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**Informalization of the EU's external migration
policy: bypassing EU values in the name of
efficiency?**

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Fisciano Campus, Università degli studi di Salerno



UNIVERSITÀ DEGLI STUDI DI SALERNO



International Migrations, State,
Sovereignty and Human Rights:
Open Legal Issues

PRIN 2017
(2020-2024)



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Summary

- Part 1: Theories on EU integration
- Part 2: Informalization in EU External Relations
- Part 3: Emergence of EU External Relation soft law
- Part 4: Joint Way Forward EU-Afghanistan



A chapter of my PhD thesis:

In the international PhD course of Unisalento on «*Law and Sustainability*»

The PhD focus on the study of *the legal nature of phenomenon of informalization in the EU external relations* applied to three cases studies:



Part 1 - Functionalism: spillover and metaphor of the stone (in the lake)

Jean Monnet



Modern theories on EU integration and the role of soft law in EU external relations

- Functionalism (Jean Monnet and Schuman) and neofunctionalism (Mitrany)
- Normative transformation of the EU or normalization (Terpan, 2020, 2015)
- Multiple Representation Model and Representative System (Besson and Marti 2022)



Part 2 –Informalization in EU external relations

‘Recourse to non-binding instruments in governing the relations of the European Union with the rest of the world is increasingly common’ (Andrade and Terpan 2015, Wessel 2021, Poli 2021, Casolari 2021))

L 6/32

EN

Official Journal of the European Communities

11. 1. 2000

AGREEMENT

for scientific and technological cooperation between the European Community and the Argentine

HR(2015)14

Ref. Ares(2015)284178 - 23/01/2015

The EUROPEAN COMMUNITY (herein
on the one part, and
The ARGENTINE REPUBLIC (hereinaft
on the other part,
hereinafter referred to as the 'Parties',

EUROPEAN EXTERNAL ACTION SERVICE



GREFFE

Memorandum of Understanding

of 19/01/2015

jointly signed by the European External Action Service
and the General Secretariat of the League of Arab States



Micro-Financial Assistance for Ukraine
Loan Facility from the European Union of up to 1 billion EUR

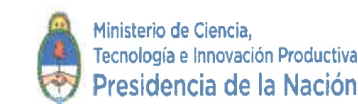
MEMORANDUM OF UNDERSTANDING

Between

THE EUROPEAN UNION
as Lender
and
UKRAINE

MEMORANDUM OF UNDERSTANDING
ON A STRATEGIC PARTNERSHIP ON RENEWABLE HYDROGEN
BETWEEN
THE EUROPEAN UNION AND
THE ARAB REPUBLIC OF EGYPT

hereinafter referred to collectively as “Sides” and individually as “Side”.



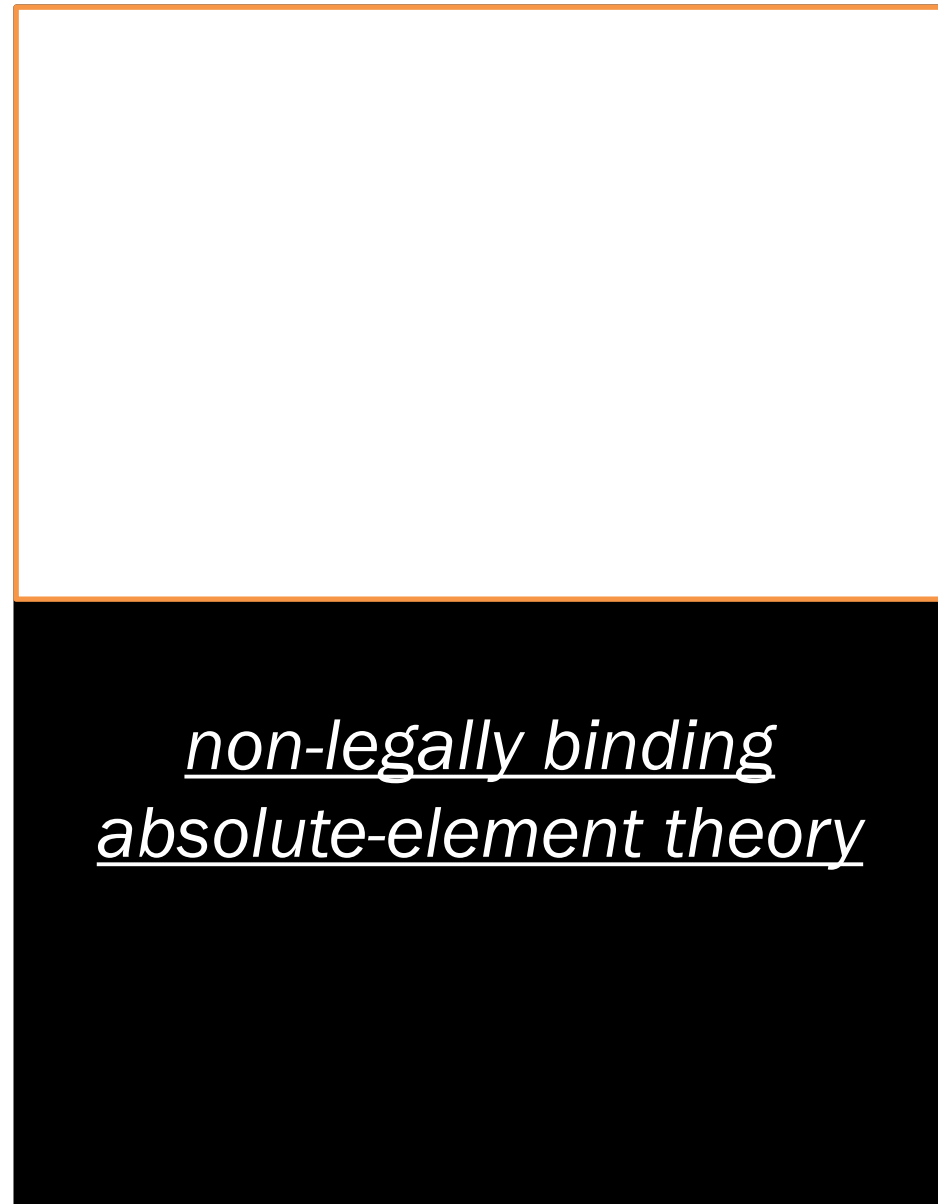
ADMINISTRATIVE ARRANGEMENT

BETWEEN THE EUROPEAN COMMISSION AND THE MINISTRY OF
SCIENCE TECHNOLOGY AND PRODUCTIVE INNOVATION OF
ARGENTINA ON MARINE RESEARCH AND INNOVATION CO-
OPERATION

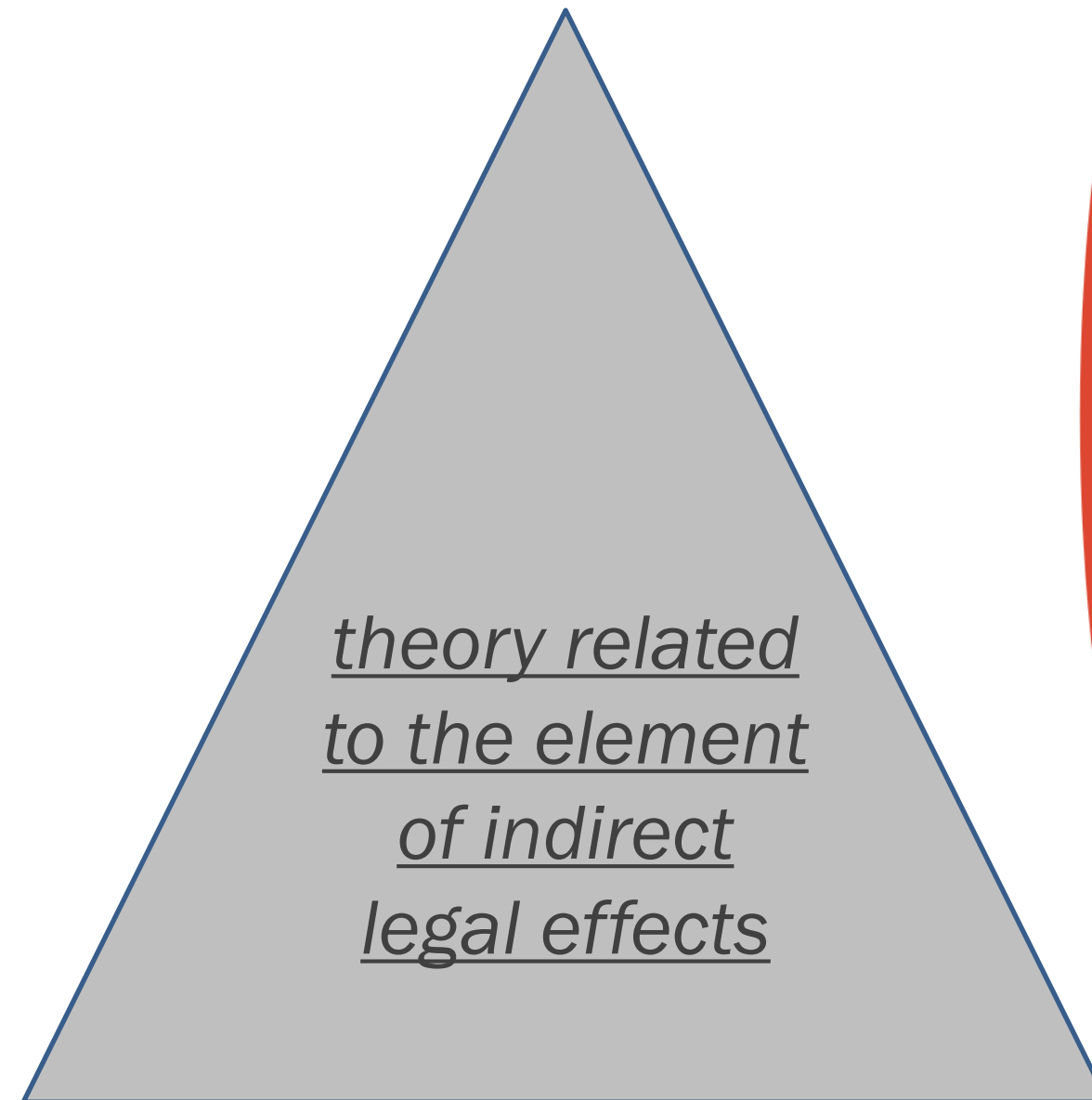


Definition: international law and the two frontlines

More than 50 years of debate...(Baxter, 1980)



Raustilia 2005, Shelton 2008



D'Aspremont 2008, Abbot & Snydal 2000

Definition: EU Law

Rules of conduct which in principle, have no legally binding force but which nevertheless may have practical effects (Snyder 1994)

have certain (indirect) legal effects, and that are aimed at and may produce practical effects (Senden, 2004)

soft law begins where measures convey fewer obligations on its drafters than traditional 'hard' law, either through a diminished binding power, less precision and/or the lack of delegation of authority for its interpretation and implementation (Terpan, 2015)

Part 3 – Emergence of a special category of EU external relation soft law

- ARIEL (Austrian Review of International and European Law)

Taxonomy Theory and the emergence of EU External Relations Law



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The Employment of International Soft Bilateral Instruments by the European Union in its External Relations

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Author: [Francesco Spera](#)

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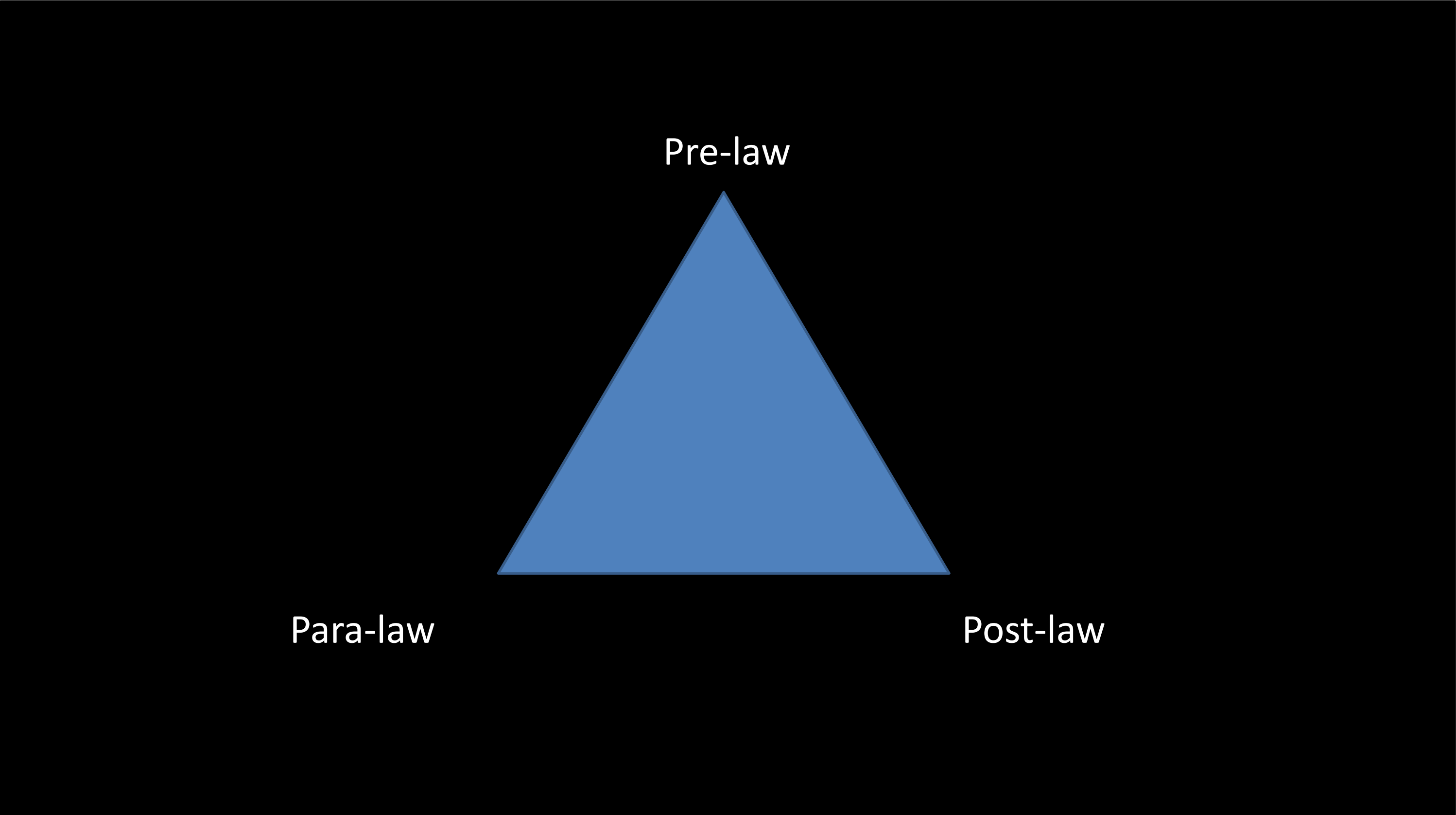
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3. RATIONALE : ADVANTAGES



Categories of EU external relations soft law



Main features

Intention of the parties

labelling disomogeneity

Lack of sanctions

Practical effects



2-BIS EU SOFT LAW IN EXTERNAL RELATIONS



Research question

- To what extent EU external relation soft law is entrenched or is fit or serve for the purpose of EU integration according to the theories of EU integration?
- How soft law instruments are identified according to the categorization
- Which EU treaties principles apply to these instruments and which one might be bypassed and breached or are at risk?



Part 4 – Joint Way Forward EU-Afghanistan

An effective and well-managed return policy is an essential part of a comprehensive migration policy. The inefficiencies of the EU return system act as an incentive for irregular migration. The difficulty of cooperating with migrants' countries of origin is one of the reasons for low returns of irregular migrants (Report 2021, EU Court of Auditors)



ABC NEWS Set location For local weather

Just In Watch Live Coronavirus Politics World Business Analysis Sport Science Health

BREAKING NEWS SA's Deputy Premier will step down from her ministerial roles, pending the outcome of her decision to knock back a seaport on Kangaroo Island

More than 1 million asylum seekers reached Europe by sea this year: UNHCR

By Patrick Wright
Posted Wed 30 Dec 2015 at 4:29am



eurostat newsrelease

217/2015 - 10 December 2015

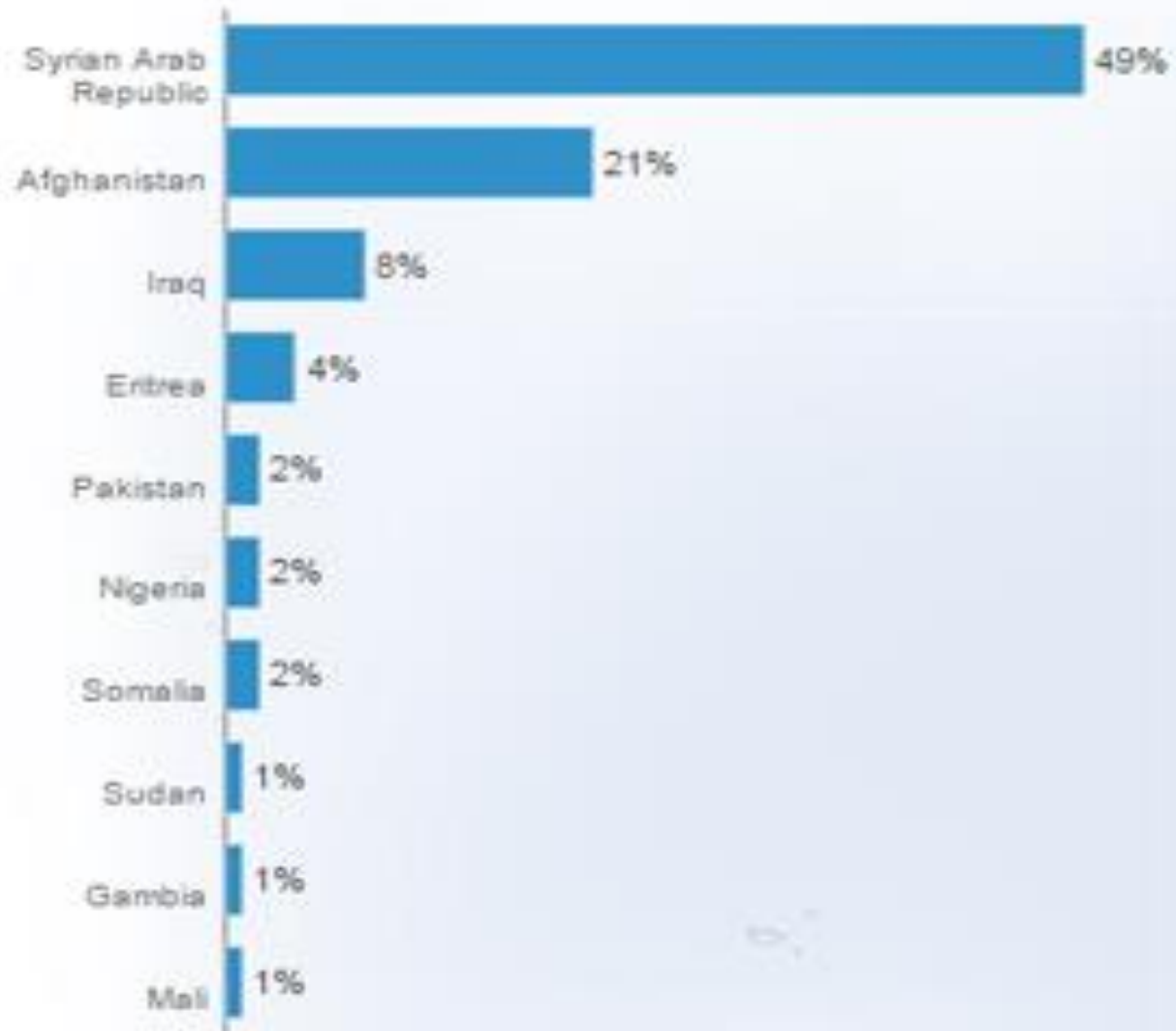
Asylum in the EU Member States

More than 410 000 first time asylum seekers registered in the third quarter of 2015

1 out of 3 are from Syria

Top-10 nationalities of Mediterranean sea arrivals

Top-10 nationalities represent **90%** of the sea arrivals



Migrant numbers

numbers in 2015 numbers in 2018

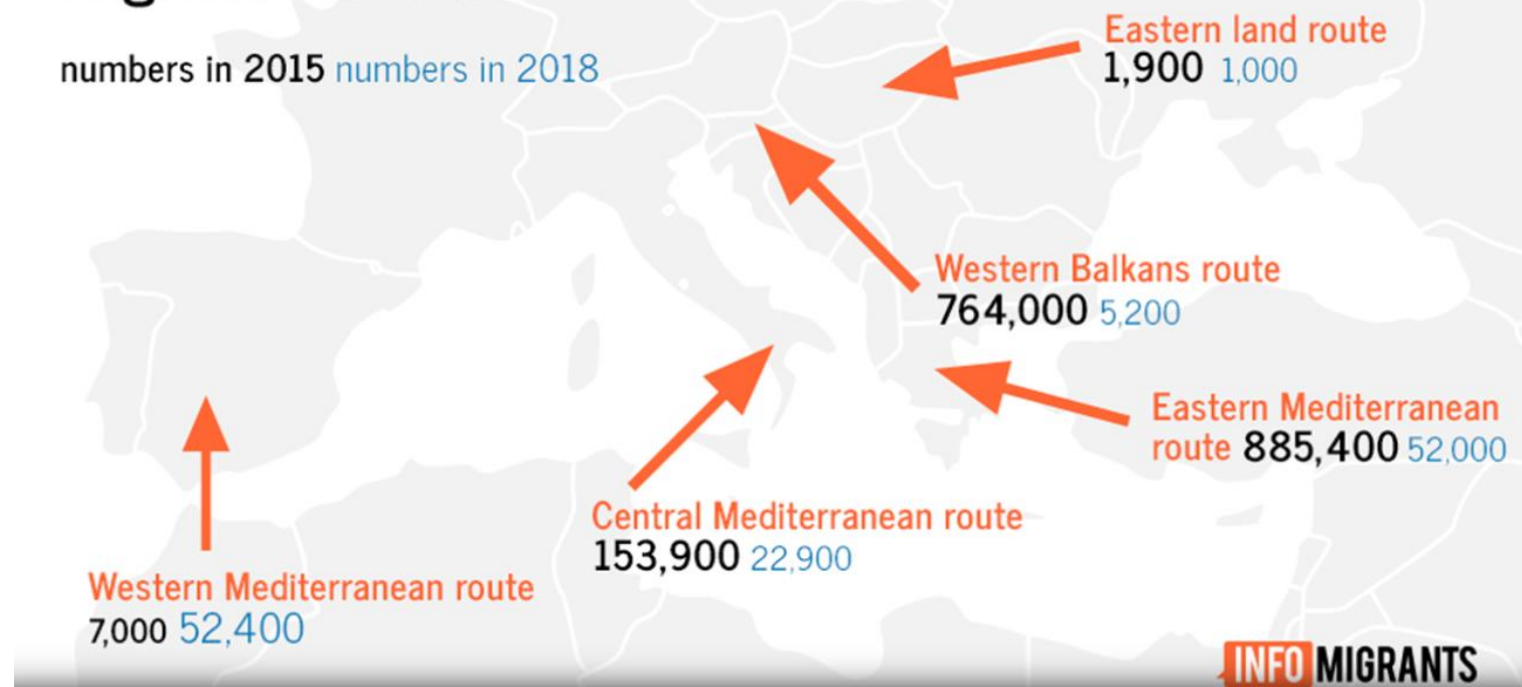
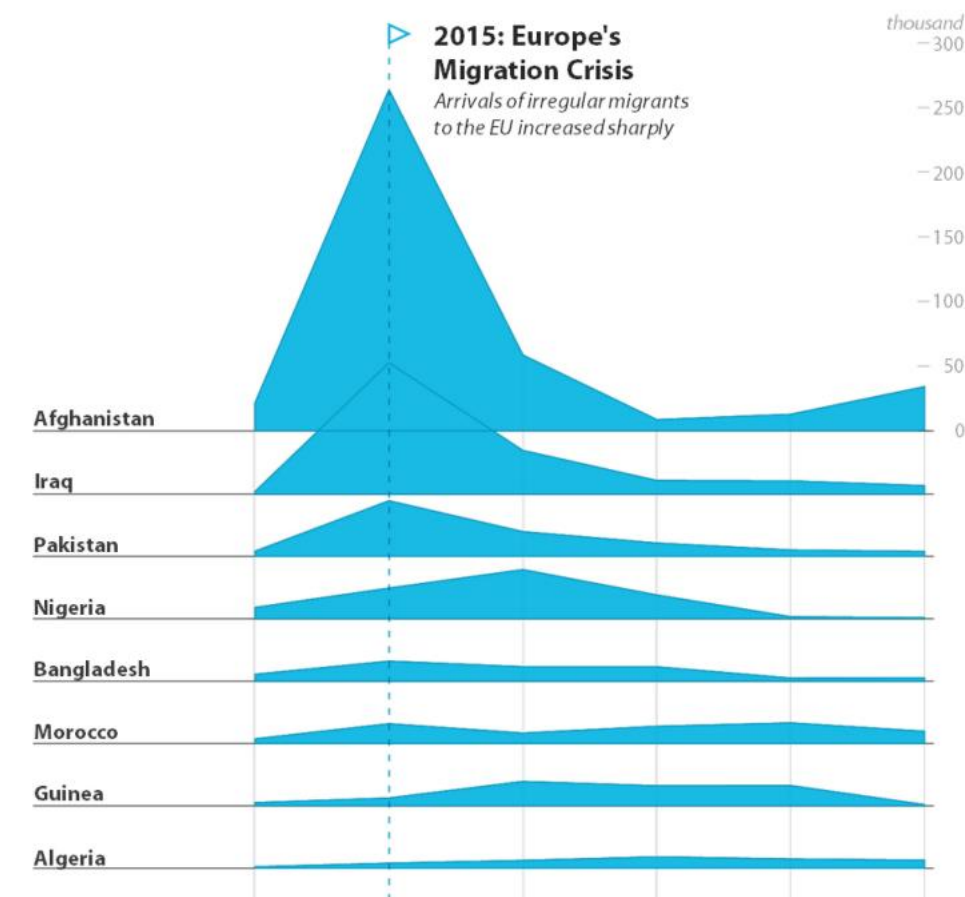


Figure 5 – Detections of illegal border-crossings at the EU borders

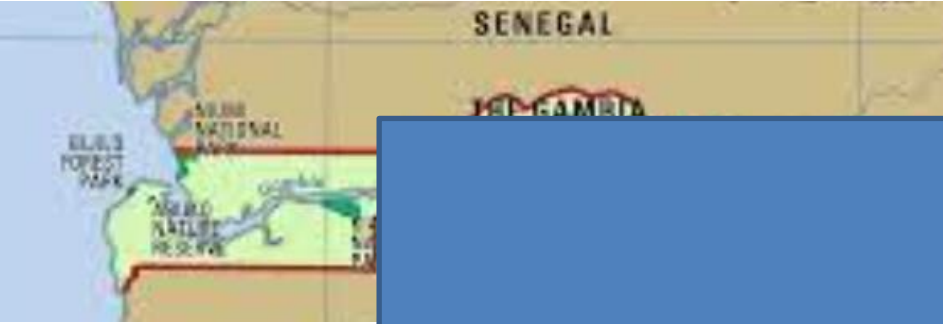
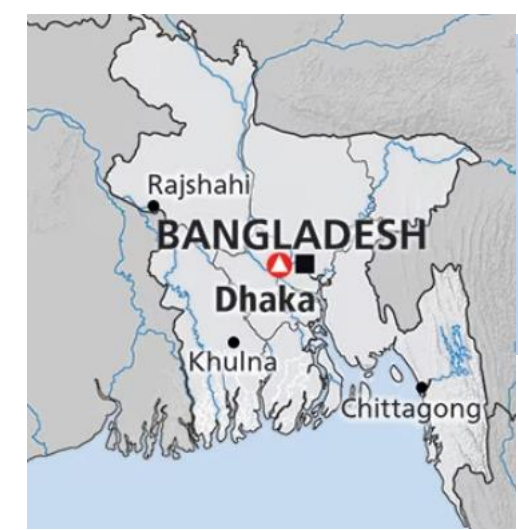


Given the disappointing movement on finalizing formal agreements in sub-Saharan Africa and beyond, the turn towards informality was to be expected (Slagter, MPI, 2019)

The European Commission concluded a flurry of informal readmission agreements (2015-2019)

Critics:

- challenge principles of democratic and judicial accountability
- insufficiently guarantee compliance with European and international human-rights standards
- serious concerns about the intertwinement between asylum procedures, return procedures, and the designation of safe countries of origin



More criticized: Joint Way Forward Afghanistan 2016

Problem with Afghan nationalities and not with Syrians (non-recognition of international protection by many member states)

Germany and Sweden and failed bilateral agreements

Inability to conclude a formal readmission agreement (UNHCR had declared Syria and Libya as countries at risk only) and urgency

The European Union (EU) and the Islamic Republic of Afghanistan face unprecedented refugees and migration challenges. Addressing them requires solidarity, determination and collective efforts.

This Joint Way Forward (JWF) reflects the joint commitment of the EU and the Government of Afghanistan to step up their cooperation on addressing and preventing irregular migration, and on return of irregular migrants, who after the consideration of all relevant international law and legal procedures cannot be granted international protection status, as part of the

The Commission and the EEAS achieved limited progress in concluding readmission agreements, but were more successful in negotiating legally non-binding readmission arrangements (Report ECA 2021)

Figure 6 – Timeline of negotiations



Why a EU external relation soft law: Intention of the parties

Legally non-binding arrangements may be politically more acceptable for other third countries (Report)

The JWF is not intended to create legal rights or obligations under international law. It paves the way for a structural dialogue and cooperation on migration issues, based on a commitment to identify effective ways to address the needs of both sides. It comes in support of the EU Member States bilateral relations with Afghanistan and cannot be interpreted as superseding the existing or preventing the conclusion of future bilateral agreements between the EU Member States and Afghanistan.

Lack of sanctions

We found that the contents of the EU readmission agreements and arrangements that were concluded have addressed most of the common obstacles to easing readmission. In this context, joint readmission committees or working groups have provided forums for periodic evaluation of readmission cooperation. However, the recurring nature of some of the issues discussed showed that there were limits to their effectiveness (Report)

- Joint working group
- Exchange of documents

Part VI: Joint Working Group

A joint working group will meet regularly to facilitate the application of this declaration. The said working group will:

- a) monitor the application of this declaration and report to the EU-Afghanistan High Level Dialogue on Migration;
- b) discuss further arrangements to facilitate cooperation and enable an orderly management of return flows;
- c) recommend changes to this declaration.

Part VII: Exchange of Documents

The EU and Afghanistan declare their intention to exchange the following documents:

- a) a list of diplomatic and consular staff in the territory of the requesting side for the purpose of issuing travel documents;
- b) a list of airports that should preferably be used for return operations;
- c) all information to facilitate communication or the proper implementation of this declaration; and
- d) a list of documents to be considered as evidence of nationality.

Para-law? EU readmission agreement in disguise?

In the case of legally non-binding readmission arrangements, the process is simpler. The Commission requests authorisation from the Council before starting a negotiation, and the Council has to confirm the outcome. However, the consent of the European Parliament is not required (Report)

EU Commission and Afghanistan intentions matters: *France v. Commission, 2004, C-233/02* ([...] *intention of the parties*, which is the *only decisive criterion* in international law for the purpose of establishing the existence of binding effect)

EU Return
directive

- Voluntary return
- Reintegration

This Joint Way Forward (JWF) reflects the joint commitment of the EU and the Government of Afghanistan to step up their cooperation on addressing and preventing irregular migration, and on return of irregular migrants, who after the consideration of all relevant international

Afghan nationals who are found to have no legal basis to remain in an EU Member State, whose protection needs or compelling humanitarian reasons, if any, have been considered in accordance with the applicable legislation and who have received an enforceable decision to leave that Member State, can choose to return voluntarily. Afghan nationals who choose not to comply with such a decision on a voluntary basis will be returned to Afghanistan, once administrative and judicial procedures with suspensive effects have been exhausted.

law, Afghanistan reaffirms its the EU or are staying on the EU individual case by Member States.

Integration Assistance

for Afghans up to the final destination in accordance with international flight weight,

including administrative costs to arrange for travel.

2. Return programmes and reintegration assistance are separate from and irrespective of the development assistance provided to Afghanistan, which seeks to address many of the root causes of irregular migration to Europe, including through job creation.
3. In order to facilitate reintegration, the EU is developing and funding programmes providing support for Afghan nationals returning to Afghanistan. Special consideration will be given to the needs of women, children and other vulnerable groups in the development and implementation of the reintegration programmes.
4. To facilitate the re-establishment of returnees' livelihoods in Afghanistan and considering the broader reconstruction and rehabilitation needs of Afghanistan, the EU is launching the reintegration programme, as described in attachment.

In line with EU Treaties? Horizontal divisions of attribution: Art. 13 TEU and Art. 17 TEU p. of mutual sincere cooperation

Since 2016, the Commission has therefore focused on developing practical cooperation arrangements with third countries, and has negotiated six legally non-binding arrangements for returns and readmissions (Report)

Commission adopted: what about the power?

France v. Commission, 2004, C-233/02

The fact that a measure such as the guidelines is not binding is not sufficient to give that institution (European Commission) the competence to adopt it. The ECJ impose the application of the p. of sincere cooperation to informal/not-binding acts

Germany v. Council, 2012, C-399/12, MoU Switzerland-EU

The Commission cannot be considered to have the right, by virtue of its power of external representation under Article 17(1) TEU, to sign a non-binding agreement resulting from negotiations conducted with a third country.

Why not EP? Funds from EU budget

EP should have been involved as in the EU Return Directive

Legal argumentation:

1- Art. 14 TEU: The European Parliament shall, jointly with the Council, exercise legislative and budgetary functions

Two oral questions by the EP (2016-2019) Art. 218 TFEU must apply

Answer given by Ms Johansson on behalf of the European Commission

18.8.2020

> [Written question](#)

1. Since December 2016, EUR 218.7 million have been committed under the [Development Cooperation Instrument of EU Budget Heading 4 \(Global Europe\)](#) in support of Afghanistan. These funds have been implemented in line with the provisions of Commission Decisions [C\(2016\)8433\[1\]](#) and [C\(2017\)6190\[2\]](#).

Development Cooperation Instrument

Total reference amount: €19,661.64 million (current prices)

Aims

The Development Cooperation Instrument focused on combating poverty in developing countries. It also contributed to the achievement of other objectives of EU external action, in particular fostering sustainable economic, social and environmental development as well as promoting democracy, the rule of law, good governance and respect for human rights.

Legal basis

[Regulation \(EU\) No 233/2014 establishing a financing instrument for development cooperation](#)

Article 20

Financial envelope

1. The financial envelope for the implementation of this Regulation for the period 2014-2020 shall be EUR 19 661 639 000.

The annual appropriations shall be authorised by the European Parliament and the Council within the limits of the **multiannual financial** framework.

Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.

(22) It is appropriate to align the period of application of this Regulation with that of Council Regulation (EU, Euratom) No 1311/2013 ⁽¹³⁾. Therefore, this Regulation should apply from 1 January 2014 until 31 December 2020,

P. of transparency, Art. 15 TEU?

The content of these practical arrangements, except for Afghanistan, remains confidential (Report)

P. of consistency? Art. 21 TEU

The Union shall ensure consistency between the different areas of its external action and between these and its other policies.

Observations

Results of negotiations with third countries are suboptimal due to insufficient use of synergies with Member States and across EU policies (Report)

Justiciability?

Case T-192/16, NF v European Council

the action for annulment laid down in Article 263 TFEU must be available in the case of all measures adopted by the institutions, bodies, offices and agencies of the Union, whatever their nature or form, provided that they are intended to **produce legal effects** vis-à-vis third parties

Return decisions are subject to the administrative and legal remedies envisaged by European and national legislation. If an appeal is lodged, the national authorities or courts assess each case based on its merits, including whether it is safe for a migrant to be returned to the third country (Report)

Prior to returning Afghan nationals, the EU side will give fair consideration to humanitarian aspects in accordance with international law to unaccompanied minors, single **women** and **women** who are head of their families, family unity, elderly and seriously sick people. Special measures will ensure that such vulnerable groups receive adequate protection, assistance and care throughout the whole process.

Afghan nationals who choose not to cooperate with the process will be returned to Afghanistan, and any suspensive effects have been exhausted.

What about practical effect? ECJ according to the doctrine say yes (Poli 2021, Wessel 2021)

Practical effects

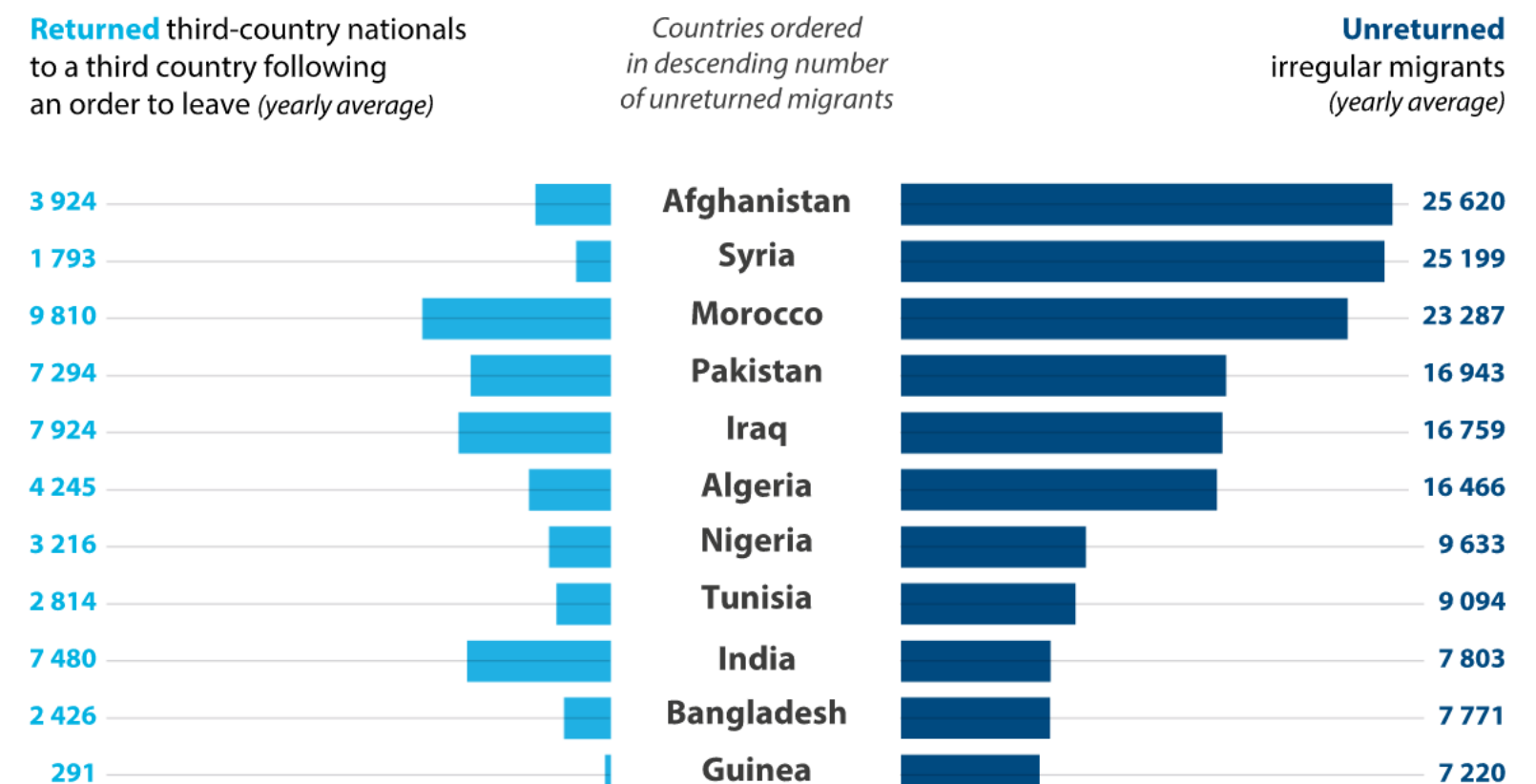
The 10 third countries with the most non-returned irregular migrants during the 2014-2018 period (excluding Syria) were, in order of significance, Afghanistan, Morocco, Pakistan, Iraq, Algeria, Nigeria, Tunisia, India, Bangladesh and Guinea (Report)

Parliamentary questions, 23 March 2021, Question for written answer E-001578/2021 to the Commission, Rule 138, Dominique Bilde (ID), Subject: Ineffectiveness of the joint way forward on migration issues signed with Afghanistan

France, ***only 11 Afghan nationals were forced to return to their country of origin between 2017-2018***, despite Afghans in 2020 representing the second largest group of asylum seekers with 48 578 applications, and 37% of unaccompanied minors.

Very different treatment based on the procedures of each country: in Italy (93.8% acceptance of requests) in Bulgaria (4.1%)

Yearly average returns of irregular migrants (2014-2018)



Efficiency? Going beyond the data?

-Focus not on the return rate

-View as a products of broader migration relations and coordination toward a common EU migration policy

NeoFunctionalism

Normative
transformation

Multiple international
European
Representation System



The rolling stone of the «de-facto» and «de jure» Brussels effect in the EU External relations



ANU BRADFORD
The Brussels Effect
HOW THE EUROPEAN UNION
RULES THE WORLD



Thank you/grazie!

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