employment and developing training contribute in the long term to normalising migration flows.”124

The general understanding of the migration-development is that the alleviation of poverty in developing countries encourages people to ‘stay home’ instead of emigrating in search of greener pastures. Even though Article 13 seems to indicate a mutual understanding of this migration-development nexus, in reality, the parties hold different views on how the two elements of ‘migration’ and ‘development’ ought to be intertwined.

Geiger and Pecoud define the EU’s vision of the migration-development nexus as “views, according to which migration is a ‘problem’ stemming from under development – views which consequently see development aid as part of control policies and ‘stay at home’ strategies.”125

They further explain that “the assumption is that successful development efforts should enable people to stay at home and avoid the disruption of the social order represented by their mobility.”126

For the Europeans, the nexus can be used as a tool for ‘stay at home’ or ‘control your borders’ strategies. As Adejou et al. explain, “In Europe, it is no exception to offer development aid to poor countries in exchange for cooperation on migration control and readmission.”127

ACP countries are challenging this view. They do not consider that immigration is a ‘problem’ that could be solved by the allocation of aid. They believe that, quite on the contrary, the phenomenon of migration to the North can be directly beneficial to them through remittances, the money sent by migrants to their homeland. They also point to the benefits of the acquisition of skills and expertise by ACP citizens who migrate to the North. In summary, the ACP holds

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124 Cotonou Agreement, supra note 2, Article 13(4).
126 Ibid., p. 370.
the view that issues of readmission should not take precedence over the acquisition of skills and the issue of remittance.

### 3.2. The phenomenon of Intra-ACP Migration

Until recently, the South-South migration phenomenon has been a rather under-researched topic. Jonathan Crush however notes that this trend is changing. According to him, “South-South migration has recently come onto the global migration and development agenda and is commanding increasing international attention.”

Discussions around Article 13 and the difficulties of revisions regarding irregular immigration have allowed the ACP states to emphasise a few points, one being that the main targets of mass migration are the ACP countries themselves and not the EU. Anna Knoll aptly remarks: “Most people moving across borders do so within the region in which they live.”

In a very informative publication on the migration aspects of the ACP-EU relations, she explains that “in sub-Saharan Africa, the share of intra-regional migration [was] estimated at 63% in 2010, while in West Africa about 75% per cent of migrants moved within the region in the same year.”

Having now become increasingly aware of this issue of south-south migration, the EU is now increasingly trying to use the phenomenon to its advantage as a way to avert unwanted migrations to Europe. It seeks to promote South-South mobility and present it as beneficial for the ACP and for the EU.

In this regard, the EU has helped fund the **Intra-ACP Migration Facility** which includes the **ACP Observatory on Migration**, an organ conducting research on migration patterns but primarily focusing on South-South Migration. In a Communication Paper, the EU laid out its vision on the subject by claiming that ‘this south-south’ migration often brings benefits to migrants in the form of better job opportunities and higher incomes than available at home.”

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128 J. Crush,” Between North and South: The EU-ACP Migration Relationship,” CIGI PaPers no. 16 — (April 2013) at p.11.
129 A.Knoll, supra note 11, at p.236.
130 ibid. at p.237.
§3. Legal and Institutional Framework of the Cotonou Agreement

A. Legal framework

The CPA is a legally-binding global agreement between the EU and the ACP countries. Through the agreement, the EU and ACP countries are bound by a contractual relationship which entails mutual obligations for the signatory parties and sets out desirable outcomes. As indicated earlier, the essential elements of the agreement, which are among other things their shared values (human rights, the rule of law, democratic governance) provide a powerful legal tool to the parties involved to influence the domestic national politics of their partners. In practice, it vests in the EU the political leverage to influence democratisation processes in the Global South and ensure the defence of human rights in the ACP countries. Articles 96 and 97 are provisions foreseeing consultations in case of non-compliance with the principles of the agreement by one of the parties. These consultations can lead to the suspension of the non-complying party.

B. Institutional framework

The Cotonou agreement foresees sustained collaboration between ACP and EU institutions. These sustained forms of collaboration can be characterised as joint management mechanisms between the ACP and the EU. The role of these joint institutions, “with a specific mandate and tasked to advance specific CPA objectives,\(^{132}\)” is laid out in the agreement in Articles 14 to 17. In addition to the joint institutions, key institutions on the African continent and in the EU are involved in the negotiation, implementation, and monitoring phases of the agreement.

1. The Council of Ministers

The Council of Ministers is, among other things, tasked with “conduct(ing) an ongoing dialogue with the representatives of the social and economic partners and other actors of the civil society in the ACP and the EU.”\(^{133}\)

2. The ACP-EU Joint Parliamentary Assembly

The institutional framework of the Cotonou agreement also involves legislative bodies, such as the Joint ACP-EU Parliamentary assembly, whose mission is set out in Article 17. The ACP legislative bodies are designated as agents of change in the South, especially in the promotion

\(^{132}\) J. Bossuyt and al. supra note 81, at p.78.

\(^{133}\) Cotonou Agreement, supra note .2, Art.14.
of democratic governance and the market economy. The joint institution is a consultative body and has no legislative powers per se. It meets twice a year, alternatively in an ACP country and in the EU. Lawmakers regular interactions are presented as very useful by who frames their added value as follows:

The intensive cooperation between European MEPs and representatives of the parliaments of the ACP States does not merely foster mutual understanding. It also has the effect, hanks to this understanding, of making the European representatives into the best defendants of the interests of ACP parliaments.134

3. The private sector and civil society

Actors from the private sector and ‘civil society,’ (or non-state actors as the CPA names them) are designated as key stakeholders in the development of the ACP. Their involvement is in line with the EU’s promotion of market-based democracy in the ACP countries. The involvement of civil society under the Cotonou Partnership Agreement is not limited to economic operators. The contributions of civil society, identified as a key actor for development, is enshrined in Articles 7 and 19(1). The participation of members of civil society is also encouraged in the many dialogues between the EU and the ACP countries as they broaden their perspectives on political actors.135 Greater involvement from civil society is also identified as a factor for sustainable peace.

Section II. The 2007 Lisbon Declaration, the Africa-EU Strategic Partnership and the Joint Africa-EU Strategy (JAES): Towards a Continental Approach

§1. The path towards the continental approach and the JAES

The following sub-section is divided into two parts. The first part will examine the emergence of “strategic thinking” and “strategic culture” within the EU. The second part will be focused on the EU-Africa relationship and examine how we came to talk of an Africa-EU Strategic Partnership.

A. Emergence of a strategic culture in the EU

1. The ESS

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135 Cotonou Agreement, supra note 2, Art.8(7).
In 2003, the EU has published a landmark policy document, the European Security Strategy. In this document, the EU acknowledges the economic and security challenges posed by globalisation and the necessity to embark on partnerships with key global players to face them efficiently. Taking cognisance of the growing influence of the ‘emerging powers’ of the global South (South Africa, Russia, Brazil, China), and underscoring the historical and cultural ties with the USA and Africa, the ESS endeavoured to engage with these prominent international partners in the pursuit of common objectives.

The document sketches out the situation as follows:

There are few if any problems we can deal with on our own. The threats described above are common threats, shared with all our closest partners. International cooperation is a necessity. We need to pursue our objectives both through multilateral cooperation in international organisations and through partnerships with key actors.

The political scientist, Gianni Grevi notes that with the publication of this landmark document ‘the EU has showed a clear intent to mobilise bilateral partnerships to address global and regional issues and crises with its partners.’ He believes that these “strategic” partnerships should rest on “comprehensiveness, reciprocity, empathy, and normative proximity, duration and the ambition to reach beyond bilateral issues.”

After the publication of the document, the EU undertook institutional innovations aimed at bolstering the capabilities of the EU as a strategic actor and implementing its strategies, the most emblematic breakthroughs being the creation of the EEAS, the High Representative for the CFSP, and Vice President of the Commission.

### 2. The EU’s strategic partnerships
#### 2.1 Definition

To this day, there is no consensus in the academic world on a definition for strategic partnerships. Luis Fernando Blanco explains that ‘these and other terms can be used to establish demarcations, differences, and hierarchies.’

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136 EU Council (2003), supra note 14.
137 Ibid., p.14
139 Ibid., p.10.
Quevedo Flores provides a workable definition based on identifiable criteria. He defines them as ‘una alianza entre dos o más Estados o regiones, con el objetivo de generar beneficios mutuos a partir de identificar sinergias de cooperación entre ambas partes. Dichas asociaciones estratégicas ponen un énfasis sobre los rasgos de estructura del Estado, en donde se identifica la capacidad y autoridad del mismo para hablar, ejecutar, movilizar recursos a nivel regional e internacional.’ 142

The interest of this definition is that it breaks strategic partnerships down into three constitutive elements:

a. Engage in a dialogue
b. Implement
c. Mobilise the necessary resources at the regional and international level.

Quevedo Flores argues that in order to qualify as a strategic partnership, the bilateral relationships must have comprehensive character and not be limited to one or two sectorial elements. 143 Without completely defining them, the European Parliament characterises these partnerships as consisting of the “EU’s response to an increasingly interdependent world, since cooperation with key powers is necessary to ensure that the EU’s values and interests are preserved at the global level”144

Thomas Renard provides a working definition of the strategic partner which is a key global player which has a pivotal role in solving global challenges – in the sense that the EU cannot hope to solve these issues without the positive contribution of that partner – and is willing to cooperate with the EU to solve these challenges, preferably in a multilateral framework, in multilateral forums. 145

To this day, the EU has concluded 10 different partnerships with state actors and three strategic partnerships with regional actors among which include the African Union.146 Thomas Renard

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142 “An alliance between two or more states or regions, with the objective to generate mutual benefits by identifying synergies between the two parties. These strategic partnerships put the emphasis on the structures of a state, in which can be identified the ability of the partner to speak, execute and collect the necessary resources at the regional or international level.” Translation made by the author. J. Quevedo Flores “La paradoja del multilateralismo eficaz a través de las asociaciones estratégicas en la acción exterior de la Unión Europea” European Scientific Journal October edition vol. 8, (2012),pp.1-24 at p.14.

143 Ibid., p.14.

144 See <https://epthinktank.eu/2012/10/02/eu-strategic-partnerships-with-third-countries/>


146 The EU has engaged in “strategic partnerships” with 10 countries: Brazil, Canada, China, India, Japan, Mexico, Russia, South Africa, South Korea and the United States. It is also engaged in strategic partnerships with three macro-regions Africa, the Latin-American and the Caribbean and the Mediterranean and Middle east. See
explains that the common feature of these actors is “that they have been identified as pivotal players overall, including the security area.”

2.2. Functioning of the strategic partnerships

Strategic partnerships are essentially based on regular meetings and policy dialogues between the EU and its partners. Thomas Renard notes that “Meetings can take place at various levels: summits, ministerial meetings, senior official meetings or expert/technical dialogues.” He adds that these dialogues are divided between sectoral dialogues (on particular issues of mutual concern which are led by the European Commission) and the political dialogues (on matters related to security and foreign policy, which are led by the EEAS).

B. The EU’s Strategy for Africa

The 2003 ESS document mentions several key actors with whom the EU ought to cooperate in multilateral settings. It does not however single out the African Union as a potential partner. The conceptualisation of the regional organisation as a strategic partner would be much more gradual and not happen before 2007.

In 2000, the EU and African heads of state held an important summit in Cairo. During this Cairo Summit in 2000, the EU and the Organisation of African Unity (the AU’s predecessor), set out to “give a new strategic dimension to the global partnership between Africa and Europe for the twenty first century.” In 2005, following the conclusions of the Cairo summit, the European Commission drafted a document ‘The EU’s Strategy For Africa’ aimed at accelerating Africa’s economic development, bringing more coherence to the African policy of the European Union and to providing guidance in the tackling of major challenges such as peace, environment protection, and the alleviation of poverty. Louis Michel, who at the time was the European Commissioner for Development, outlines the reasons behind the increasing conceptualisation of the African continent as a place of high strategic relevance: “as the pace of globalization and


147 T. Renard; supra note 149, at p.16.
148 Ibid., p.27.
149 Ibid.
internationalization of, for example, security threats, energy trading and migration flows accelerates, Africa has taken on an increasingly strategic importance for Europe.”  

C. The Lisbon Declaration

As indicated above, in the year 2000 the Africa-EU Lisbon Summit took place in Cairo. The stated purpose of the summit was to redefine the relations between both continents (at the time the EU’s institutional interlocutor for Africa was the OAU) at the height of the globalisation of challenges and threats. After committing to giving a new strategical dimension to their relations, the African and European heads of state again convened for the second Africa/EU Summit in 2007 in Lisbon. This time, Europe’s main interlocutor was the African Union which had replaced the OAU five years earlier.

Noting that “In Africa we have witnessed the creation of the African Union, which offers a new continental framework for addressing African issues” and that “the EU has grown in membership and scope, deepening its process of integration, and acquiring new responsibilities in the world” the heads of states proclaimed in the Lisbon declaration, we have today an increased understanding of our vital interdependence and are determined to work together in the global arena on the key political challenges of our time, such as energy and climate change, migration, or gender issues.  

From that moment on, the EU and the African Union would engage in a new relationship “characterised by institutional and policy cooperation between the two regional actors” and “grounded on the principles of equality, partnership and local ownership.”

This Lisbon Summit held from 8 to 9 December 2007 would eventually lead to the adoption of the Joint Africa-EU Strategy (JAES). In the last words of the declaration, African and European leaders wanted to emphasise the fact that the partnership would be a new departure in Africa-EU relations: “We believe that this Summit will be remembered as a moment of recognition of maturity and transformation in our continent to continent dialogue, opening new paths and opportunities for collective action for our common future.”

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154 T. Haastrup, supra note 33., at p. 791.


156 Ibid.
D. The JAES

The Joint Africa-Europe Strategy is the outcome of years of preparations based on regular interactions between African and European heads of state, the European Commission, the African Commission, and African and European civil servants. Gilbert Khadiagala describes the JAES’ overall purpose as to “provide a long-term framework for Africa-EU relations to be implemented through successive short-term action plans and political dialogue at all levels in a bid to achieve outcomes in specific areas of this partnership.”

The establishment of the JAES did not aim to substitute other frameworks of cooperation such as the Cotonou Agreement or the European Neighbourhood Policy, but endeavoured to be complementary to these cooperation schemes and even draw on their achievements. The essence of the framework and its normative underpinnings are outlined in the JAES policy paper under a heading entitled *Shared Vision*:

The partnership will be based on a Euro-African consensus on values, common interests and common strategic objectives. This partnership should strive to bridge the development divide between Africa and Europe through the strengthening of economic cooperation and the promotion of sustainable development in both continents, living side by side in peace, security, prosperity, solidarity and human dignity.

E. The Africa-EU Partnership: Towards “a continental approach”

1. The African Union as main interlocutor

One of the main reasons that prompted the EU to embark on creating this new framework lies in the added value represented by a single partner, acting as *a unified whole*, namely the African Union. As indicated above, the AU being Africa’s most prominent regional organisation exerts a major influence on its member states who see it as a source of legitimacy. The AU is increasingly becoming a respected interlocutor on the world stage through its activism in the promotion of peace, human rights, and the rule of law, and through the ties it is building with global powers such as India and the United States.

Finally, the importance of the African Union is connected with the relative fragility of the ACP states. As the European Commission points out in its 2005 Green Paper “the ACP group is in reality neither a political group nor an economic entity. It grew up for essentially historic reasons and exists only in the framework of relations with the European Union.”

157 G. Khadiagala, supra note 6, at p. 233.
158 European Council (2007), supra note 155., at p.2
159 Commission of the European Communities (1996), supra note 82., at p.ix.
many analysts, either in academia or in policy circles, remark that the ACP countries have often failed to come together and present a united front in the defence of their interests.  

2. A more suitable geographical and political scope

The most cited advantage of the continental approach is that it allows the avoidance of fragmentation when it comes to the EU’s dealings with the African continent. Louis Michel frames this advantage aptly when he remarks that “with this Strategy, Europe takes a decisive step towards viewing Africa as a single continent, whose problems, as well as hopes and aspirations, echo from Cape Town to Tunis.”

The EU/Africa partnership in which every African country is involved differentiates itself from the Cotonou framework which only covered the sub-Saharan countries but not the five North African countries whose associations with the EU are governed by the EU through the European Neighbourhood Policy and the Euro-Med partnership. Catherine Flaesch-Mougin believes that the continental approach offers a real added value to other frameworks such as the Cotonou framework. She explains that


§2. The Objectives of the JAES

In its founding policy document (the JAES), Africa and the EU have singled out four main objectives that would need to guide the two partners throughout the long-term partnership:

A. The strengthening of the Africa-EU political partnership

The fostering of a closer political partnership between the AU and the EU is a primary goal for the JAES. The JAES stipulates that “both sides will treat Africa as one and upgrade the Africa-EU political dialogue to enable a strong and sustainable continent-to-continent partnership, with the AU and the EU at the centre.” This endeavour is a response to the fragmentation of

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160 See J. Bossuyt and al., supra note 81.
161 L. Michel, supra note 152, at p.4.
163 EU Council (2007), supra note 155, p. 20.
the EU’s policy towards the African continent and also a desire to anchor EU-Africa relations in the new, multipolar, globalised world order and break ties with previous cooperation patterns.

B. The consolidation of peace, security, human rights, and democracy

This objective is in line with those of previous Africa-EU cooperation arrangements and does not represent a break. Ever since the 1990s, the EU has presented human rights, the rule of law, and democracy as its governing principles in its relations with its partners. Yet, presenting these principles as common to both partners allows a response to the accusation of interventionism and paternalism levelled at the EU when it tries to promote democracy, peace, and the rule of law on the continent.

C. The promotion of the principle of effective multilateralism

By anchoring their relations in the principle of effective multilateralism, in which the United Nations, the WTO “and other key international organisations” would cooperate with the AU and the EU in tackling global challenges, the EU and Africa are embracing new modes of governance and further breaking with past patterns. Gilbert Khadiagala further explains that promoting the principle of effective multilateralism is also a way with the EU to loosen its ties with former colonies and embrace more globalised and multilateral settings.164

D. The promotion of a people-centred relationship

In naming this objective, the JAES emphasises the fact that the African and European people are the prime concern of this policy framework. This implies that African citizens, NGOs, private operators, and members of civil society in general will also be the building blocks of this partnership. The JAES acknowledges the central role that these actors will play in the future “Ongoing dialogue with civil society, the private sector and local stakeholders on issues covered by this Joint Strategy will be a key component to ensure its implementation.” More precisely, the document also proclaims among other things that “Africa and the EU will empower non-state actors and create conditions to enable them to play an active role in

164 G. Khadiagala. supra note 6, at p. 235.
development, democracy building, conflict prevention and post-conflict reconstruction processes.”

§3. Legal and institutional framework

A. Legal framework

1. Legal basis in Europe and in Africa

For the EU, it is Articles 21^{166} TEU which provides the legal basis for the strategic partnership.

For the African Union, the situation is less straightforward, as explained previously. Contrary to its predecessor, the Organisation of the African Union, the international legal personality of the African Union is not directly granted by its Constitutive Act. It can be inferred through the theory of implicit powers and is generally acknowledged.

2. A partnership governed by soft law instruments: summits and action plans

On the legal front, the Africa-EU Strategic Partnership is organised around soft law instruments: its declarations, its summits, and the implementation of its action plans. These practices are considered as soft law instruments by many scholars and are increasingly a subject of inquiry in legal scholarship.

Declarations are powerful tools used to either state a reality, prescribe a certain course of action to both state and non-state actors, and most importantly to express consensus and a community of thought on a particular issue. Like-mindedness or “normative convergence” are viewed as essential elements for this partnership. Joint declarations could be a useful tool in that regard to assert this convergence.

Summits are important for the socialisation of actors at a higher level. This is of significance when considering the central place that heads of state and governments occupy for the formulation and implementation of policies, especially in Africa.

^{165} European Council (2007), supra note 155., at p. 11

^{166} Article 21TEU reads “The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles" of "democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law”; and, "The European Council shall identify the strategic interests and objectives of the Union.”
In addition to the joint summits and joint declarations, the EU/Africa partnership rests on the crafting and implementation of action plans. These action plans are defined by the European Commission as being political documents which draw together existing and future work in the full range of the EU’s relation with its neighbours, in order to set out clearly the overarching strategic policy targets and benchmarks by which progress can judged over several years.167

Action plans are a striking example of what soft law instruments are and the role they ought to perform. Bart Van Vooren find them very useful and points out that: “non-binding action plans are speedily adopted, functionally flexible, easily adapted and pose few procedural constraints, thereby avoiding the pitfalls of competence-related struggles.”168

B. Institutional framework

1. The central role of the AU and the EU169

The Lisbon summit marks a shift in the history of EU/Africa relations as the African Union was designated as the EU’s main interlocutor. The JAES document proclaims unequivocally that “The African Union has emerged as a natural interlocutor for the EU on continental issues and as the most important institutional partner for the EU. Therefore, the institutional architecture promoted by the Joint Strategy will, on the African side, be centred on the AU.”170

Explaining this choice,” Gilbert Khadiagala notes that:

In a departure from the tradition established since the 1950s in dealing with different regional groupings, Brussels earmarked the AU largely because of its renewed commitments to be the comprehensive security, economic and political framework for regionalism in Africa.171

2. The private sector and civil society

In line with previous cooperation patterns, the African-EU partnership views the intervention of the private sector very favourably and champions its involvement. It involves a web of actors ranging from NGOs, economic operators, academics, members of civil society, and representatives of local authorities.

168 B. Van Vooren, supra note 8, at p.194.
169 A more detailed description of the actors of the JAES can be found in Annex II.
170 EU Council (2007) supra note 155 , at p. 22.
171 G. Khadiagala, supra note 6., at p.233.

A. The second EU-Africa summit: Lisbon 2007

Upon its establishment, the JAES was followed by the adoption an action plan for the 2008-2010 period, outlining the concrete objectives of the partnerships and formulating concrete and measurable expected outcomes. The 2008-2010 action plan concentrated on trade and security matters, as the EU and the AU wanted to reinforce African capabilities in both areas.

Furthermore, the first action plan identified eight thematic priorities around which the AU/EU partnership would revolve. These eight thematic priorities are Peace and Security, Democratic Governance and Human Rights, Regional Trade Integration and Infrastructure, the UN Millennium Development Goals, Energy, Climate Change, Migration Mobility and Employment, Science, Information Society, and Space. These “thematic priorities” are subdivided into concrete objectives decided between the AU and the EU, objectives whose implementation is mostly tasked to the JEG and monitored by several institutional actors in the AU and in the EU among which are the EEAS, the JEG and the troika of ministers.

B. The third EU-Africa summit: Tripoli 2010

This summit took place in Tripoli, the capital of Libya. This is very significant in many respects as the president of Libya, Colonel Gadhafi, was one of the champions of the creation of the African Union, but was also considered a controversial interlocutor for the West. The choice of the venue is also particularly significant because of the particular strategic importance of Libya for the EU on pressing issues such as terrorism, migration, and conflict prevention.

At the third Africa-EU summit in Tripoli, similarly to the Lisbon summit, most discussions revolved around trade and security issues. On the subject trade, the heads of state reaffirmed their wish to see the EPAs concluded rapidly and also reaffirmed their beliefs in an international trade system. The scope of the dialogue on security was extended to include the pressing issue of the migratory flows coming from Sub-Saharan Africa to the EU. The fact that the summit took place in Libya is also of high symbolic value since it is a major transit country for illegal migrants wishing to reach the Italian coasts.

The summit was followed by the adoption of an action plan, the Second JAES Action Plan 2011-2013, which focused on Human Rights, Governance, and Rule of Law issues, but also on

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172 It is worth underlining that these goals present the double characteristic of being universally acknowledged as global issues and to be of ‘vital interests’ for both continents.
energy issues, climate change, the environment, and immigration.\textsuperscript{173} It is noteworthy that migration issues in all of their complexities occupied an important place in the discussions on matters such as human trafficking, the refugee questions, as well as maritime operations.\textsuperscript{174}

C. The fourth EU-Africa Summit: Brussels 2014

The fourth EU-Africa Summit took place in Brussels on 2-3 April 2014, and led to the adoption of an action plan that focused on four key priorities: peace and security, human development, trade, democracy, human rights, and good governance. On security, the capacity-building of the African Union’s security forces was tackled through the operationalisation of the \textit{African Peace and Security Peace Architecture}. For the joint strategy on trade, the EU took stock of the AU’s concerns regarding the EPAs and the realisation of Africa’s economic regional integration, namely the Continental Free Trade Area (CFTA).

The Fifth Africa-EU Summit will take place in the Ivory Coast in November 2017.

Section III. Intermediate conclusions

§1. The successes and shortcomings of the Cotonou Partnership Agreement

Postcolonial relations between the EU and Africa have been the subject of voluminous research whether in economic, law, history, or political science. These relationships have drawn much criticism from scholars, but also from lawmakers, NGOs, or civil society. The main criticisms are levelled at the inequality between the partners, a paternalistic behaviour from the EU, and the inefficiency of policy frameworks for redressing Africa’s plight. Yet, after having studied the Cotonou agreement and its revisions, it appears that this policy framework has laid the groundwork for much improvement on various issues:

A. The milestones of the Cotonou Agreement

1. The promotion of a comprehensive, flexible, and dynamic institutional framework


\textsuperscript{174} This will be addressed more in detail in the second part of the master’s thesis.
The CPA institutional framework identifies a large number of actors as key to the success of the ACP-EU partnership, and vehicles for the development and democratisation of the ACP countries. Lawmakers, ministers, senior officials, and diplomats, as well as economic operators and civil society, through their involvement and their interaction, influence ACP-EU ties, and consequently the ACP countries’ domestic policies.\(^{175}\)

In spite of persistent accusations of paternalism and domination triggered by discussions on the EPAs or migration, the participation of all of these ‘non-state’ actors from ACP and EU in the cooperation arrangement might signal the break with a donor-recipient relationships and anchor the ACP/EU relations in a more partner-like relationship.

Yet, some observers are casting doubts about the commitment of the ACP-EU to widen the governance. Bossuyt and al. note that “Despite generous provisions and laudable support programmes towards a wide range of actors (...) EU-ACP cooperation has remained a rather closed shop managed in a highly centralised and bureaucratic manner.”\(^{176}\) They note that consequently, “limited opportunities exist for a real and effective participation in decision-processes or accessing funding.”\(^{177}\)

2. The nurturing of an intra-ACP solidarity

With its promotion of enhanced cooperation within the ACP group, the EU aimed to foster a certain degree of economic and political solidarity among these states but also to create spaces for socialisation between them in which they would exchange and share knowledge and experience, and pursue common interests in international fora. In that regard, Article 2 of the Georgetown agreement name the promotion and strengthening of the ACP group as a main objective.\(^{178}\) Intra-ACP cooperation discussions on many essential issues such as trade (rejection of the EPAs) or immigration (rejection of the revision of Article 13 in 2010) have borne fruit and influenced the cooperation arrangement between the EU and the ACP group.

Yet, it seems that the few common interests of the ACP cannot overshadow their core differences. Bossuyt, Keijzer and al. note that “*the A, the C and the P, taken separately,*

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\(^{175}\) Arguably, ACP-EU relations are rather geared at the fostering of transformation in the ACP bloc and not in the EU.

\(^{176}\) J. Bossuyt and al. *supra* note 81, at p. 106.

\(^{177}\) *Ibid.*

\(^{178}\) *Georgetown Agreement supra note 75, Article 2.*
are very different regions, facing specific geopolitical, economic and development challenges that cannot easily be accommodated and pursued within a tri-continental structure.”179 This state of affairs prompt many policymakers to question the relevance of another ACP-EU framework beyond the expiration of the Cotonou framework in 2020, and publicly wonder if the African Union operating within the JAES framework would not be a much better vehicle to promote this intra-south solidarity.180 Those questions are reinforced by the realisation that the Pacific and Caribbean states have much less ‘strategic value’ for the EU than Africa. As Bossuyt and Keijzer posits:

“Europe and Africa are increasingly aware that they are ‘condemned’ to ever-closer dialogue and collaboration in a wide range of pressing policy areas (such as migration, stability). For the C and the P, political cooperation with the EU has been low over past decades, reflecting the marginal status of both small regions for Europe.”181

3. Development

The chief purpose of the Cotonou agreement was to bridge the developmental divide between the North and the ACP countries, recalibrate their relationships, and ultimately anchor the ACP countries to the world economy. Reports conducted by the EU institutions as well as independent agencies show that these efforts have borne fruit and that poverty has significantly been alleviated in some ACP states. While previous frameworks such as Lomé did not manage to alleviate poverty and even saw many ACP states become poorer and more mired in debt, it was estimated in mid-2015 that 6 of the 13 fastest growing lands in the world were ACP (African) countries.182 It would be uneasy to ascribe this state of affairs partly or totally to the CPA and its predecessors, but it is undeniable that many African economies such as Rwanda or Senegal are striving to attract foreign investment and develop investment-friendly environments in line with the principles put forward by the Cotonou Partnership Agreement.

B. The shortcomings of the Cotonou Agreement

1. The EPAs

179 J. Bossuyt and al., supra note 81, at p.37.
180 Ibid.
181 Ibid.
182 J. Akokpari, supra note 90, at p.70.
The negotiations on the EPAs proved to be problematic for many sub-Saharan and Pacific countries. The fact that the EU only managed to conclude a single comprehensive EPA by the original deadline (in 2007) can be explained by the fact that there was more convergence between the EU and the CARIFORUM group than with other sub-groupings, especially in Africa. The disconnect between the African ACP states and the EU is fuelled by the belief that the EU sought to impose agreements that would be mostly beneficial to its own interests but mostly detrimental to Africans. Finally, a last criticism concerns the sub-regional groups who negotiated with the EU. These groups, with the notable exception of the ECOWAS, do not reflect the sub-regions recognised by the African Union, the Regional economic Communities which threatens the consolidation of these regional groupings.

2. Migration issues

The CPA exhibits major shortcomings in the handling of migration issues. The failed renegotiations of Article 13 have provided a clear illustration of the lack of ownership of EU readmission clauses in ACP countries, especially in Africa. As has already occurred with the negotiations on the EPAs, the ACP countries blamed the EU for imposing agreements that would mostly reflect European interests and not pay sufficient enough attention to African needs, particularities, and lack of capabilities to implement the agreements. Furthermore, the ACP states blame the EU for not offering enough opportunities for legal migration, which they believe would contribute greatly to their development.

To remedy this situation, the fostering of a real ACP solidarity might prove useful, Adepoju and al argue that, "countries of the South, especially African countries, may need to form a common agenda of interests to offset the agenda of the EU."183

§2. The Joint Africa-EU Strategy

A. Academic criticisms of the strategic partnerships

First, the EU’s strategic partnerships generally draw much criticism from political and legal analysts. They hold the view that strategic partnerships in general are sometimes useful, but most of the time merely serve political purposes. He notes that they are "sometimes part of a grand scheme for systemic change but that diplomats use them as a rhetorical device to

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183 Adepoju and al, supra note 127, at p. 67.
navigate the rough edges of shifting global politics.” As for the JAES in particular, some analysts such as Damien Helly believe that “the partnership remains an opaque bureaucratic construct very much, devoid of any tangible impact on real life.” For her part, Karen Del Biongo, believes that the JAES is based upon principles that are mostly rhetoric (ownership, equality, shared values) and have not been in fact proven by the reality of the interactions between Africa and the EU. Furthermore, she remarks that such an equality would be difficult to attain with such asymmetrical financial powers between the partners, with the European Commission having more than ten times the budget of the AUC and more than twenty times as many staffers. Others, without directly defending the principle of strategic partnerships, defend the originality and added value of the EU foreign policy toolkit, and believe that the EU could benefit from these innovative avenues in the pursuit of their EU foreign policy objectives. As Keukeleire and Delreux explain “The specificity and added value of an EU foreign policy can be precisely that it emphasizes different issues, tackling different sorts of problems, pursuing different objectives through alternative methods, and ultimately assuming a form and content that differs from the foreign policy of its individual members.”

B. The JAES in light of the EU’s foreign policy objectives

This section has demonstrated that the launching of the Joint Africa-EU strategy and the conceptualisation of the African Union as a ‘strategic partner’ was in line with a foreign policy orientation taken by the EU ever since the publication of the ESS, namely the identification of key partners in the pursuit of its objectives and the preservation of its vital interests. It has been demonstrated that in spite of its many ambiguities and shortcomings, the framework was of some substance and had the potential of serving useful functions:

187 Del Biongo notes indeed that the EU’s budget in 2014 was of 147.2 billion € while the African Union ran the same year with a budget of 227, 4 million. The differences are as stark concerning the personnel of both commissions with 1450 staffers for the AU Commission in 2014 against 33,039 for the EU commission.
First, through the adoption of an inter-continental approach, the African Union came to play a central role in Africa-EU relations with the ultimate ambition of serving as a counterpart to the EU. The strong emphasis put on equality between the “two unions sharing one vision” was clearly aimed at addressing many of the criticisms levelled at the EU by ACP countries who deplored their lack of bargaining power in face of European partners. The AU/EU Partnership is based on a normative proximity (or a commonality of values) between the two regional bodies, the joint identification of areas of common interest, and the insistence on conducting a partnership of equals, which facilitates it to further break with the patterns of a donor-recipient relationship and move towards a more egalitarian partnership, in which both partners would equally be involved in the shaping and implementation of a common strategy.

Second, the framework would allow the two regional institutions to raise their international profiles. The European Union can use the JAES framework to mainstream the idea that the former patterns driven by ‘paternalistic behaviours’ and ‘battles of influence’ belonged to the past and that a genuine partnership with its African partners was now at play. The African Union, which is a nascent regional organisation with very limited means and which is composed of weak states, sees a real interest in embarking on a sustained partnership with the powerful EU. The partnership would grant the AU with legitimacy on the world stage mostly because it is repeatedly presented as the EU’s equal in policy discourse.

Third, the JAES managed to some extent to take advantage of the potentialities offered by a cooperation framework at the inter-continental level, between the two international organisations that are the EU and the AU. International organisations are gaining momentum in international relations, and their interactions are producing practices, political and legal instruments, as well as fostering partnerships that are both innovative and flexible.

C. The limitations of the JAES

After acknowledging the potentialities contained in the JAES framework, a thorough analysis of the strategic partnership allows me to formulate a few criticisms:

Firstly, one might doubt the entirely innovative character of the framework. The JAES is based upon the principles of ownership, partnership, and equality. But it is noteworthy that a similar rhetoric, insisting heavily on ‘the equality of the partners,’ was held ahead of negotiations of the Cotonou partnership. These two frameworks underscore the importance of political dialogue, and the identification of common areas of concern to be tackled jointly. In fact, the biggest novelties in the framework compared with others such as Cotonou is that it is the first
time that the African continent as a unified whole is presented as a partner of high strategic relevance and that the framework is exclusively based on soft law.

Secondly, another issue identified by the critics of strategic partnerships in general and the JAES in particular, are the asymmetrical capabilities between the partners. These inequalities can be of an economic, diplomatic, technological, or political nature, and raise serious doubts about the reality of the partnership of equals principle. As noted earlier, the European commission has much more personnel and enjoys of much more financial means than the African Union Commission even though they are presented as equal stakeholders in the partnership. In these conditions co-ownership and equality are more difficult to reach than in a partnership made of partners with relatively equal influence and powers. Regardless, in many respects, the EU adopts a ‘mentoring’ role towards the AU rather than a real partnership between equal partners. It has through the APA for example, and has been very active in championing the development of a security culture within the African Union. In that regard, the scholar John Akokpari pointedly notes: “successive summit communiqués have seen the EU commit to assisting Africa to achieve certain objectives and not the other way around.”

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189 J. Akokpari, supra note 91., at p. 68.
Part II. Case study: The Africa - EU Partnership on Migration Issues

“Millions of people are on the move worldwide and we can only manage this if we act globally, in full partnership.”

Federica Mogherini

Chapter I. The EU’s policy choices on cooperation with African countries in the fight against irregular migration


§1. Terminology

In academia and in policy circles, the concepts of “the External Dimension of EU Migration Policy” and “Externalisation of EU Migration” are often used indiscriminately when they cover different realities. Jack Mangala points out that the term “externalisation” does not cover the same reality as the “external dimension” of EU migration policy. He explains that “while the former is concerned with outsourcing, the latter generally refers to all aspects of engagement and policies directed beyond EU borders.”\(^{190}\) In the context of migration, externalisation can be defined as “the reproduction of European Internal migration policy at the external level, which entails burden-sharing in the policing of European borders with bordering countries, and the setting up of migration management policies in the countries of origin, particularly concerning illegal migration, in line with European interests.”\(^{191}\) One could say that “externalisation” is in fact a subset of the external dimension of migration policies.

§2. The progressive development of the externalisation of the EU’s migration policy in Africa

A. Legal basis: assessing the Union’s competence

Even though the question of ‘communitarian’ immigration regulation encroaches on a state’s sovereign choice to decide who has the right to reside on its territory, the necessity of an integrated approach on the issue of migration control has increasingly been acknowledged by member states.

\(^{190}\) J. Mangala, supra note 7., at p.200.

The Treaty of Amsterdam transferred all of the matters related to cooperation on migration under Title IV called ‘VISAS, ASYLUM, IMMIGRATION, AND OTHER POLICIES RELATED TO FREE MOVEMENT OF PERSONS.’ Furthermore, the Treaty of Amsterdam introduced the Schengen Acquis into the EU’s legal order.192 Another innovation of the Amsterdam Treaty is that the Council was conferred by Section 63(3)(b) the competence to adopt measures to control “illegal immigration and illegal residence, including repatriation of illegal residents”.

Since 2007, in the Lisbon Treaty under Section V, entitled ‘Area of Security and Justice.’ under chapter 2 ‘POLICIES ON BORDER CHECKS, ASYLUM, AND IMMIGRATION’ the EU is endowed with new competences on immigration issues in Articles 79 and 80. Article 80 sets out the principles upon which the common immigration policy shall be conducted (fair sharing, solidarity), but it is Article 79 that truly provides the Union with a competence on migration issues.

Article 79(1) of the TFEU reads: ‘The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration […]’

B. Towards the externalisation of EU migration policy

Immigration is by nature a transnational phenomenon and its management often requires the involvement of numerous actors among which are the sending, receiving, and transit countries. In 1999, at the Tampere Council, the European council called upon the Union and its member states “to contribute, within their respective competence under the Treaties, to a greater coherence of internal and external policies of the Union.” It also stated that “Partnership[s] with third countries concerned will also be a key element for the success of such a policy, with a view to promoting co-development.”193 Three years later, in 2002 at the Seville Council, the Union reaffirmed its conviction that the internal and external dimensions of migration issues were interwoven and that cooperation with third states would be necessary to tackle the issue when it claimed that “the European Council stresses the importance of

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ensuring the cooperation of countries of origin and transit in joint management and in border control as well as on readmission.” 194  

These two summits are presented as milestones in EU migration policy and have set the tone for externalisation, as they have identified non-EU countries as key elements in the achievement of the EU’s goals.

Section II. Cooperation with African countries on migration issues

The EU tends to seek cooperation with third countries to avert undesired migration flows or facilitate the readmission of unwanted immigrants. These cooperation arrangements with third countries seeks to address many of the problems ranging from human rights violations incurred by irregular migrants, to the destabilisation of these non-EU countries’ internal structures. This section will identify and analyse some of the main instruments endorsed by the EU in matters relating to cooperation on migration issues with third states.

§1. Readmission clauses

In its relations with third state partners, the EU has often resorted to the promotion of readmission clauses. These readmission clauses, which entail an obligation for a state to readmit a national that has been expelled from the partner’s territory and to contribute to his repatriation, have gained weight these past few decades.

A. Rationale

At the Council of Tampere, the European Council had already called upon “the Council to conclude readmission agreements or to include standard clauses in other agreements between the European Community and relevant third countries or groups of countries. Consideration should also be given to rules on internal readmission.” 195 Yet, it was three years later, at the Council of Seville, that the EU endorsed the idea of introducing readmission clauses (or standard clauses) in every future cooperation agreement with third countries. At the summit, the European Council noted that “any future cooperation, association or equivalent agreement which the European Union or the European Community concludes with any

194 European Council (2002), supra note 119, at p. 11.
country should include a clause on joint management of migration flows and on compulsory readmission in the event of illegal immigration.”

One of the most emblematic readmission clauses is the one enshrined in Article 13(5)(c) of the Cotonou Partnership Agreement that binds the EU with its ACP partners. In one of its Communications, the Commission acknowledged the potential held in this instrument by claiming that “Article 13 of the Cotonou Agreement provides a comprehensive and balanced agenda for action, which could serve as a model for migration clauses to be negotiated in future agreements with other third countries.”

Jean-Pierre Cassarino explains that, in reality, the impetus for the inclusion of a readmission clause in global agreements resides in the fact that readmission agreements are overwhelmingly rejected in the global south. Migrant-sending countries do not gladly cooperate in the readmission of their nationals without any incentives to do so. Furthermore, Cassarino points out that in African countries, these readmission agreements are very unpopular with local populations and that governments try to play them down. For these reasons, including readmission clauses in global partnership agreements is a way for the EU to ensure compliance with these issues. To this day, readmission clauses have been included in Partnership and Cooperation Agreements with Kazakhstan, Armenia, Georgia, Lebanon, Chile, and Croatia.

B. Enforceability

As previously mentioned, it is generally admitted that these clauses must be accompanied by a bilateral readmission agreement in order to be enforceable.

§2. Readmission agreements

Readmission agreements between EU member states and migrant sending countries are commonplace and have existed for quite some time. The European Union has called the instrument an ‘essential tool’ in the external dimension of its migration policy.

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196 European Council (2002) supra note 119, at p.11.
199 Ibid.
A. Definition and principles

1. Definition

The European Commission in one of its Communications defines readmission agreements as an: “agreement setting out reciprocal obligations for the contracting parties, as well as detailed administrative and operational procedures, to facilitate the return and transit of persons who do not, or no longer fulfil the condition of entry to, presence in, or residence in the requested state.”\(^\text{202}\)

In the European Commission’s words, these readmission agreements perform a useful task as they “set out clear obligations and procedures for the authorities of the non-EU country and for the EU Member States as to when and how to take back people who are irregularly residing there.”\(^\text{203}\)

2. Principles

Roig and Huddleston remind us that ‘Readmission agreements do not establish the state’s obligation to readmit its citizens, but merely facilitate this process.’\(^\text{204}\) This fact has two implications. First, that the repatriation of an unwanted migrant in his country of origin is based on a principle of international customary law stating the obligation for a country to readmit its nationals once they have been evicted from another country. Second, it implies that readmission agreements are merely a tool for facilitating a process and not an end unto itself. Facilitating the repatriation process involves for the migrant-sending countries the obligation of assisting the EU in the identification of an unwanted migrant, the issuance of travel documents, and the taking of the necessary steps to welcome the migrant back.\(^\text{205}\) Readmission agreements contain mutual obligations for the states to readmit their nationals and are therefore not solely directed at binding the EU’s partners, even though repatriations overwhelmingly occur from the North to the South.

B. Legal basis


\(^{204}\) A. Roig & T. Huddleston, *supra* note 122. at p.364.

\(^{205}\) Council (2002), *supra* note 202 , at p.11.
The Lisbon Treaty has introduced a legal provision endowing the EU with a competence to conclude readmission agreements.\textsuperscript{206} Today, European readmission agreements exist alongside classical bilateral readmission agreements between member states and third countries.\textsuperscript{207} As nation states, EU member states can conclude bilateral readmission agreements based on their sovereign right to conclude international agreements with third states and their sovereign right to decide which non-EU citizen can reside in its territory.\textsuperscript{208} However, even though the conclusion of readmission agreements is not included in the list of exclusive competences of the EU\textsuperscript{209} (this competence is exerted concurrently with member states), the majority of the legal scholarship considers that the EU’s competences takes precedence of the member states’ in this area, and that EU member states would not pursue a bilateral readmission agreement with a third state if the European Commission had already begun to negotiate.\textsuperscript{210} This precedence is explained by the theory of implicit powers. Finally, EU institutions have been active in setting up a legal framework for EU readmission agreements by adopting the so-called ‘return directive’ in 2008.\textsuperscript{211} This piece of legislation aims to harmonise the return procedures for irregular migrants, set up minimum standards on detention, and provide details about their judicial solutions.\textsuperscript{212}

\textbf{C. Fundamental rights implications}

One of the most recurring criticisms levelled at the EURAS is that they mostly ignore the human rights implications of sending irregular migrants to countries with dismal human rights records. The international law principle of \textit{non-refoulement} prohibits a host country from sending a non-national back to a country where he might endure torture or ill-treatment.

\textsuperscript{206} In Article 79 (3) of the TFEU it is stipulated that “the Union may conclude agreements with third countries for the readmission to their countries of origin or provenance of TCNs who do not or who no longer fulfil the conditions for entry, presence, or residence in the territory of the Member States.” It is the European commission that is vested with the power of concluding these EURAS agreements with third party states once mandated by the Council on basis of Article 218 of the TFEU.\textsuperscript{206} See P. Craig & G. De Bürca \textit{EU Law Text cases and materials}, Fifth Edition Oxford, (2011). at p.236.

\textsuperscript{207} In the EU, the most active users of these instruments in the EU are France, Italy and Spain who have drawn up frameworks and stroke up cooperation agreements with various north African and sub-Saharan countries.\textsuperscript{208} There are of course many exceptions to this rule, such as the \textit{non-refoulement} clause in asylum law or rules related to family reunifications.

\textsuperscript{209} Article 3 TFEU

\textsuperscript{210} J.Rijpma & M.Cremona , \textit{supra} note 191 , at p. 10.


\textsuperscript{212} As of today, the directive has now been transposed in every member state’s domestic law order and have been the subject of a case-law, at the EU level such as the Achughbabian (Case C-329/22), Sagir ir Ek Dridi case (Case C-61/11).
This state of affairs seems sufficiently alarming to the European Parliament, as in 2007 the EU’s legislative body voiced its concerns on the issue and pointed to the problems the Union would have in dealing with undemocratic regimes, in casu, Russia, which would eventually lead the EU to violate the values it purports to promote:

“the question of readmission is not as cut and dry as it seems at first sight. A fair readmission procedure implies that the contracting parties have to have an unequivocally democratic state structure and the organisation of their institution and their political practice must be certain to guarantee human rights.”213

Human rights abuses can be ascribed to an under-training of law enforcement personnel in partner countries and by the resistance opposed to the repatriated migrants not wishing to return to their country of origin.

In 2011, the rapporteur of the EU Parliament Committee on Foreign Affairs urged the Commission “to ensure that any readmission agreement signed by the EU and its Member States fully respects human rights and the principle of 'non-refoulement' and does not put at risk any persons in need of international protection.”214

D. The failed negotiations on an EU-Morocco readmission agreement

As of July 2017, the EU has concluded EURAS with 13 third countries and territories. With the exception of Cape Verde, none of these countries are African.215 The EU has sought to sign an EURAS with Morocco but has encountered a major impediment, this obstacle being Morocco’s refusal to include a TCN clause in the readmission agreement. Negotiations to conclude a readmission agreement with Morocco began in 2000 when the EU Commission received the necessary mandate from the EU Council.216 As of today, no agreement has been signed due to Morocco’s resistance. The analysis of Morocco’s refusal to conclude this agreement is of significance for the purpose of this study, as it sheds light on some of the most recurring problems regarding cooperation on migration with third countries in Africa.

1. Morocco’s strategic position for an EU readmission agreement

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215 These countries are Hong Kong (a third territory, not country), Macao, Sri Lanka, Russia, Albania, Ukraine, the former Yugoslav Republic of Macedonia and Bosnia and Herzegovina, Montenegro, Serbia, Moldova, Pakistan and Georgia.

216 This happened before the entry into force of the Lisbon Treaty. The Commission started the negotiation in pursuance of the article Article 63 (3) (b) TFEU.
In many respects, Morocco holds a strong strategic value for its European partners on the issue of migration. First, its geographic position in the South of the Mediterranean makes it one of the most favoured routes for irregular migrants’ to reach the European continent. Second, Morocco maintains strong political and economic ties with the EU, and especially with countries such as France or Spain with whom it has been engaged in many economic and political partnerships.217 Third, it is one of the countries with the biggest economies and strongest institutional structures on the African continent. As a result, one could conclude that it is one of the most capable of meeting the obligations set out in an international agreement.

2. The third country nationals clause

The issue of the TCN clause has already been touched upon several times in this study. This clause implies an obligation for the signatory country of the EURAS to readmit its own nationals but also the nationals of third states who have transited through that country in order to reach Europe illegally. As previously noted, the idea of including this clause was already pushed forward by EU member states but rejected by ACP partners. In 2002, at the European Council of Seville, the EU repeated this endeavour and noted that “readmission by third countries should include that of their own nationals unlawfully present in a Member State and, under the same conditions, that of other countries’ nationals who can be shown to have passed through the country in question.”218

2.1. Rationale and effects of the TCN clause

The inclusion of a third-national clause explains the preference of EURAS for EU member states as it is difficult to impose in bilateral readmission agreements. 219

The rationale behind the inclusion of that clause is that irregular migrants often refuse to cooperate in their identification by destroying their papers or refusing to answer questions about their country of origin in order to render readmission impossible. As a result, sometimes the only available information about the origin of these migrants is the route they followed.220

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220 A. Roig & T. Huddleston, supra note 122. at p. 365.
2.2. Morocco’s refusal to comply with the clause

None of the third-party EURAS signatories (Albania, Ukraine, Bosnia…) have opposed the inclusion of the clause. Morocco, however, has always firmly rejected the inclusion of such a clause in the agreement citing reasons similar to the ACP’s when negotiations on the first version of Cotonou were ongoing, namely the enormous financial, political and diplomatic strain that such a clause would put on the country. Carrera and Cassarino note that “it became clear throughout the negotiations that Morocco strongly opposed such an EU readmission agreement, in view of its financial and political costs.”

Morocco’s position is aptly represented by Taieb Fassi Fihri, who in 2006 at the Euro-African Conference on Migration and Development held in Rabat, issued the following statement:

“No country has the capacity to control its own migration flows [. . . The European Union] should not externalise its actions towards one country [i.e., Morocco] under the pretext that the latter is the last country of transit for migrants en route to the European coast.”

Furthermore, the minister added that “. . . If readmission agreements are concluded with each partner [of the African continent], Morocco will no longer have the problems it is facing.”

2.3. The weakness of intra-African cooperation on readmissions

The weakness of intra-African cooperation on migration issues also explains Morocco’s reluctance to readmit the irregular migrants transiting through its territory. Annabelle Roig and Thomas Huddleston point out that “most transit countries lack the political leverage to persuade other countries of transit or origin to readmit them.”

As explained earlier, African member states have indeed few incentives to extend their collaboration to third countries in the identification and readmission of their citizens. Carrera, Cassarino, et. al. also explain that another reason behind Morocco’s reluctance was that it did not wish to strain its relationships with its Sub-Saharan neighbours ahead of its accession to the African Union. They point out that:

Morocco needs the support of sub-Saharan countries, including from West Africa, to defend its Western Sahara policies. In this context, Morocco cannot afford to cooperate on the deportation of citizens of African countries on

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221 S.Carrera & J.P. Cassarino, supra note 220, at p. 5.
223 Ibid.
224 A. Roig and T. Huddleston supra note 122, at p. 380.
225 S. Carrera & J.P. Cassarino, supra note 219, at p.6
Europe’s behalf. It not only hampers the economic interests of these countries, it also represents a public relations nightmare for Morocco, with images of coercion and camps used for the expulsion of irregular immigrants.  

2.4 The EU’s assessment of the failed EU-Morocco Readmission agreement

The EU seems to have taken cognisance of the problem. An evaluation report published in 2011 by the European Commission identifies the TCN clauses as the culprit for the failings of many EURAS. The report states that

If a TCN clause was not demanded by the EU or was underpinned with appropriate incentives, some negotiations could have been concluded already (e.g. Morocco and Turkey) and many others could have been concluded much quicker. It is, however, clear that an EURA with a major transit country for irregular migration to the EU without a TCN clause holds little value for the EU.

§3. The Externalisation of Border Controls

A. Background

On the issue of externalisation of EU migration policy, the externalisation of border controls is an approach that has always been favoured by the EU.

The principle of a common management of border controls is couched in article 77(2)(d) TFEU which enjoins the EU to develop a communautarised policy in visa facilitation and border controls.

The main EU legal instrument on borders management is the Schengen code.

The EU have pursued this objectives through the creation and subsequent empowerment of the Frontex agency but also through partnership with non-EU partners, in the EU neighbourhood or broader neighbourhood, in border management.

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226 Ibid.
228 It is worth reminding that these borders are the borders of the Member States and not the borders of the EU which does not have its own borders.
B. Cooperation with third states on border controls

1. Principle
In its fight against irregular migration, the EU has chosen to enlist the cooperation of key African countries such as Libya, Egypt, or Algeria in the externalisation (or extra-territorialisation) of border control. These countries are considered strategically important because of their status as transit countries for many irregular migrants from sub-Saharan countries. They are part of the Central Mediterranean Route which 130,000 irregular migrants crossed in 2016 to reach the EU via Italy. The principle of externalisation implies that these countries would prevent irregular migrants from crossing their own borders and reaching the territory of the EU.

2. Capacity building and institutional strengthening.
As is the case for the conclusion of readmission agreements, African member states suffer from major capacity constraints in the management of their borders. These capability constraints concern various areas such as funding, technological capability, the training of personnel, and inter-state cooperation frameworks. For this reason, the EU holds the view that some degree of capacity-building would be key to achieving its goals.

In Seville, the EU Council has affirmed proclaimed: “the Union is prepared to provide the necessary technical and financial assistance for the purpose, in which case the European Community will have to be allocated the appropriate resources, within the limits of the financial perspective.” This capacity-building is in line with the EU’s view that its African partners’ empowerment might also serve its strategic interests. In a similar vein, Whitman and Haastrup argue that the EU’s practice has been “to engage in activities to supply technical and logistical knowledge with the aim of increasing indigenous capacity.”

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231 It is worth underscoring that this sort of cooperation framework is not only aimed at irregular migrants but also to asylum seekers, even though their case is beyond the scope of this section.


233 The EU as an institution is not the only stakeholder in the training and capacity building of third countries’ law enforcement forces. The Spanish guardia civil and Italy are also investing much effort in the empowerment of these personnel.

234 European Council (2002) supra note 119, paragraph 34, at p. 11.

The EU has directed much of its effort to the capacity-building of its partners in Africa. One of the most active institutional actors in this regard is the **Frontex** agency, which, through its working arrangements, provide training to partner countries’ law enforcement personnel. Under Article 14(2) of its regulation, Frontex is also empowered to conclude working arrangements with non-EU states for the management of migration.\(^{236}\)

Similarly, Article 36(6) of the Frontex regulation reads that “The Agency shall also offer additional training courses and seminars on subjects related to the control of the external borders and return of third-country nationals for officers of the competent national services of Member States and where appropriate of third countries.”\(^{237}\)

In 2016, the EU launched **Operation Sophia**, whose mission was primarily to fight against migrant smugglers and traffickers, with the mandate of providing capacity-building assistance to the **Libyan Coast Guard**. Its new mandate was to “enable the Libyan Coast Guard to carry out border surveillance and search and rescue operations as well as other coast guard functions (e.g. fisheries control, prevention of oil smuggling) along the Libyan coasts.”\(^{238}\)

In a joint communication to the EU’s parliament, Council of the EU, and the European Council, the European Commission detailed the capacity-building needs of the Libyan coast guard which “range from basic seamanship and an ability to operate safely at sea, to conducting the full range of law enforcement tasks expected of a coastguard. A particular emphasis is put on guaranteeing the respect of migrants’ human rights.”\(^{239}\)

One of the EU’s newest projects is the **Seahorse Mediterranean Network** whose role is to “strengthen the border authorities of North African countries and allow better operational cooperation amongst them.”

In April 2017, the **EU Trust Funds for Africa**, whose mission is described by the Commissioner for European Neighbourhood Policy and Enlargement Negotiations Johannes Hahn, as contributing “to reducing the drivers of irregular migration and to make the


\(^{237}\) Emphasis added by the author.


smugglers ‘task more difficult’ has adopted a €90 million programme for the protection of migrants and the improvement of migration management in Libya.\textsuperscript{240}

C. The issue of fundamental rights violations

In an article on the issue of EU migration policies and human rights, Valeria Bonavita remarks that “externalizing border controls through either operational arrangements or development cooperating instruments negatively affects the EU’s capacity to abide by its internally established regime of fundamental rights protection, including relevant provision of international law.”\textsuperscript{241}

The practice of externalising border controls has been the subject of much discussion and has sparked outrage in human rights circles as it has given rise to many human rights violations. The most commonly documented abuses are those occurring in the detention centres of Libya, where asylum-seekers and irregular migrants incur abuse from law enforcement personnel and are forced to live in deplorable conditions. The European Commission has also acknowledged this state of affairs when it noted that “conditions in the centres where migrants are held are unacceptable and fall short of international human rights standards.”\textsuperscript{242} These abuses are usually ascribed to the under-training of law enforcement personnel in these countries, the lack of legal accountability for their actions, as well as the lack of clear guidelines on the way irregular migrants ought to be treated.

This state of affairs puts the EU in a difficult position, as it stands in complete contradiction with its core values as laid out in Articles 3(5) and 21 of the TEU. It has been repeatedly accused of ignoring these abuses as it served its immediate strategic interests. Valeria Bonavita remarks that “by externalising migration control and by moving its southern frontier further away in an attempt to hold back migration at its sources, the EU has allowed migrants to be denied their fundamental and asylum-related rights.”\textsuperscript{243}

Libya is not the only subject of concern, a 2014 report written by Human Rights Watch titled “Abused and Expelled, the Ill-Treatment of Sub-Saharan African Migrants in Morocco”


\textsuperscript{242} European Commission (2017), supra note 232, at p.10.

\textsuperscript{243} V. Bonavita, supra note 241., at p. 30.
documents the human rights abuses that sub-Saharan migrants have to endure.\textsuperscript{244} They are beaten up, robbed, and sometimes sexually abused by the local authorities.\textsuperscript{245} The rapport notes that: “While Morocco has the right to police its borders and enforce a legal regime for the processing of migrants, it must not engage in cruel, inhuman, or degrading treatment of migrants, beating them, robbing them of their possessions, and summarily destroying their makeshift shelters.”\textsuperscript{246}

Even though the rapport has Morocco as its main subject, it notes that other human rights abuses have also been reported in Tunisia and Algeria.

Section III. Intermediate conclusions

A. Cooperation with third countries

1. Readmission clauses and readmission agreements

The EU’s failures to negotiate a European readmission agreement with Morocco provided a good overview of the institutions’ difficulties in enforcing readmission clauses and readmission agreements with African countries. First, it appears that these clauses and these agreements are very unpopular in African countries’ domestic policies. African countries have little incentive to conclude these agreements and assist the EU in the identification and repatriation if its nationals. Second, Morocco had pointed out that intra-African cooperation on readmissions was too weak and that the Moroccan state would have difficulties in repatriating third country nationals to their countries of origin. Third, these provisions do not take into account the limited capabilities of these countries in admitting third country nationals in pursuance of the TCN clauses.

The study has showed that the EU had taken cognisance of this fact by favouring readmission clauses when concluding global agreements and by officially acknowledging that the ‘TCN clause’ was the reason for Morocco’s reluctance to conclude this agreement.

2. The externalisation of border controls

The EU has been enlisting third states in Africa to take steps in forbidding irregular migrants from crossing their borders to reach the territory of the EU. This outsourcing of border surveillance is fraught with problems due to the inherent institutional weaknesses of these countries (poor financial and technical resources, undertrained personnel, lack of judicial

\textsuperscript{244} Human Rights Watch, supra note 9.
\textsuperscript{245} As has been demonstrated above, Morocco is not bound by an EURA agreement with the EU (and corollary TCN clauses), but its cooperation with EU member states, especially Spain is named as the culprit of these flows of irregular migrants in Morocco. The Spanish state and its guardia civil have enlisted Spain’s cooperation in the management of its borders.
\textsuperscript{246} Human Rights Watch, supra note 9.
accountability…) As a result, these countries often prove to be problematic partners for the EU in spite of their advantageous strategic position. Furthermore, the poor intra-African communication and cooperation structures in the control of borders is impinging on the efficiency of this policy approach.

3. Capacity building, transfer of technology and know-how

It appears upon analysing the EU’s communications and policy documents that they view the transfer of expertise, capability, and even policy as a crucial element in the fight against irregular immigration. This empowerment of third-countries essentially occurs through the interactions of EU agencies (such as Frontex) and is bound to draw less rejection from non-EU states than other policies such as the EU readmission agreements, since these states would benefit from the advancement of their technological capabilities and the acquisition of expertise. However, this policy approach is still not a panacea as ‘weak states’ such as Libya do not evolve in optimal enough conditions to use these capabilities optimally or to receive the EU’s training.

B. Human rights issues

The externalisation of the EU’s Migration policy and its approach to burden-shifting puts the EU in a delicate situation and challenges its narrative of civilising power. Roig and Huddleston explain that “The transfer of responsibility to countries of transit with fragile capacities and spotty human rights records could result in rendering the EU as an accomplice in forced returns, human rights violations, and human tragedies.” 247

Indeed, by embarking in formal or informal partnerships with illiberal or authoritarian regimes to curb migration flows, the EU is de facto disregarding its human rights obligations as they are set out in Articles 21, 8, or 3§5 of the TEU. 248

This state of affairs has prompted the legal scholar Marise Cremona to wonder if “in the field of EU migration policy the EU practices what it preaches.” 249

247 A. Roig & T. Huddleston, supra note 122. at p.382.
248 Article 21 TEU provides that: 1. The Union’s action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the united Nations Charter and international law. It is noteworthy that article ends with the following defining provision: The Union shall ensure consistency between the different areas of its external action and between these and its other policies.
249 J.H. Rijpma & M. Cremona, supra note 191, at p. 3.
This mismatch can be explained by the clash between values and interests that the EU is often confronted with in the pursuit of its objectives on migration issues. As Erwoan Lannon aptly posits, “the balance between values and interests is still very difficult to achieve, especially in highly sensitive political areas such as migration and border controls.”

Chapter II. The Migration Policy of the African Union

Section I. Overview of the AU’s immigration policies

The African Union has produced several major policy documents related to the management of migration flows. Prior to the establishment of the AU, the Organisation of African Unity had already drafted a major piece of legislation on forced immigration and displaced persons signalling that these issues mattered for the African continent and were taken seriously.

In this section, some of the major AU initiatives on immigration will be reviewed, bearing in mind that most of them have been poorly implemented or stayed at the declaratory level, due to a lack of political commitment and funding.

§1. The free movement of people in Africa

A. The Abuja Treaty

1. Context

On June 3 1991, prior to the creation of the AU, the Abuja treaty establishing the African Economic Community was adopted. It came into force on May 12th, 1994, and its purpose was to ensure the economic integration of the African continent and guarantee its prosperity. It adopted a gradual implementation that involved six different stages, for a period not exceeding 34 years, after which all the objectives set out in its Article 4 would be met. Among its objectives are the creation of a common market, the adoption of a common market, and the gradual removal, among Member States, of obstacles to free the movement of people, goods,
services, and capital and the right of residence and establishment. As had happened in the EU, Africa saw them as a corollary to its economic integration. In its article 43, the Abuja Treaty urges member states to take “the necessary measures, in order to achieve progressively the free movement of persons, and to ensure the enjoyment of the right of residence and the right of establishment by their nationals within [the African Economic] Community”.

The overarching goal of the free movement of persons is to strengthen and increase labour exchanges on the continent, especially in a situation where skilled manpower would have to move from one African state to another to fill the shortage of skilled workers in a specific sector. These efforts have awakened the interest of the EU, which seeks to encourage the free movement of persons in Africa as a way to promote local migration and avoid migration flows in Europe.

The inclusion of this treaty among the AU’s policies on migration issues can be justified by the fact that it aims to provide legal migration channels and plans to organise it through the granting of legal rights, the taking of administrative measures, and the establishment of regional and national bodies to enforce them.

1. The RECs

It appears throughout the treaty that African leaders had chosen to rely on Africa eight regional economic communities (RECs) as vehicles for the economic integration of the continent and subsequently for the free movement of persons. One of their missions is to realise the free movement of persons within their own specific zone prior to the achievement of a free movement area for the entire continent. The rationale behind using these RECs is that the African continent is already characterised by a high level of cross-border migration where people regularly cross frontiers in search of labour or to flee conflicts. As of 2017, with the exception of two RECs, the ECOWAS and the EAC which have partially removed barriers to movement and establishment for members of these communities (the ECOWAS has even issued a passport), very little has been accomplished to promote the free movement of people.

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252 Ibid., Article 4.
253 Ibid., Article 43
254 See R. Pakers; supra note 12.
255 Those are the Arab Maghreb Union, Common Market for Eastern and Southern Africa (COMESA), Community of Sahel-Sahara, States (CEN-DAD), East African Community (EAC), Economic Community of Central African States (ECCAS), Economic Community of West African States (ECOWAS), the International Authority on Development (IGAD) and the Southern African Development Community (SADC.) See: https://au.int/en/organs/recs [last accessed 10.08.2017]
256 The RECs have adopted protocols to guarantee these movements but the results have been unequal.
B. The AU passport

1. Objectives

In line with the principles enshrined in the Abuja treaty, the AU has launched in 2016 the initiative of an electronic African Union passport that would be delivered to all African citizens by 2020. The passport would allow the free movement of African citizens on the whole continent and therefore profoundly impact the African border regimes. 258

In a statement, the AU laid out the objectives of the passport as to “facilitating free movement of persons, goods, and services around the continent-in order to foster intra-Africa trade, integration and socio-economic development.” 259

In an editorial on the subject, the scholar Oscar Kimanuka extolls some of its virtues when he writes that “A common passport will make it easier for Africans to travel within the continent; cross border traders to conduct business; employers to hire across borders, and Africans to migrate to different parts of the continent for economic purposes. It will improve intra-African trade and will go a long way in easing the movement of domestic goods and services between member states.” 260

Kimanuka also notes that the passport “lays the foundation for millions of Africans who have remained stateless or are in refugee camps to have some forms of permanent and legal status on the continent.” 261

The idea is also presented as African’s answer to stemming the emigration of its citizens to Europe. In an interview with CNN, Dr Khabele Matlosea, AU Director for Political Affairs, presents it as a potential avenue out of the migration crisis to the EU: “We have a problem now that young people are risking their lives to cross the Saharan Desert or travel on boats to Europe.” He adds that “if we open opportunities in Africa we reduce that risk.” 262

2. Potential shortcomings

258 The African Union Passport Initiative was officially launched during the Opening of the 27th AU Summit in Kigali the 17 July 2016.


261 ibid.

The passport, however, has many opponents within the African Union, including some countries who fear the economic losses caused by suppressing visa revenues.

Others point to the lack of realism for the deadline set out by the AU. David Zounmenou, senior research fellow at the Institute for Security Studies, explains that “not all countries have the same level of technology needed for the biometric system and to register their citizens.”

Finally, some point to the dangers that such a passport would cause in the fight against terrorism as terrorists and organised criminals would be able to move more freely. Zounmenou answered this concern by stating that “one key advantage is that we will have centralized records to show who is going where.”

§2. The Migration Policy Framework for Africa
A. Context

In 2006, the African Union executive council issued a policy document on migration issues drafted by the African Union’s commission, entitled the *Migration Policy Framework for Africa.* That same year the AU heads of states issued a *Common African Position on Migration and Development* in which they expressed their views on the migratory challenges lying ahead in the 21st century. Their purpose was to “enable Africa to ensure that its concerns are properly reflected at the Africa/Europe dialogue and other international fora.”

The African Migration Policy framework and the African Common position were both conceived and issued ahead of the Africa-EU Conference on Migration and Development in Tripoli. They were predicated on the acknowledgement that migration flows were increasing and that the member states’ migration policies that were already inadequate in many respects, needed adaptation to tackle the phenomenon. While the African Common Position is a mere political declaration in which African leaders expressed their concerns and views on the issue, the Migration Policy Framework is a comprehensive strategic document which aims to tackle the migration issue in a comprehensive manner and is described as “a policy guideline” aimed at member states with nine key thematic migration issues. Its mission statement is presented as

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263 Ibid., Emphasis added by the author.
264 Ibid., Emphasis added by the author.
“to assist governments in the formulation of their own national and regional migration policies” as well as “their implementation in accordance with their own priorities and resources.”\textsuperscript{267} Finally, the ultimate goal of the AU regarding a proper management of migration flows is explained as “properly manage migration with a view of optimizing its benefits, while minimalizing its impacts.”\textsuperscript{268}

B. Political declaration

The African Union’s Migration Policy Framework contains an array of statements and declarations which shed light on the African Union’s perception of the migration challenges.

1. The root causes of immigration
In the introduction, the African Union identifies the “deteriorating political, socio-economic, and environmental conditions, as well as, armed conflicts, insecurity, environmental conditions, as well as armed conflicts.” as the root causes of migration and forced displacement in Africa.\textsuperscript{269}

2. Labour migration
In its very first page, the AU executive council states that “cross-border migration in Africa also represents an important livelihood.”\textsuperscript{270} They add that “migration does not only bring efficiency in the labour market, but also has substantial benefits in terms of skills and knowledge transfer, cultural diversity and strengthening the broader globalisation process.”\textsuperscript{271}

3. Irregular migration
The executive Council notes that “In Africa, as in other parts of the world, border management systems are coming under increasing pressure from large flows of persons including irregular and ‘mixed flows’ moving across regions and/or national borders.”\textsuperscript{272}

4. The importance of dialogues
The executive council views dialogues as an essential tool in the management of inter-state migration, be they national, regional, or international. They remark that “Enhanced dialogue between states, particularly in the context of North-South Relations, is critical in implementing effective safe, humane policies and mechanisms for return and readmission.”\textsuperscript{273}

C. Recommendations

\textsuperscript{268} African Union Executive Council (2006) supra note 265, at p.43.
\textsuperscript{269} Ibid., p.1
\textsuperscript{270} Ibid; 1.
\textsuperscript{271} Ibid., 4.. Emphasis added by the author.
\textsuperscript{272} Ibid. p. 13. Emphasis added by the author.
\textsuperscript{273} Ibid., p.18. Emphasis added by the author.
In the document, the executive council makes a host of recommendations to address the problems caused by immigration and maximise the benefits of regular migration.

<table>
<thead>
<tr>
<th>It has been established that…</th>
<th>Recommended Strategies</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Legal channels of immigration</strong></td>
<td>• “Facilitate the integration of migrants in the labour market including the education and training sector.” 274</td>
</tr>
<tr>
<td>1) “A well-managed migration has the potential to yield significant benefits to origin and destination states.” 274</td>
<td>• Enhance the participation of “social partners and pertinent civil societal organisations in the definition and implementation of labour migration policies.” 275</td>
</tr>
<tr>
<td>2) The free movement of skilled workers is an essential element for economic growth.</td>
<td>• Provide social protection and social security benefits (unemployment insurance, old age pensions for labour). 276</td>
</tr>
<tr>
<td>3) Mismanaged or unmanaged migration can have serious negative</td>
<td>• “Enhance co-operation and co-ordination amongst states in sub-regions and regions with a view to facilitate free movement at bilateral, sub-regional and regional levels.” 278</td>
</tr>
<tr>
<td></td>
<td>• Harmonise “sub-regional migration policies to promote free movement and right of residence.” 279</td>
</tr>
</tbody>
</table>

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274 Ibid., p.3  
275 Ibid., p.8  
276 Ibid., p.10.  
277 Ibid., p.9  
278 Ibid., p.12.  
279 Ibid.
consequences for states and migrants’ well-being, including destabilising effects on national and regional security, and jeopardising inter-state relations.\textsuperscript{280}

4) “The process of effective and sustainable return and re-admission of irregular migrants requires co-operation and mutual understanding between states of origin and their destination.”\textsuperscript{281}

- Strengthen national laws regulating migration including through the creation of “clear, transparent categories for admission, expulsion and clear eligibility criteria for protection.”\textsuperscript{282}

- Enhance “cooperation/cooperation between law-enforcement officials, immigration officers, and customs.” \textsuperscript{283}

- “Enhance the role of the AU as well as other sub-regional agencies in mobilising financial/technical resources, harmonising policies and programmes of action, and coordinating activities of member states for effective border management.”\textsuperscript{284}

- “Strengthen Inter-State Dialogue, regional consultation and cooperation for effective migration and borders.”\textsuperscript{285}

- Promote “greater policy coherence at the national, sub-regional, and regional levels.”\textsuperscript{286}

\textsuperscript{280} Ibid., at p.3-4.
\textsuperscript{281} Ibid., at p.18
\textsuperscript{282} Ibid., p.8.
\textsuperscript{283} Ibid., at p.14
\textsuperscript{284} Ibid.
\textsuperscript{285} Ibid., at p.18
\textsuperscript{286} Ibid., at p.15
<table>
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<tr>
<th>The Protection of Fundamental Rights</th>
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<tr>
<td>5) “Historically, migrants have often been deprived of their rights and been subject to discriminatory and racist actions and policies including exploitation, mass expulsion, persecution, and other abuses.”(^\text{290})</td>
</tr>
</tbody>
</table>

| • “Adopt a comprehensive information collation system on smuggling to facilitate the tracking and dissemination of information on the trends, patterns and changing nature of smuggling routes as well as the establishment of databases on convicted smugglers.”\(^\text{287}\) |
| • Identify measures “to encourage and facilitate voluntary departure and return.”\(^\text{288}\) |
| • Collaborate with the EU, to ensure that irregular migrants from both parties can be repatriated swiftly to their country of origin.\(^\text{289}\) |
| • “Ensure that the rights and interests of irregular migrants are not violated when there are cases of mandatory return.”\(^\text{291}\) |
| • Disseminate “information about migrants to counter anti-immigrant sentiments and xenophobia.”\(^\text{292}\) |
| • Encourage states to “develop and promote anti-racist and gender |

\(^\text{287}\) Ibid., at p.16
\(^\text{288}\) Ibid., at p.18
\(^\text{289}\) Ibid., at p.18
\(^\text{290}\) Ibid., at p.24
\(^\text{291}\) Ibid., at p.18
\(^\text{292}\) Ibid., at p.26
sensitive human rights training for public officials.”

| Capacity Building | • Member States ought to “define their migration needs and create the mechanisms to promote their policy research capacity.”
• “Capitalize on technical, material, and financial assistance from UN Agencies, and International Organizations.” |

6) “Policymakers need to base their decisions on well informed and well researched problems.”

D. Critical appraisal

This framework is a well-appraised document characterised by its comprehensiveness, interconnectedness, and forwardness. In this policy paper, the AU indicates that it has taken cognisance of the many legal (fundamental rights and international customary rights on refugee issues, but also labour and social security law), economic, and social challenges posed by migration and has decided to face them. The AU has also demonstrated that it has, at least rhetorically, many convergences with the EU on the issue, namely the necessity to tackle the issue in a holistic manner and to involve as many relevant stakeholders as possible in both the definition and operationalisation of key measures. It has also acknowledged that, given the AU’s limited capabilities, African member states might benefit from the assistance and advice of external stakeholders such as the EU, the UN, or the International Organisation for Migration.

However, legally speaking, the framework can only be characterised as a recommendation paper without any legally-binding effects. Henrike Klavert indeed remarks that “member states can choose to ignore the Common Position and Framework as they are reference documents and the AUC was not mandated to develop implementation mechanisms.” The fact that it is merely a “guideline” and is by no means legally binding is unfortunate. The lack of legal

293 Ibid., at p.26.
294 Ibid., at p. 42.
295 Ibid.
296 Ibid., at. p.29.
297 H. Klavert, supra note 267, at p.9.
abidingness of the framework prompts Henrike Klavert to call it “a framework without any teeth.”

§3. The African Union Border Programme

A. Principles and objectives of the programme

1. The driving factors behind the establishment of the programme

The prevailing view in academic and policy circles is that one of the main factors facilitating the illegal flows of migration is the poor definition and delineation of African borders and the poor quality of their management. A report commissioned by the Commission of the African Union remarked that “less than a quarter of African borders have been delimited and demarcated.” This state of affairs can be ascribed to many factors inherent to African particularities which are: a lack of political will, under-financing, and poor resources.

In addition to these structural problems, Dr Wafula Okumu, Senior Capacity Building Officer for the African Union Border Programme, remarks that the borders are enormously strained by the “movements of people from their countries of origin in search of greener pastures.”

In view of this state of affairs and the many problems it creates, the AU ministers in charge of border management decided to launch the African Union Border Programme in Addis Ababa in 2007. This AU Border Programme is a project involving technical experts, members of civil society, and civil servants, whose primary goal is to delineate and demarcate all of Africa’s borders by the year 2017. The programme adopts a sort of two-tiered approach, with its first step devoted to researching Africa’s borders and the second focused on the implementation of reforms. This second step is highly reliant on Africa’s civil servants, whether they be from local authorities or at the higher levels.

Dr Wafula Okumu, extolls the virtues of the program. He claims that it is contributing to better border management in Africa by encouraging AU member states to demarcate their boundaries, assisting local communities in their cross-border activities, and by developing a curriculum that seek to enhance the capacities of personnel to effectively manage borders.

\[\text{References}\]

298 H. Klavert. supra note 267, at p. 4.
299 Paradoxically, borders hold a special place in African politics. The sanctity of the boundaries inherited from the colonial era, uti possidetis juris is enshrined in the AU Constitutive Act, in its Article 4(b).
301 Ibid., at p.1.
302 Ibid., at p. 15.
In Malabo in July 2011, the Assembly of the African Union imposed a deadline on all AU Member States that by 2017 all African inter-state borders would have to be demarcated and delimited.

On the 6th and 7th of October 2016, 46 ministers of the African Union’s member states in charge of inter-state borders held meetings in Addis Ababa to ‘review the implementation of the AUBP’ which was launched nine years before. During this meeting, the ministers acknowledged that the deadline previously set out for demarcating and delimiting all African interstate borders would be expanded from 2017 to 2022.

The AU did not conceive of it primarily as an instrument to fight irregular immigration, but instead to remedy an overarching problem that the African continent has faced: having borders that are ill-defined and exposed to constant disputes, trafficking, and other illegal activities. Furthermore, their poor management is also impeding the economic growth of African states.

2. Capacity-building: an everlasting overarching goal

AU ministers identified “capacity building in the area of border management, including the development of special education and research programmes” as a necessary preliminary step in the redefinition of African borders. For them, the programme’s mission in terms of capacity building consists of “assisting African countries to develop their capacities in the areas of border delimitation, demarcation, and management.”

Dr Okumu concurs with this view and adds that “consequently, the strengthening of border management systems in terms of technology, infrastructure, business, processes for the inspection of travellers, and training of staff has become a primary area of concern.”

The programme is as much a research and knowledge-led programme as it is a policy framework. It relies on networking and on the cooperation of technical experts (geography, historians, engineers), civil servants from the African Union itself, and national personnel from the member states. It calls upon the AU and its member states to:

(i.) Provide training to law enforcement and administrative personnel.

(ii.) Design multidisciplinary research programs on the issue.

(iii.) Draw from the best practiced strategies (for instance, following the examples of the Association of the European Border Regions (AEBR); The International Region Development or the ECOWAS sub-regions.)


304 W.Okumu, supra note 300, at p. 16.
(iv.) Build-up technology (identification of persons, electronic monitoring of borders…)
(v.) Increase cross border collaboration and encourage co-management of common borders

3. Political dynamics

Even though the programme mostly relies on research and technical expertise, the success of the programme cannot be achieved without some degree of political participation. The management of the borders is a very sensitive political issue, and in that regard, it is what AU ministers see as “the important role AUBP plays with regard to its contribution to the structural prevention of conflicts, the promotion of regional and continental integration and the strengthening of economic and social development in Africa.”

In the Addis Ababa Declaration on AUBP, the AU ministers responsible for inter-state borders urged among other things “the Member States to develop and implement a national policy on borders and to set up and sustain a national body responsible for border issues.”

Upon judging the many delays in the implementation of the programme, it seems that African political leaders are generally not as enthusiastic as the experts in implementing the programme. Henrike Klavert explains, in addition to a lack of capability, inadequate funding, insufficient expertise and the dismal management of interstate borders is explained by the fact that “governments have little interest in controlling them.”

D. Critical appraisal

This programme has many merits:

(i) It calls out member states’ responsibilities to address the situation and advocates the implementation of “home-grown” initiatives.
(ii) It acknowledges a certain deficit of knowledge the African authorities possess on border control and immigration matters and pleads for the founding of research and education programmes on the topic.
(iii) It identifies proper personnel training (of law enforcement agents and administrative agents) as a prerequisite for success.
(iv) It advocates inter-state cross border cooperation within the African Union.

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306 Ibid. Emphasis added by the author.
The African Union’s underfunding is also identified as an impediment for the implementation of the project. Henrike Klavert notes that “the lack of an implementation mechanism for the framework leaves the AUC without any clear instructions on how the framework should be enforced.”

§ 4. The AU Convention for the protection and assistance of internally displaced persons in Africa (The Kampala Convention)

A. Context

Africa is by far the continent which contains the most refugees and internally displaced people in the world. Apart from the problems arising from their precarious economic conditions, these people often face discrimination, exclusion, and persecution in their host countries. The African continent is infamous for its poor standards in terms of fundamental rights, and the issuance of legislation was long overdue. In 1969, the Organisation of African Unity had decided to tackle the question of internally displaced persons by issuing the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa which at the time was applauded as a positive effort in establishing a legal framework for refugees that was adapted to Africa’s specificities. Yet, in the 21st century, the situation had not positively evolved and Africa contained more internally displaced persons and refugees than ever.

In an attempt to address this pressing issue, the AU issued the Kampala Convention for Internally Displaced Persons in 2009. This Convention is the first AU legally-binding document in the field of migration and human rights.

In the Preamble of the Convention, African heads of state and government acknowledged ‘the gravity of the situation of internally displaced persons as a source of continuing instability and tension for African states.’

The Kampala Convention was adopted at a Special Summit of the Union, held in Kampala, Uganda the 23rd of October 2009.

308 H.Klavert, supra note 267, at p. 4.
B. Legal analysis

The Convention, made up of 23 articles, imposes obligations on the 53 (at the time) Member States of the African Union. Its objectives, which are laid out in Article 2, comprise the prevention of the root causes of internal displacement, the assistance of victims, and the promotion of cooperation between the state parties. The overarching goal of the Convention is to establish a legal framework which would address the issue of refugees and internally displaced persons, a phenomenon which affects Africa more than any other continent. Article 3 lays out the negative and positive obligations imposed on the state parties which are the first to ‘refrain from prohibiting and preventing arbitrary displacement of populations’; and to ‘prevent political, social, cultural, and economic exclusion and marginalisation, that are likely to cause the displacement of populations or persons by virtue of their social identity, religion or political opinion,’ and of course to protect the fundamental rights (non-discrimination, protection of the law) of the internally displaced persons.

Another major obligation laid out by Article 3 (second paragraph) is the obligation for the state parties to amend their domestic law to include the provisions of the Convention and to designate ‘an authority or body’ to ensure the assistance and coordination on the protection of internally-displaced persons.

Interestingly, Article 5(4) of the Convention imposes on signatory states “to take measures to protect and assist persons who have been internally displaced due to natural or human made disasters, including climate change.”

Article 8 of the convention assigns obligations to the African Union, especially the obligation to intervene in one of its member states in pursuance of Articles 4 (h) and 4(j) of the African Union Act to prevent the displacement of populations and restore peace and security.

Another interesting section is Article 13 entitled ‘Registration and Personal Documentation.’ This article enjoins the member states to ‘create and maintain an up-to-date register of all internally displaced persons within their jurisdiction or effective area of control’ and ensure that ‘internally displaced persons shall be issued with the relevant documents necessary for the enjoyment and: exercise of their rights, such as passports, personal identification documents, civil certificates, birth certificates etc.'
Article 14 entitled ‘Monitoring Compliance’ enjoins the state parties to ‘establish a Conference of State Parties to this Convention to monitor and review the implementation of the objectives of this Convention.”

C. Implementation
Contrary to many African Union frameworks on the issue of migration, the Kampala Convention is accompanied by a follow-up plan. The AU, especially the AUC, has been very active in lobbying states to ratify the treaty and take the necessary measures to enforce its provisions. Among its recommendations for the states is the identification of vulnerable groups, the amendment of national laws, as well as the reunion of all key stakeholders.\textsuperscript{311} As of August 2017, the Convention has been signed by 50 Member States and ratified by 27.\textsuperscript{312}

D. Critical appraisal
The Convention is overwhelmingly acclaimed in policy circles, as it is the first legally-binding policy on migration issues.\textsuperscript{313} The Convention has many merits, among which include the definition of an internally displaced person in light of the 21st century realities as well as the inclusion of innovative provisions, such as the recognition of refugees and IDP victims of climate change. The AUC has also demonstrated activism in enjoining its member states to take the necessary measures to enforce the Convention.

It is worth highlighting however, that even though the Convention as adopted only five years ago, less than half of the AU’s member states have ratified it. This points to a recurring problem in African politics, namely leaders’ lack of will in cooperating on issues related to migration or cross-border crossings.

Section II. Intermediate conclusions

In view of the analysis conducted on the AU’s migration policies, some conclusions must be drawn as to the ability of the AU to devise and implement efficient Pan-African policies to tackle the challenges of migration efficiently.

§1. The strengths of the AU immigration policies

A. Identification of pressing issues and potential solutions


\textsuperscript{312} See https://au.int/sites/default/files/treaties/7796-sl-african_union_convention_for_the_protection_and_assistance_of_internally.pdf

In spite of its recurring problems of under-resourcing, technical deficits, and a lack of political cooperation among its member states, the African Union has, with the mere formulation of these policy initiatives, managed to display some degree of strategic actorness on migratory issues. Out of the analysis of the AU Strategic Migration Framework, we can conclude that the African Union has taken stock of its dire situation, identified potential venues, and realised, at least rhetorically, the necessity of an efficient border management to combat illegal migration, trafficking, and human smuggling.

Among the many venues explored by the AU to address this global issue, one can conclude that it relies on three instruments: **policy dialogues, regional integration, and capacity building.**

Policy dialogues conducted between African states or with international organisations such as the EU aim to harmonise migration policies, address **inconsistences**, and bridge possible gaps between countries of origin, transit, and destination. This approach has been heavily promoted by the **African Union Border Programme** and the Migration Policy Framework and is also often the only tool at the AU’s disposal as it has no binding powers on migration issues and cannot force a member state to follow its recommendations.

In general, attaining sustainable growth and a flourishing economy is a key to curbing irregular migration. As for regional integration, the **RECs** are presented by the AU and the EU as building blocks in the management of migration issues. Furthermore, the sub-regional level is seen as the most appropriate level of action to build the ground for a policy of well-managed free movement of persons on the African continent. Discussions about the African Union passport seem to indicate that the AU is ready to take a new step and enable the free movement of people on the whole continent.

Finally, **capacity building** is being singled out as a fundamental ingredient of a successful African migration policy. In policy papers, the inadequacy of Africa’s infrastructures and equipment, and the under-training of law enforcement and administrative personnel are identified as contributing factors to the current migratory crisis in the same way as much as poverty, conflicts, and the lack of labour opportunities.

**B. The involvement of various stakeholders in the AU’s fight against irregular migration**

In the **Migration Policy Framework for Africa**, the African Union itself justifies the establishment of these networks by remarking that “**Migration is a multi-actor process in which**
different stakeholders will have stakes in the process.”

In its effort to manage the problems arising from illegal immigration and illegal crossings, the African Union has been ready to establish networks made of policy-makers, technical experts, law enforcement personnel, and academics to draw up and implement efficient and well thought-out policy frameworks. It has also established sustained policy dialogues with the EU, which has championed many of these initiatives as it has also served its interests.

The study of the African Union Border Programme has shown that it valued the contribution of academics, technical experts to find solutions to the enduring problem of border delimitations, demarcations, and management on the African continent. Its line of argument is that the greatest challenges facing the continent would not only be tackled by civil servants, lawmakers, or governments. The AU’s endorsement of a multidisciplinary approach in the management of the migration issue also manifests itself through its endeavour to have better trained law enforcement and administrative personnel that would follow harmonised and clear guidelines on the treatment of irregular migrants.

§2. The limitations of the AU immigration policies

By its own admission, the African Union is facing an uphill battle for the definition of an integrated migration policy. In his report on the African Union Border Programme, Wafula Okumu identifies some of the most enduring obstacles to the implementation of a common African immigration policy. He points specifically to Member States’ disinterest or reluctance, low capability, and underfunding.

A. The capability-expectation gap

Even though the conducting of extensive research and the formulation of well-detailed policy frameworks indicate the voluntarism of the AU’s actions towards the definition of a common vision on issues related to migration, most of these frameworks have remained at the declaratory level due to a lack of resources to implement them. As is the case for many other African Union programmes and policies, the financial and legal means are insufficient for implementing the policy recommendations issued by the Pan-African organisation. These policies provide another illustration of the “capability-expectation gap.” The asymmetric powers between the EU and the AU also translate themselves in their ability to take concrete measures to address the issue of migration. The AU has time and again identified an enhancement of its technological capabilities, in matters as essential as the monitoring of interstate borders, as a

314 AU Executive Council (2006) supra note 265, at p.43.
prerequisite for the success of any policy frameworks on migration issues, even though these frameworks have been agreed upon with the EU.

**B. Institutional constraints, political resistance, and the lack of cohesiveness among member states**

As noted earlier, the AU has been able to issue policy and pieces of legislations in order to address the many challenges posed by migratory issues. Yet, even though these efforts are to be applauded, one can only concur with Purdey Devischer who aptly points out that: ‘*policy frameworks are not an end in itself, they need to be reflected by legally binding commitments.*’

On the issue of a common immigration policy, Florent Trauner and Sarah Wolff note that “*the EU is the regional organization with the farthest reaching legal competences in the field.*”

Over the years, the EU institutions have managed to extend their prerogatives in justice and home affairs to the point that it has acquired competences in an area that touches directly on the core of member states’ sovereign powers, immigration.

The situation is completely different for the African Union whose functioning is mostly intergovernmental and does not possess any supranational powers to implement migration policies. As a result, the fortunes of the AU’s frameworks rely heavily on the member states’ good will. Except on matters directly concerning refugees and internally displaced persons, the AU’s institutions have to rely on political influence and soft law to induce compliance in its member states on issues related to migration. This lack of supranational capacities on immigration policy is very problematic, as many analysts point to the need for enhanced cohesion, cooperation, and communication between member states who tend to pursue their own immediate interests without any global vision on the issue.

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Chapter III. The Implementation of the Africa EU Strategic Partnership: Actions, Plans and Summits (2008-2016)

Section I. The fight against irregular immigration in Africa-EU Ministerial Conferences

Migration issues have been the subject of several meetings at the ministerial levels between African and European civil servants. James Hampshire identifies the phenomenon as follows: “there is a proliferation of forums in which state representatives meet to discuss international migration, typically with non-binding aims such as seeking common ground, sharing information, and identifying best practices.”317 These meetings are an essential part of the international management of migration and deserves further inquiry. Apart from the JAES, several meetings have taken place

§1. The Joint Africa-EU Declaration on Migration and Development (the Tripoli Declaration)

A. Context and political declaration

This declaration was adopted in November 2006 on the occasion of the EU-Africa Ministerial Conference on Migration and Development.318 In the Declaration, the EU and African ministers emphatically reaffirmed their commitments to other frameworks on migration such as the African Union Common Position and the Ouagadougou Declaration on the Alleviation of Poverty or cooperation schemes between the EU and African countries such as the Cotonou Partnership Agreements and the First Africa-EU Summit in Cairo.

The African and European ministers responsible for migration management jointly acknowledged that large spontaneous and illegal or irregular migration flows can have a significant impact on national and international stability and security, including by hindering states’ abilities to exercise effective control over their

borders, and creating tensions between origin, transit and destination countries in Africa and within local host communities.\(^{319}\) 

In view of this state of affairs, the ministers agreed “to “better manage migration in a comprehensive, holistic and balanced manner.”"\(^{320}\)

### A. The EU-Africa Joint Strategy.

In the declaration, Africa and the EU identified nine priority areas in which they would have to gear their efforts.

<table>
<thead>
<tr>
<th>Key issues</th>
<th>Recommended strategies</th>
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</table>
| 1) Migration and Development            | • Support RECs and the process of regional economic cooperation.\(^{321}\)  
• Encourage foreign direct investment.\(^{322}\)  
• “Support Intra-African freedom of movement of labour and migratory flows in the spirit of the Abuja Treaty.”\(^{323}\). |
| 2) Migration management challenges      | • Create “an enabling environment in the countries of origin” and foster the rule of law, good governance, and human rights in these countries. \(^{324}\)  
• Seek policy coherence in the management of migration at the regional, local, and international levels.\(^{325}\)  
• “Provide “assistance to African Countries in the management of |

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\(^{319}\) Ibid., at p.7.  
\(^{320}\) Ibid., at p.4.  
\(^{321}\) Ibid., at p.6.  
\(^{322}\) Ibid., at p.7.  
\(^{323}\) Ibid.  
\(^{324}\) Ibid.  
\(^{325}\) Ibid.
### 3) Peace and Security
- Strengthen cooperation in crisis management operations and support the building of African capabilities in crisis prevention and resolution.
- Provide logistical support to African regions and sub-regions.

### 4) Human resources and brain drain
- Strengthen African educational systems and adapt them to the needs of each African country.
- Encourage the movement of skilled African labour between host countries and sending countries. Create centres of excellence and partnership between African and EU institutions.

### 5) Concern for human rights and the well-being of the individual
- Promote the human rights of migrants through the application of core human rights instruments.
- Promote the dissemination of information regarding human rights of migrants.
- Enhance the role of civil society in “promoting integration and employment and preventing discrimination.”

### 6) Sharing of best practice
- Support joint research on migration and development, including the collection of statistical data.
- Further develop dialogue between the EU, the AU, and the AU RECs, and

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<th>Title</th>
<th>Description</th>
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| 7) Regular migration opportunities | • Assist African countries in the development of national policies on migration.  
• Develop seasonal temporary migration.  
• Discuss \textit{``simplified entry procedures for specific categories of people''}^327 |
| 8) Illegal or irregular migration | • Carry out information campaigns.  
• Enhance cooperation on border control measures, encourage the training of border guards. |
| 9) Protection of refugees | • Ensure the quick identification of those in need of international protection.  
• Ensure effective protection for refugees and internally displaced persons \textit{``via regional protection, and the implementation of relevant international and regional conventions relating to the status of refugees and the principle of non-refoulement.''}^328 |

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327 \textit{Ibid.,} at p. 9.  
328 \textit{Ibid.,} at p. 10.
§2. The Valetta Summit on Migration

A. Context

The Valetta Summit took place in November 2015. It reunited the AUC, the EU and African and European States. It was followed by the adoption of a political declaration and an action plan. This summit aligns itself with former cooperation efforts such as the Rabat Process, the Khartoum Process and the JAES and is overwhelmingly held up as a watershed moment in the international management of migration and asylum matters.

It was at the occasion of the Valetta Summit that the EU Emergency Trust Fund was created. This Fund is tasked to finance projects in several regions of the African continent (Horn of Africa, the Sahel, North of Africa) aimed at addressing the root causes of irregular immigration such as:

- The promotion of sustainable economic opportunities
- The promotion of health and food security
- Migration management in all its aspects (human rights, security, integration of migrants, border surveillance).

B. The Political declaration

At the Valetta Summit, the European Union issued a joint political declaration. The participants have also acknowledged the diversity of African countries and a need of differentiation in any approach. In the declaration, the partners also endorse a multilateral approach in the tackling of the migration issue. It specifically singles out the African Union as a key stakeholder in the definition and implementation of a strategies.

The participants committed to:

“Support African countries, regional and pan-African institutions, in particular the African Union, in developing or further strengthening national and regional migration strategies while taking note of individual countries specificities.”

As for the return of irregular migrant, the participants declared that “we are determined to strengthen the fight against irregular migration in line with existing agreements and obligations under international law, as well as mutually agreed arrangements in return and readmissions.”

C. The Valetta Action Plan

The Valetta Action Plan is structured around the five main priorities that are the root-cause of migration, protection and asylum, mobility and legal channels of migration, readmission and return and the fight against irregular migration. These five key priorities are themselves subdivided in priority actions which are themselves divided into 80 actions. The deadline set for the start of the implementation of these actions is the end of 2016.

As for the implementation, the Valetta Action Plan will be monitored by several existing frameworks such as Africa-EU partnership, the Rabat and Khartoum process.

<table>
<thead>
<tr>
<th>Key issues</th>
<th>Recommended Strategies</th>
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| 1) The root-cause of migration | • Support sustainable growth through the promotion of regional economic integration.  
• Leading joint investigation between the EU and Africa to identify the root causes of migration.  
• Enhance labour opportunities.  
• Invest more effort in conflict prevention and avoid events generating international displacement such as human rights violations, abuses.  
• Support the implementation of the African Peace and Security Architecture, African Governance Architecture. |

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331 Ibid.
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<th>2) Protection and asylum</th>
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<tr>
<td></td>
<td>• Prevent losses of life at sea</td>
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<td></td>
<td>• Support countries in the adherence and implementation of the 1951 Refugee Convention and its 1967 Protocol.</td>
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<td></td>
<td>• Facilitate access to justice and legal assistances and health support for refugees, migrants, and asylum seekers.</td>
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<th>3) Legal channels of migration and mobility</th>
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<td>• Support economic cross-border activities.</td>
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<td>• Promote the involvement of the diaspora.</td>
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<th>4) The fight against irregular migration, migrant smuggling, and trafficking in human rights</th>
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<td></td>
<td>• Provide training to law enforcement and judicial forces in the management of illegal borders crossings, the prosecution of human traffickers, and the protection of the victims.</td>
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<td>• Capacity building in the detection of fraudulent documents.</td>
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<td>• Improve information and intelligence sharing.</td>
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<td>• Foster cooperation between judicial authorities and police forces.</td>
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<th>5) Readmission and return</th>
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<td>• Organisation of best practices seminars in the fight against irregular migration.</td>
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</table>
Section II. The migration issues within the MMEP framework

As of August 2017, there has been three JAEs summits between European and African heads of states. The first one in Lisbon, the second in Tripoli and the third one in Brussels. The Fourth EU-Africa Summit will be held in November 2017. All these summits tackled the migration issues and the objectives and achievements of these meetings will be exposed below.

§1. The Lisbon Summit

A. Context

Held for the first time in Lisbon in 2007, the Africa-EU Migration, Mobility, and Employment Partnership (MMEP) was predicated on sustained dialogue, and the formulation, implementation, and monitoring of action plans.

B. First MMEP Action Plan (2007-2010)\textsuperscript{332}

The First MMEP action plan revolved around three priority actions. The EU Commission, the EU member states, the EU Parliament, civil society actors, and the Pan-African Parliament and RECs were involved in its redaction. It is in great part focused on the enhancement of legal mobility opportunities such as the launch of a Pan-African University or the implementation of provisions from the Abuja Treaty.\textsuperscript{333}

The African Commission and the European Commission are the key actors of the partnerships which also involves NGOs and actors from the private sector.

<table>
<thead>
<tr>
<th><strong>Key Points</strong></th>
<th><strong>Recommended Strategies</strong></th>
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</table>
| 1) Implement the declaration of the Tripoli Ministerial Conference | • Reduce obstacles to free movement of people within Africa and the EU  
• Establish migration observatories  
• Adopt and implement poverty reduction strategies  
• Advance progress “towards the implementation of the AU Migration |


\textsuperscript{333} Ibid.
2) Implement the EU-African Plan of Action on trafficking of Human beings

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<tr>
<td>- Address the root causes of human trafficking and smuggling.</td>
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<td>- Empower women and children</td>
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<td>- Enhance awareness on trafficking in human beings</td>
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<tr>
<td>- Promote the legislative frameworks “in place to arrest and prosecute the organizers of trafficking.”</td>
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§2. The Tripoli Summit

A. Context

Held from November 29-30, 2010, the Tripoli Summit brought EU and African representatives together to renew their commitment to previous initiatives such as the 2006 Tripoli Ministerial Conference on Migration and Development, or the Ouagadougou Declaration. They endeavoured to continue their joint efforts for economic development in Africa and renewed their endorsement of principles such as social dialogues, the fight against irregular immigration, and regional economic integration.

B. Second MMEP Action Plan (2011-2013)334

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This plan is divided into 12 initiatives, and is primarily directed at the fight against the root causes of immigration, namely poverty, and a lack of sustainable labour opportunities for Africans.

<table>
<thead>
<tr>
<th>Key issues</th>
<th>Recommended Strategies</th>
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</thead>
</table>
| 1) The root causes of immigration   | • Favouring the creation of better and more sustainable jobs.  
                                           • Engage civil society, including the private sector, in the creation of labour opportunities.  
                                           • Establish an AU/EU platform for social dialogue connecting the relevant stakeholders.  
                                           • Through the Decent Work Initiative spearheaded by the AUC and the EC, reflections will be launched on the provision and extension of social coverage in the sector of the informal economy.  
                                           • Encourage the creation of regional and sub-regional platforms of social dialogue striving for the regional harmonisation of social security and labour frameworks.  
                                           • Prepare the establishment of the African Remittances Institute. |
| 2) Regular opportunities of immigration | • Engage with the diaspora in the EU to favour the transfer of knowledge, technology, and good practices through the creation of the Africa–EU Diaspora cooperation framework. |
| 3) Fundamental rights issues         | • Deepening of the political dialogue on the human rights of migrants  
                                           • Learn from the best practices of previous instruments such as the OAU convention on refugees. |

335 Ibid., at p. 62.  
336 Ibid. at p. 64.  
337 Ibid.  
338 Ibid. at p. 62.  
339 Ibid.  
340 Ibid.

A. Context

This summit took place on April 2nd-3rd 2014 in Brussels, with the heads of state and government issuing a joint declaration in which they expressed their most pressing concerns and reaffirmed their commitments to core values and core principles:

Migration, mobility, and employment are key issues for us all. The serious social and human impact of irregular migration should be effectively tackled in a comprehensive way, including by addressing its root causes among other means by ensuring an effective and concerted return policy between countries of origin, transit, and destination.

We are appalled by the loss of life caused by irregular migration and remain more than ever committed to further action to avoid such tragedies in the future. We reiterate our unambiguous commitment to continue fighting trafficking in human beings, which is a new form of slavery.

We are committed to ensuring that human rights of all migrants, including those of the diaspora and victims of trafficking, are fully respected. We recognise the positive contribution that well-managed migration and mobility make to countries of origin, destination and to the migrants themselves. We will work together to mobilise the potential of migrants for development and to reduce the cost of remittances, including through the consolidation of the African Institute for Remittances. We set out our approach in more detail in the attached statement.341


The third action plan aims to build on former initiatives and pursue the work engaged by the second action plan.

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<thead>
<tr>
<th>Key issues</th>
<th>Recommended Strategies</th>
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<tr>
<td>1) Fight against human trafficking</td>
<td>• Prosecute human smugglers and human traffickers</td>
</tr>
<tr>
<td>2) Fight against irregular migration</td>
<td>• Enhance capacity building on border management</td>
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<td>• Organise awareness-raising campaigns in the origin, transit, and receiving countries on the danger of irregular migration.</td>
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<tr>
<td>3) Diaspora and remittances</td>
<td>• Reduce the cost of remittances</td>
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</table>

| 4) Mobility and labour migration | • Accelerate the operationalisation of the **African Institute for Remittance**  
                                     • Gather information about the diaspora (identity, behavioural patterns) |
|----------------------------------|------------------------------------------------------------------|
| 5) Strengthening human rights protection | • Involve the private sector (trade unions)  
                                         • Make sure that all relevant actors (EU, AU, RECs) enforce the existing regional protection of refugees. |

### Section III. Intermediate conclusions

#### §1. Addressing the root causes of immigration

The analysis of the joint action plans and joint declarations of the JAES indicate that the EU has shown real commitment in its endeavours at addressing migration issues globally and not solely **through a security lens**. Together with the African Union, the EU considers that the migration issue is for a large part the consequence of a lack of economic and labour opportunities on the African continent. The host of measures that the EU/AU has championed (the Decent Work initiative, Pan-African Universities, the centres of excellence) depart from the observance of the lack of labour opportunities and the dismal job conditions in African countries.

It is worth highlighting that both the EU and the AU have identified the RECs, the African Union’s regional economic groupings, as vehicles for growth and prosperity, among other things, because they are seen as being the most appropriate level to promote the free circulation of labour at.

The recurring issue of remittances have been addressed at all Africa-EU summits and therefore shows the emphasis that it has on EU/Africa relations. Members of the diaspora are presented as actors of development on the continent in the same way as businesses or civil society. Furthermore, the inclusion of this topic on the common agenda and the subsequent creation of the African Institute for Remittances indicate that the EU has, to some extent, acknowledged the socio-economic realities of the African continent and to what extent Africans have relied on the diaspora for its own development. As well, it illustrates that the African Union and its member states have been successful in articulating their claims and pressing their concerns.
§2. Power asymmetry

The JAES employs a vocabulary full of references to positive and promising concepts such as “equal partners” or “two unions for one vision” with the purpose of addressing recurring accusations of paternalism and neo-colonialism levelled at the EU member states from their African partners. These accusations were particularly prevalent in the EU/Africa’s interactions on the management of migration issues. African countries felt that their cooperation with the EU on migration mostly served the Europeans’ interests and that they were coerced into accepting policies and measures that did not correspond to Africa’s needs. In Adepojou’s words “Migration agreements do not yet reflect the interest of southern partners” because “power differences play an important part in this imbalance of represented interests.”

One should bear in mind that one of the overarching objectives of the EU-Africa strategic partnership was to foster a sense of cooperation in which each partner would articulate their concerns on a particular issue in a spirit of trust and equality. Upon analysing the JAES and the numerous EU-Africa Ministerial conferences on irregular immigration, one can conclude that, as of today, this challenge was only partially met.

On the one hand, it is noteworthy that the tone of the JAES and of the EU-Ministerial Conferences were not overwhelmingly governed by a security-led discourse. As indicated earlier, the migration issues are tackled in a holistic manner with a particular emphasis on the empowerment of African economies. These topics are very much in Africa’s interest and cannot be presented as serving the EU’s interest only.

On the other hand, the asymmetrical powers between the partners has been identified by all observers as an impediment to the proper functioning of the partnership on migration issues. It is noteworthy that all efforts geared at empowerment and capacity-building involve the EU empowering the African continent and not the other way around. Furthermore, as has been identified earlier, the EU budget is ten times larger than the AU’s, and the EU is far more integrated than the African institution. These elements contribute to this asymmetry of powers regardless of the partners’ intentions.

§3. The methodology and the actors of the partnership

The JAES was predicated on the idea of ownership and equality. These concepts were put forward in order to address the criticisms levelled at past cooperation patterns between the EU and the African continent. The lack of ownership was exclusively ascribed to the fact that EU-

343 A. Adepoju and al., supra note 127, at p. 65.
African leaders which were exclusively working from a top-down approach in which heads of state and lawmakers were taking major decisions without the involvement of their population. As for the concept of equality, as has been numerously explained throughout this essay, it aims to dispel the notion that EU-Africa relations are uniquely predicated on power inequalities. To assess the reality of the two core principles of the partnership one should examine the actors and the methods of the partnership.

A. Methodology: A partnership built on socialisation processes
The JAES and the EU-Africa Ministerial Conferences are based essentially on political dialogues, policy discussions, networking, and learning processes. This methodology is consistent with most EU strategic partnerships but also with more formal frameworks such as the Cotonou partnership agreement. The very large number of actors involved in the partnership, their disparities in terms of capability, concerns, and values, justify the recourse to these innovative, “soft law,” tools based on socialisation processes and the formation of epistemic communities of legal and technical experts.

B. The actors of the partnership
Leaving the management of migration issues to heads of state and unelected civil servants is detrimental to the ownership of policies and would hamper their efficiency. As has been the case for the Cotonou Partnership Agreement, the JAES has tried to involve all of the relevant stakeholders in the common strategy on migration issues. In doing so, African and European institutions would foster the ownership of the framework, especially on the African side. Economic operators, law enforcement personnel, and judicial authorities are presented as essential actors in the implementation of the strategy.
Concluding Remarks

I. To what Extent can the African Union be considered as a Proper Strategic Partner for the EU in the Fight against Irregular Immigration?

The overall purpose of this master’s thesis was to determine whether the African Union could be considered a proper strategic partner for the EU in its fight against irregular immigration. In 2003, the EU claimed in the European Security Strategy policy paper that partnerships would be opened to ‘those who share our goals and values, and are prepared to act in their support’\(^{344}\). Generally, in the now fifteen years of its existence, the African Union has established itself as a pivotal stakeholder on the African continent, an international organisation representing 55 countries in the international arena, and a respected interlocutor the EU. Specifically, on the addressing of migration issues, this master’s thesis has demonstrated that the AU, even though still a nascent and under-resourced institutional organisation, has the potential to be a proper strategic partner for the EU in its fight against irregular immigration in many respects:

A. The African Union as a value-based partner

In light of the controversies surrounding the EU’s externalisation of its migration policy, where it has to deal with states such as Libya or Morocco whose law enforcement authorities and local populations are criticised for their ill treatment of irregular migrants, doubts have been raised about the EU’s ability to abide by its own core values laid out in Article 3(5) and 21 of the TEU. Consequently, the EU stands regularly accused of abandoning its core values in its fight against irregular migration. The African Union’s activism in the protection of fundamental rights and the rule of law and could be, in that regard, useful to the EU’s endeavour that migrants’ rights are not violated when it outsources its management of migration and asylum issues to its partner countries in North Africa. It is undeniable that the pan-African organisation has demonstrated voluntarism, flexibility, and innovation in the pursuit of its objectives and the defence of its core values. In spite of the cumbersome obstacles erected by AU member states, for whom the principle of state sovereignty should remain central, the AU has managed to produce norms and develop institutions to tackle the many challenges faced by the African continent on issues related to human security, fundamental rights, the rule of law, and governance. In pursuance of Article 4(h) of the Constitutive Act, it has already resorted to its interventionist powers in defence of human rights on a continent where state sovereignty is still considered a cardinal principle. It has demonstrated several times that it was capable of strategic thought, by acknowledging some of the most pressing issues threatening the continent and addressing them

\(^{344}\) European Council (2003), supra note 11., at p 15.
with the issuance of legislation (both soft and hard law) and the creation of independent institutions. Moreover, the AU has shown it could provide authoritative legal definitions of notions such as *unconstitutional changes of government* or *internally displaced persons*, create the appropriate instruments and norms to address these issues, and mainstream them to its member states. This ability could prove useful to the EU on bilateral or multilateral negotiations on the readmission of migrants or border controls. Finally, the AU could enrich traditional discourses on democracy and human rights by providing more comprehensive understanding of these policies and the way they operate on the African continent.

**B. The African Union as a strategic actor on migration issues**

Some legal scholars such as Michèle Olivier remark that “the AU has embraced a variety of supranational impulses responding to strategic needs that have influenced norms and principles”.345 Although the assertion is not inaccurate, it appears that these supranational impulses do not concern the international management of migration issues and border control. The migration policies of African members states are overwhelmingly castigated for their lack of coherence, coordination, and forward-thinking character. The African Union, which does not possess supranational powers on migration issues (with the notable exception of the issue of refugees and internationally displaced persons), has no formal way of forcing its member states to integrate their migration policies.

Yet, it is worth underlining that the African Union does not find itself in unchartered waters when migration policies are concerned. The analysis of the African Migration Policy Framework drawn up by the Pan-African institution, indicates that the African Union believes, at least rhetorically, that irregular immigration is a threat to Africa’s vital interests. Furthermore, the AU has demonstrated its ability to think strategically in the tackling of this matter of grave concern. In the *Migration Policy Framework*, the African Union has reminded others that African continent was particularly affected by the phenomenon and laid out some of the many challenges imposed by ill-managed migration flows on the African economy (brain drain) and on its people (human rights, trafficking…).

On the operational side, it has championed the harmonisation of migration laws, the mainstreaming of norms, and guidelines addressed to law enforcement and administrative personnel. It has also encouraged the building of networks and the gathering of expertise from its member states, European partners, its regions, and international institutions. Finally, it has

345 M. Olivier *supra* note 5, at p. 514.
identified research, information, training and capacity-building as essential tools in the management of migration fluxes, especially in view of the problems raised by poor border management on the African continent.

C. The African Union as a political platform and space for socialisation

PD Williams has characterised the AU as “a political arena where its member states interact alongside a transnational bureaucracy.”

The African Union is an international organisation, acting as a united whole representing 55 states driven by very different economic, social, and political realities, and driven by different sets of values, objectives, and interests, and covering a heterogenous territory stretching from Morocco to South Africa. In order to represent the interests of its member states on the world stage efficiently, it might learn to accommodate their interests internally.

This master’s thesis has demonstrated that the flows of irregular African migrants are as much an intra-African area of concern as a European or Inter-continental issue. Intra-African discrepancies on migratory issues are mostly concentrated on the issues of inter-border cooperation and the readmission of third nationals in transit countries. This master’s thesis has shown that North African countries complain about bearing the costs of sub-Saharan countries’ inability to monitor their borders and manage the situations of returnees. They claim that irregular migrants are putting a strain on their own social and economic development.

Through its institutions such as the Pan-African Parliament or the Executive Council, the African Union could establish platforms where these pressing topics would be addressed, where views could be weighed and exchanged, and where the partners would be looking for common solutions. Furthermore, it could play the role of coordinator, facilitator, and mediator between African sending and transit countries, and members of civil society, technical experts, and researchers to enhance the opportunities for labour and the living conditions of migrants on the continent.

D. The limitations of the AU as a strategic partner

This section would not be complete without identifying some of the AU’s limitations in its role of strategic partner for the EU in its fight against irregular migration.

First, it is worth noting that despite being called an ‘equal’ by the EU, the AU’s capacities and resources are more inferior than its European counterpart. The African Union and the European Union have known different integralional paths and have been driven by different challenges and encountered different types of difficulties.

The AU’s problems of under-financing and under-resourcing make it a relatively weak strategic partner in comparison with other superpowers such as China, Brazil, or the USA. These
structural weaknesses strongly affect the EU’s ability to achieve its goals on the African continent.

Second, apart from notable exceptions such as Article 4(h), most of the decisions taken by the African Union require broad consensus which is very difficult to reach. Like other international organisations, the AU mostly functions on soft law and has very little legal means to pressure its member states into following its recommendations, the most important of them being the amendment and integration of their migration policies. The African Migration Framework and the African Union Border Programme have provided an illustration of this relative weakness in curbing member state’s resistance and induce compliance.

II. Compared to the Cotonou – ACP framework, to what extent is the Africa -EU strategic partnership a more appropriate framework in the fight against irregular immigration?

One of the purposes of this thesis was to determine whether the AU/EU Partnership on migration and mobility matters could remedy some of the problems raised by the ACP/EU framework and if an intercontinental approach could yield more positive results than this cooperation framework.

Before answering this question, it has to be underlined that ACP-EU cooperation on migration issues should be limited to the sole question of the enforceability of Article 13.

A. The Cotonou acquis

This master’s thesis has shown that ever since the establishment of the EU-ACP cooperation framework, a host of initiatives have been taken on the issues of migration and mobility, and that significant milestones have been achieved in a number of domains:

First, it has set up many frameworks for dialogue between the North and South in which the countries of the Global South would express their concerns and advance their agenda on the management of migration. As a consequence, the scope of the discussion and of action was significantly expanded.

Second, the ACP-EU framework has shed light on the most recurring problems in collaboration on migration management, namely the inability of ACP countries to live up to their commitments due to capability constraints.

Finally, it has allowed the EU to explore innovative venues for tackling the problem, such as the promotion of South-South movement of people to curb the migration fluxes to the EU.

It is noteworthy that many of the initiatives and methods generated by the Cotonou acquis, such as regular dialogues, exchanges of knowledge, and institution building were replicated in the MMEP of the JAES.
B. The provision of a more suitable geographical cooperation framework

Without undermining the value of the Cotonou acquis, one could argue that the EU/AU strategic partnership, which has been conceived as a complementary framework to other cooperation arrangements, such as the CPA, but not as a replacement, might remedy the shortcomings of this policy framework on migration issues in several respects:

As has been previously underlined, the ACP is neither a geographical nor economic entity. Furthermore, the ACP-EU cooperation framework suffers a major drawback where migration issues are concerned, which is the absence of North African countries who are considered major stakeholders by the EU in its externalisation of migration policy. The inapplicability of the Cotonou framework has been acknowledged by the EU considering the numerous joint ministerial meetings organised since 2000 between AU and EU ministers, and the remarks made by Roderick Parkes who remarks that “the EU has begun lighting the distinction it makes between sub-Sahara and its arc of North African neighbours” and that a continental approach was “a simple reflection of regional migration flows.”

C. The design of a long-term vision in opposition to the short-term objectives

The migratory crisis is a pressing, but also contentious issue for EU member states. All of the controversy surrounding this issue has led to the adoption of inconsistent and poorly thought-through policies. This lack of strategic thinking is identified by Georgia Papagianni, who notes that “the evolution of the external dimension of the EU migration policy has been in practice to a significant extent the result of policy answers to a series of rather inconsistent, often unpredictable and primarily political, both internal and external, challenges and shocks.”

For its part, the Cotonou Agreement, which is a 20-year agreement, is characterised by its long duration and the review processes occurring every five years. This long duration of the framework has been acclaimed in policy circles as it has allowed the experimentation, monitoring of progress, identification of pitfalls, and the nurturing of a culture of collaboration between partners. Unfortunately, discussions surrounding Article 13 and the enforceability of readmission clauses have pointed towards a desire to satisfy short-term objectives rather than the setting out of a long-term vision. In contrast to Article 13 of Cotonou and other EU policies such as readmission agreements, the AU-EU partnership, which is a policy framework based on soft law policy discussions at the head of state, ministerial, or administrative levels, has the advantage of being a long-term framework but also of being below the mediatic radar. It is

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346 R. Parkes. supra note 12, at p.4.
therefore sheltered from the daily pressures exerted on national policymakers. Furthermore, the approaches chosen to rely on poverty alleviation and economic empowerment and are more in line with long-term strategic thinking than with Article 13 that the EU lawmakers want to use to answer short-term imperatives.

C. Fostering of ownership, instigating change in narratives and attitudes

The scholar Alexander Betts has once pointedly remarked that “the international politics of migration is built upon a fundamental inequality of power.”

This master’s thesis has demonstrated that African countries, be they North African or sub-Saharan states, have always experienced difficulties in expressing their concerns to the EU on the management of migration. In view of their lower economic, military, and political power, migrant-sending and transit countries do not have sufficient leverage in the negotiation of migration agreements with the EU or its Member States. This state of affairs often leads these countries to welcome the EU’s agreements and policies with scepticism and resentment.

After analysing the MMEP, one could argue that the AU-EU strategic partnership, based on the equality of two unions sharing one vision, could re-equilibrate the relationship between the European and African partners and foster the ownership of Africa-EU agreements for two reasons:

First, because the framework has enlisted the participation of numerous stakeholders, especially social partners and economic operators, their involvement could foster ownership as bottom-up approaches are usually more efficient in implementing change than top-down strategies.

Second, the approach taken by the partners within the partnership, an approach which rests on economic empowerment based on the development of Africa’s entrepreneurial strengths is regarded more favourably than the mere provision of aid which has predicated previous relationship patterns between the EU and Africa.

III. Which aspects of the African integration process should the EU encourage in the pursuit of its objectives on irregular immigration?

A. Support Africa’s regional economic integration

The study of the African Union migration policies, of the MMEP and of EU-Africa Ministerial conferences, have shown that Africa’s regional economic integration is overwhelmingly

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identified as a potential route out of the migration crisis affecting the African and the European continent. The EU should keep exploring this promising venue and promote it to the best of its capabilities for three reasons:

First, in taking steps towards a regional or continental economic integration, the AU might create a more favourable ground for growth and job opportunities. The EU and the AU have time and again identified the lack of perspectives as the main driving factor for young Africans to leave their native country to reach the EU. In sum, the bolstering of the AU’s regional integration is in line with the global approach taken by the EU which consists of fighting irregular migration by addressing its root causes: poverty and lack of job opportunities.

Second, in addition to fostering more favourable ground for economic growth and labour opportunities for Africans, the AU and its RECs, by taking the necessary steps to integrate their economies, would be taking administrative measures essential for the development of a well-ordered integrated economy which could prove beneficial to the fight against irregular migration. In order to achieve this integrated economy, African states would have to pay heightened attention to the management of their borders, the identification of their people, and to build up their technological capabilities to achieve these goals. In that regard, the African Union passport is a good illustration of the AU’s activism in pursuing this heightened economic integration. The European Union could take advantage of this activism and all these initiatives and bring economic and logistical support to their realisation.

Finally, the EU might benefit from reassessing its behaviour with African countries on matters related to trade and economic partnerships, especially on the issue of the EPAs. African countries complain that the EU did not take their socio-economic realities into account when negotiating these EPAs. Africa’s regional integration process finds itself hampered by the EU’s methods, their nascent industries are threatened, and they fear that their agricultural products will suffer greatly from the competition of Europe’s subsidised goods. All these areas of concern are seen as detrimental to the continent’s development and therefore constitute a strong driving factor for Africans to leave their continent in search of greener pastures.

**B. Enhance the AU’s legal and technical expertise on migration issues**

The analysis conducted on the AU’s main features has shown that the institution is still limited in the implementation of its objectives and in the defence of its founding values. This is ascribed
to the member states’ staunch defence of their state sovereignty and to the institutions’ lack of financial and material resources. As a consequence, the possibility that the African Union may conclude an agreement with the EU, whether on readmission or border control, that would bind all of its member states, is a very remote one. This does not mean however that the African Union has no role to play in the EU’s cooperation schemes with African countries on migratory issues. The African institution has identified in, policy documents such as the AUBP or the African Migration Framework, the enhancement of technical and legal expertise in migration management as an essential tool to maintain peace and order on the continent. The EU might consider gearing up its capacity-building objectives on the continental level, and help the AU in the acquisition of legal and technical expertise on the issue of irregular migration. It would then win a valuable and empowered ally in the resolution of this delicate issue. The AU might offer legal and technical assistance to its member states, and coordinate inter-state judicial and police cooperation. This expertise could take various forms, such as the creation of a directorate for migratory issues within the African Union Commission or the creation of an institution similar to the African Standby Force, at the continental level with the mission of monitoring border-crossings better or with the more ambitious task of organising the free movement of Africans, which has been set out as one of Africa’s solutions to alleviating the continent’s poverty.

Moreover, the acquisition of the AU’s technical and legal expertise on migration might be beneficial for the EU and African countries on the diplomatic front. The regional organisation is endowed with a more robust expertise and institutional machinery on migration issues, and would transform it into a more powerful stakeholder in the international arena. It would have more influence on the definition of rules and standards in settings on international and migratory issues. Internally, gaining more expertise on migration issues might help the AU more easily accommodate the interests of its own member states whose divergences are often the consequence of a lack of capability and knowledge on the management of migration.

Finally, more broadly speaking, a more integrated African Union in Home Affairs, Justice, Migration, and Home affairs could favour more normative convergence between the EU and Africa. With a more integrated AU on migration issues, the AU could also more easily borrow good practices and legislation from its European counterpart in the management of migratory issues.
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