READMISSION AGREEMENTS
CONCLUDED BY THE EU

Masterproef van de opleiding
‘Master in de rechten’

Ingediend door
KIM GILLADE
00602610

Major: nationaal & internationaal publiek recht

Promotor: Prof. Dr. Peter VAN ELSUWEGE
Commissaris: Purdey Devisscher
Contents

1. Introduction................................................................................................................................. 5

2. Migration Policy........................................................................................................................... 7
   2.1 Definitions ............................................................................................................................. 7
   2.2 History of the national readmission agreements................................................................. 8
       2.2.1 Nineteenth century ....................................................................................................... 8
       2.2.2 Post–WW II ............................................................................................................... 8
       2.2.3 From the nineties until today .................................................................................... 9
   2.3 Migration policy at EU level: Historical overview.............................................................. 10
   2.4 Towards a Common readmission policy .............................................................................. 13
   2.5 The Area of Justice, Security and Freedom: Programmes .................................................. 15
       2.5.1 Introduction ............................................................................................................... 15
       2.5.2 Tampere .................................................................................................................... 15
       2.5.3 The Hague ................................................................................................................. 16
       2.5.4 Stockholm ................................................................................................................ 20
   2.6 EU Return policy..................................................................................................................... 22

3. The EU Competence to conclude readmission agreements ...................................................... 24
   3.1 Introduction ............................................................................................................................ 24
   3.2 Implied powers doctrine ....................................................................................................... 24
   3.3 Express competence after Lisbon ....................................................................................... 27
   3.4 Nature of the competence .................................................................................................... 28
   3.5 Mixity? .................................................................................................................................. 30

4. EU readmission agreements......................................................................................................... 31
   4.1 What are readmission agreements? ....................................................................................... 31
   4.2 Readmission clauses ............................................................................................................ 31
   4.3 Targeting countries ............................................................................................................. 34
   4.4 Incentives for third countries ............................................................................................... 38
       4.4.1 Introduction ............................................................................................................... 38
       4.4.2 Challenges for the third country to take up readmission obligations ....................... 38
       4.4.3 Overview of incentives at the Commission’s disposal ............................................... 39
   4.5 Procedure .............................................................................................................................. 49

5. EU return policy.......................................................................................................................... 50
   5.1 Introduction ............................................................................................................................ 50
4.6.2 Territorial application ................................................................. 51
4.6.3 Preamble ...................................................................................... 52
4.6.4 Readmission obligations .............................................................. 52
4.6.5 Reflections .................................................................................. 69

5. Human Rights considerations ................................................................. 73
   5.1 Introduction .................................................................................... 73
   5.2 EU human rights framework ............................................................ 74
   5.3 Human Rights violations ................................................................. 77
       5.3.1 Introduction ............................................................................ 77
       5.3.2 The Right to Asylum ................................................................ 77
       5.3.3 The safe third country rule ....................................................... 79
       5.3.4 The principle of non-refoulement .............................................. 82
       5.3.5 How readmission agreements may infringe human rights .......... 83
   5.4 Human rights safeguards ................................................................. 85
       5.4.1 Non-affection clauses ............................................................. 85
       5.4.2 Joint Readmission Committees ................................................. 87
       5.4.3 Transition or suspension clause ............................................... 88
   5.5 The beginning of the end? Concluding remarks ................................ 88

Conclusions .......................................................................................... 91

Annexes ............................................................................................... 94
   Annex 1: List of EU readmission agreements and mandates .................. 94
   Annex 2: List of EU Mobility Partnerships .......................................... 96
   Annex 3: Table Time limits ................................................................ 97
   Annex 4: Cobweb of national readmission agreements from the late 1990’ies until 2009 99
   Annex 5: Dutch resumé ................................................................... 100

Bibliography .......................................................................................... 101
I would like to take the opportunity to thank the persons who helped me in writing this dissertation.

I would like to start by thanking Ms. Seline Trevisanut. In the course of a very interesting lecture held at the EUI during the summer 2010, she pointed to the lack of research in the area of readmission agreements. This was a direct inspiration for me to choose this subject as the theme for my master dissertation.

The subject was enthusiastically welcomed by my Promoter, Prof. Dr. Peter Van Elsuwege. I would like to take the opportunity to thank him for receiving me whenever I asked him, for helping me with any kind of problem related to the dissertation and for giving me valuable instructions to come to a qualitative piece.

There are two more academic staff members I particularly wish to show my gratitude to. Ms. Purdey Devisscher was always prepared to answer any query of practical or other nature. Mr. Guillaume Van der Loo was so kind to draw my attention to some very interesting contributions relating to readmission agreements and for monitoring the progress I made.

Furthermore, I would like to thank Mr. Lukas Decoster both for his continued support as for his invaluable help to correct and to finish this piece.

Lastly do my parents, Ms. Lydie Van Den Neste and Mr. Guy Gillade deserve a special mention in this section for their support.
1. Introduction

Migration was conceived as a problem from the late 1970’s onwards. The worldwide estimated number of migrants has doubled between 1965 and 2000 from 75 million to 150 million\(^1\). Europe has not been spared from mass influxes. Consequently, the individual European countries started to take measures to prevent too many third country nationals from entering their territory. Parallel to the increasing concern about the migratory pressure, the European Community started to take shape. As soon as the Schengen *acquis* was implemented in the Community acquis, the need for a common asylum and migration policy arose. The second chapter attempts to place the subject of this dissertation in its context.

Different types of migration should be distinguished in order to formulate effective measures to cope with the migratory challenges. Most worrying to the European countries was and still is the phenomenon of illegal immigration. These immigrants stay under the radar and are perceived as burdensome to the European countries both in terms of criminality as illegal employment. Europe was to formulate adequate answers to such challenges. Possible solutions to combat illegal migration lie in preventing the irregular migrants from physically entering Europe, tackling root causes for migration in the countries of origin, but also ensuring effective return of the immigrants after they are apprehended and expelled. An effective return policy is important both for alleviating the burden of the host country, but also for the discouraging signal this policy sends to possible future migrants.

The European return policy consist of several measures such as the organisation of joint flights with other EU Member States to third countries, the mutual recognition of expulsion decisions and the conclusion of readmission agreements. Readmission agreements used to be concluded on the national level, but in 1999 the EU gained competence to conclude European readmission agreements, to be implemented by the Member States. A brief overview of the national practices sheds an interesting light on the further developments at the EU level, but this dissertation will further solely examine the European agreements. Today, 13 European agreements have been concluded and some are currently under negotiation. Interesting about the relatively new European instrument is its apparent lack of coherence in the choice of the third countries with which the EU has concluded agreements. We will investigate which are the criteria to appoint a certain third country as a potential partner in the area of readmission. Moreover, I was particularly curious to

assess whether the apparent incoherence in the choice of partner countries is also reflected in the content of the different readmission agreements. Are there many divergences? Can we categorize certain agreements? Chapter 4 is devoted to these considerations.

The second line of questions relates to human rights considerations. Return of irregular migrants is a sensible issue and readmission agreements are persistently criticised. Chapter 5 commences to set out the European human rights framework and assesses whether they are subject to violation when carrying out expulsion decisions trough using a European readmission agreement. The question is whether the continued conclusion of such agreements is sustainable in light of the critiques. Does the Commission’s answer to these concerns herald the end of readmission agreements as we know them?
2. Migration Policy

2.1 Definitions

It is important to use terminology that covers the subject. To define the relevant notions for this dissertation, we will be making use of the definitions provided by the Commission in its communication on a Community return policy of illegal migrants\(^2\).

*Return*: the process of going back to one’s country of origin, transit or another third country, including preparation and implementation. The return may be voluntary or enforced.

*Voluntary return*: the assisted or independent departure to the country of origin, transit or another third country based on the will of the returnee.

*Forced return*: the compulsory return to the country of origin, transit or another third country, on the basis of an administrative or judicial act.

*Readmission*: act by a state accepting the re-entry of an individual (own nationals, third-country nationals or stateless persons\(^{-}\), who has been found illegally entering to, being present in or residing in another state.

*Readmission agreement*: agreement setting out reciprocal obligations on 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.

\(^2\) COM (2002) 564 final, p. 11 and annex I.
2.2 **History of the national readmission agreements**

Readmission agreements go back to the seventeenth century and have evolved greatly until today. We will set out its evolution in the nineteenth century, the rediscovery in the fifties and sixties and the revival in the nineties. The development of the European Readmission agreements will be addressed in the following chapters.

### 2.2.1 Nineteenth century

The earliest traces of readmission agreements date back to the nineteenth century. Before that time, based on the principle of territorial sovereignty, states would simply expel unwanted individuals without cooperation from other states.³

Effective expulsion entails at least allowing the expelled individual to enter another state. Accordingly, states gradually surrendered the absolute character of territorial sovereignty and would start cooperating on the basis of agreements. Important examples are the Treaty of Gotha of 1851 and the Dutch-German Treaty of 1906.⁴ In this era, the readmission agreements did not have the same eventual purpose as is the case today. Whereas the “modern” finality of readmission agreements would be to control the migration flows, the earliest readmission agreements served the expulsion of unwanted individuals.⁵

### 2.2.2 Post-WW II

During the 1950’s and 1960’s, the conclusion of readmission agreements between European states peeked. Their objective was more in line with the contemporary goal of regulating migration flows, with the difference that they regulated the movement of persons between the European countries, instead of with third countries.⁶ They contained provisions on the readmission of both own nationals as third country nationals. The latter were limited to those third country nationals who had

---


previously stayed legally in the addressed state. A mere transit was not sufficient to request readmission.

The Benelux Convention is example of an agreement addressing readmission. The establishment of the Benelux Economic Union in 1960 granted the citizens of the parties to the Benelux treaty free movement within the Benelux area. Internal border controls were lifted and the control of persons was transferred to the external Benelux borders. In the spirit of the Benelux Agreement, the internal borders were lifted for everybody and not only for the Benelux inhabitants. The third country national could obtain a visa to stay Benelux territory if he would fulfil four conditions and if his stay would be limited to a period of three months. If the person concerned no longer fulfilled the four conditions, had overstayed his visa or had become unwanted, he or she could be expelled. The Benelux Convention of 11 April 1960 provided for readmission on two levels. The first level is between the Benelux Member States. The foreigner will be sent back to the state responsible for his or her presence in the territory if the Benelux. In the second level, the unwanted foreigner will be readmitted to a third country that has a readmission agreement with the Benelux.

For two reasons, however, the readmission agreements in this era were not a great success. Since migration was not yet perceived as a problem, these agreements and their execution were not a priority. But also practical obstacles laid at the basis of the limited success of the readmission agreements. Strict time limits for readmission requests and difficulties to provide the required proof of transit hindered the execution of the agreements.

2.2.3 From the nineties until today

The abolition of the Berlin wall and the subsequent opening of the borders with Central and Eastern European Countries was at the basis of the growing fear for illegal entry and residence. As the European Union moved towards a freedom of movement and the lifting of internal borders in accordance with the Schengen convention, the member states felt the need to engage in bilateral readmission agreements with countries from outside the union. Article 23 of the Schengen Convention provides that aliens must be expelled from the territory of the contracting party in which they were apprehended and thereby explicitly refers to readmission agreements.

---

7 D., BOUTEILLET-PAQUET, “Passing the buck”, 362.
8 Convention Concerning the Transfer of the control of persons towards external borders of the Benelux territory, 11 April 1960.
10 N., COLEMAN, European readmission policy, 16.
The CEEC’s served increasingly as a transit road for illegal immigration from Eastern European countries and the Soviet Union. In response, the member states started to conclude readmission agreements with the CEEC’s, which in return saw the visa requirements lifted. The first agreement after the Schengen convention was concluded between the Schengen countries and Poland on 29 March 1991. On the one hand, the agreement foresees that every Schengen country is responsible for its own external borders. This means that an obligation rests upon the States to readmit third country nationals and stateless people who have crossed the common external border and stayed in the territory of one of these States illegally. On the other hand, Poland must readmit all irregular migrants who have come through Poland. This heavy burden was alleviated by a subsequent bilateral agreement on financial compensation with Germany. It was the condition to make the 1991 agreement more effective, to be obtained by a bilateral modification of the 1991 agreement with Germany.

Until today, countries conclude bilateral readmission agreements with third countries which are interesting to them as they are countries of origin or transit. Notably the past ten years, the number of national bilateral readmission agreements has increased exponentially. Readmission agreements are more than ever conceived as important instruments to combat irregular migration. Witness thereof is the Common readmission policy a embedded in the EU immigration policy.

### 2.3 Migration policy at EU level: Historical overview

The EU gradually gained competence in the area of migration and asylum. Our overview of cooperation on issues of migration dates back to 1985, the Schengen convention. The Schengen convention aims mainly at thorough integration among a then limited number of member states. Along with the opening of internal borders, the concern of immigration issues arose. Accordingly, the member states engaged in informal intergovernmental negotiations which resulted in conventions and recommendations to alleviate these concerns.

From 1992 onwards there is a gradual institutionalisation of migration competence. The Maastricht treaty, also the treaty on the European Union, introduced the pillar structure. The third pillar dealt with the area of Justice and Home Affairs. Limited initial powers were granted to the Community, allowing the Council to adopt measures by qualified majority voting relating to visas, namely the determination of TCN’s who must possess a visa to enter the Union and a standard model visa for all.

---

12 Ibid.
13 See annex 4.
the Schengen countries. Migration, asylum and border control would remain intergovernmental under the third pillar. The areas of ‘Common interest’ under Justice and Home Affairs were asylum policy, rules on crossing by persons of the external borders of the member states and the exercise of controls at such borders, immigration policy and policy regarding nationals of third countries, combating drug addiction, combating fraud on an international scale, judicial cooperation in civil matters, judicial cooperation in criminal matters, custom cooperation and police cooperation. The allocation of these areas to the third pillar means that they lack judicial review, absence of parliamentary control and the requirement of unanimity in the Council.

From 1992, the ministers for immigration issued recommendations in the area of illegal immigration. These recommendations formulated principles that should govern immigration control. The subjects addressed concerned expulsion, illegal employment but also readmission. On the latter the Council made three recommendations; one concerning a specimen bilateral readmission agreement, the second one on a standard travel document and a third recommendation on the guiding principles when drawing up an implementing readmission protocol.

The integration of the Schengen acquis in the European Union’s legal framework raised the need of bringing migration, asylum and borders into the Community sphere. As Schengen provides in the abolition of internal borders, the provisions of the third pillar were held to be inappropriate to deal with the new concerns this would raise. As regards readmission, the Austrian Presidency presented in 1998 a draft Strategy Paper on immigration and asylum policy that indicated an alarming increase of refusals to readmit own country nationals. It thus appeared that the bilateral readmission agreements were insufficient to ensure cooperation. The treaty of Amsterdam in 1997 met these needs and transferred “visas, asylum, immigration and other policies related to freedom of persons”

16 For example the Recommendations of 30 November 1992 regarding practices followed by member states on expulsion and concerning transit for the purposes of expulsion.
20 Reflection group on IGC, SN 509/1/95, 1 September 1995, p 24.
to title IV of the EC Treaty. The Treaty of Amsterdam contained a transitional period of five years after the entry into force of the treaty to change the procedure to adopt measures under title IV. During the first five years, the Commission and the Member States had a right of initiative. After a mere consultation of the European Parliament, the Council could adopt the proposed measures by unanimity. When those 5 years have lapsed, on 1 May 2004, the Council may unanimously decide whether for all or certain areas subject to title IV a qualified majority would suffice and whether the Court of Justice’s powers would be expanded.23

The Treaty of Amsterdam left the question on voting procedures open to decide. All the parties involved were unable to agree on the extent of intergovernmentalism they wished to maintain in this area. Before the end of the transitional “intergovernmentalist” period, the Treaty of Nice amended the previous settlement. The result of Nice was a differentiated arrangement with qualified majority voting and co-decision for illegal immigration and border checks and unanimous procedures for legal immigration. Eventually, obeying Amsterdam and as agreed in The Hague programme24, the Council made the procedure laid down in article 251 TEC applicable for nearly entire title IV.25 As a consequence, from 1 January 2005 onwards the Commission gained the exclusive right of initiative and Parliament benefitted the co-decision procedure.

The Lisbon treaty abolished the pillar structure and so re-unites the areas of Justice and Home Affairs. As regards immigration, the competence to adopt measures on legal migration had always remained subject to the procedure that required unanimity. Lisbon now also makes it subject to title V TFEU to what is now known as the ordinary legislative procedure and was previously the QMV/Co-decision procedure. The consequences thereof are that unanimity is no longer required26 and that the European Court of Justice has now full jurisdiction in the Area of Freedom, Security and Justice.

For the areas that were since 1 January 2005 subject to the –now- ordinary legislative procedure- the Lisbon Treaty was not a source of great novelties. The greatest improvement is the further expansion of the competences of the European Parliament. It was granted powers of co-decision in 2005 to decide whether the Commission would receive a negotiating mandate. The eventual conclusion of an initialled readmission agreement was subject to article 300 TEC and provided in conclusion by QMV in the Council, only requiring a consultation in the EP. The Lisbon Treaty answered the concerns of

23 Article 67 of the Treaty establishing the European Community.
26 This was previously the case under article 67 (5) TEC.
the EP by requiring the Parliament’s consent to conclude the agreement. Moreover shall the Parliament “be immediately and fully informed at all stages of the procedure.” The first readmission agreement the Parliament consented to was the disputed agreement with Pakistan.

2.4 Towards a Common readmission policy

In 1991 there was a first call for a common readmission policy. The commission had adopted a communication on immigration to stimulate readmission agreements both in quality and in quantity. A common policy was envisaged through a harmonisation of the national readmission agreements and to boost the conclusion of readmission agreements between member states and third countries. Later that year, the national ministers of immigration prepared a report for the Maastricht Summit, as requested by the Luxembourg Summit, urging the member states to cooperate with third countries. Root causes were to be tackled through development aid and cooperation, made conditional on the conclusion of readmission agreements. One year later, the 1992 Edinburgh Summit adopted the ‘Declaration on principles of governing external aspects of migration policy’, again urging member states to conclude readmission agreements. The willingness of third countries to do so is a factor that influences the relations of that country with the European Community.

In consequence of the introduction of the pillar structure by the treaty of Amsterdam, a Justice and Home affairs council for the third pillar was set up. This council was responsible for the first concrete action on the above mentioned new policy and adopted a set of guiding principles to harmonize the agreements. These principles were, however, not a great success, and the Commission had to interfere with another communication on immigration ad asylum policies in 1994. For the first time, the Commission acknowledged the burden that the readmission agreements represent for third states. The Commission therefore stressed the importance of assisting these third countries in the fulfilment of their obligations emanating from the readmission agreements. Triggered by this

27 Art. 218 §6, (a), (v) TFEU.
28 Art. 218 §10 TFEU.
30 N., COLEMAN, European readmission policy, 19.
31 SN 4038/91 (WG 930).
33 Communication on immigration and asylum policies, COM (94) 23, §114.
34 COM (94) 23.
communication, the Council took a second series of measures for implementing the readmission policy through the adoption of a specimen bilateral readmission agreement\(^\text{35}\) and subsequent guiding principles\(^\text{36}\). The specimen bilateral readmission agreement holds provisions on the exact obligations for both parties, the legal instruments it has to comply with, time limits, and so on. The guiding principles envisage the implementation of the agreements and provide standard forms that have to be provided to allow the alien to travel, indications on proof of entry, etcetera.

In 1998, a High Level Working Group was launched by the Council with the mandate to draft cross-pillar action plans. Despite the tremendous increase of bilateral readmission agreements, the need for this HLWG arose from the generally negative views on the poor achievements to implement the EU return policy.\(^\text{37}\) The working Group’s first main mandate is to develop a “coherent and integrated policy of the European Union for the most important countries and regions of origin and transit of asylum-seekers and migrants, without geographical limitation”. Accordingly, the achievements of the HLWG are limited to specified third countries. The second mandate is to analyse migratory trends, “including, whenever required, the establishment of new Action Plans, to manage migratory flows in common”.\(^\text{38}\) The WG developed six action plans\(^\text{39}\) which hold measures of technical and political assistance for the improvement of the management of migration flows. Eventually this resulted in the recommendation to negotiate readmission agreements with four countries, being Pakistan, Morocco, Sri Lanka and Albania. The HLWG group’s mandate was to end in 2000 after it had developed the cross-pillar action plans. However, the Tampere Summit decided on the continuation of its mandate which would be directed towards the EU migration externalisation policy.

From 1999 onwards, the EU illegal migration policy, including readmission is developed through five year programmes. Therefore policy measures in the area of readmission will be addressed jointly in the following section.

---

\(^{35}\) Council Recommendation of 30 November 1994 concerning a specimen bilateral readmission agreement between a member state and a third country, Council Doc. 396Y0919 (07); OJ C 274 of 19 September 1996.

\(^{36}\) Council Recommendation of 24 July 1995 on the guiding principles to be followed in drawing up protocols on the implementation of readmission agreements; OJ C 274 of 19 September 1996.


\(^{38}\) Council Doc. 9433/02, p. 3.

2.5 The Area of Justice, Security and Freedom: Programmes

2.5.1 Introduction

The EU Member States have started to cooperate in the area of migration and asylum issues since the Treaty of Maastricht in 1992. However, the Member States were always keen to safeguard their sovereignty in that area. Nevertheless, the European Union would start to develop common policies through the conclusion of five-year programmes that focus on Justice, Security and Freedom from 1999 onwards. Since then, three programmes were concluded; the Tampere programme in 1999, The Hague programme in 2004 and finally the Stockholm programme in 2009.

The programmes can be seen as roadmaps which set out main objectives, concrete actions and deadlines. The Commission, as executing body, implements the programmes into an action plan that details and concretizes the programme.

2.5.2 Tampere

The five-year Tampere programme was the result of a special meeting in Tampere, Finland, held on the 15th and 16th of October 1999. The summit would deal with the creation of an Area of Freedom, Security and Justice in the European Union to fully benefit the opportunities granted in the Treaty of Amsterdam. The Council would draw operational conclusions from this Treaty. The programme reminds us to the area of prosperity and peace through the creation of the single market and the economic and monetary union. This inevitably attracts others who “cannot enjoy the freedom Union citizens take for granted”\(^40\) and requires an EU Common policy on asylum and migration.

The Tampere programme addresses four common goals: a common EU asylum and migration policy, a genuine European area of justice, a union wide fight against crime and a stronger external action. The former being within the scope of this dissertation, the common asylum and migration policy will be discussed. The first and main element of this common policy entails a partnership with countries of origin and transit, addressing political, human rights and developmental challenges. With regard to these partnerships, the High Level Working Group on Asylum and Migration\(^41\) is to fulfil an important role through the development of Action Plans. Special regard is given to refugee rights and the right to seek asylum. Explicit reference is in that context made to the Geneva Convention relating to the

\(^{40}\) Presidency Conclusions, Tampere European Council of 15 an 16 October 1999, §3.

\(^{41}\) See infra.
status of refugees. The eventual goal is to establish a Common European Asylum System, gradually put in place via common minimum conditions towards a common procedure and a uniform asylum status. Safeguards must also be built-in to ensure a fair treatment of legally residing third country nationals, ensuring non-discrimination in social, cultural and economic life. The measures to be taken are twofold. On the one hand the Member States must combat racism and xenophobia. On the other hand harmonization of national legislation on the conditions for admission and residence is needed. The last element of the Common asylum and migration policy is the management of migration flows. To that end the Council sets forth the closer cooperation and mutual assistance between the Member States and between Member States and third countries on border control and return. It is in this context that the Council confirms the Community’s competence to conclude readmission agreements and insert readmission clauses in other Community agreements.

Tampere was, within the scope of illegal immigration and return, implemented through the 2002 Action plan on illegal migration, the Return Action programme, and the first Community readmission agreements had been concluded. The Commission would evaluate the progress made as positive.

2.5.3 The Hague

The Hague programme aims to strengthen and firmer establish freedom, security and justice in the European Union. The Commission’s evaluation of the achievements during the Tampere programme highlights the future priorities in the Area of Freedom, Security and Justice which were taken into account in the eventual multi-year programme. The Hague programme sets orientations and goals to strengthen freedom, security and justice. The strengthening of security addresses terrorism, drugs, the exchange of information and police cooperation, whereas justice holds provisions on judicial cooperation.

The former area of freedom represents the largest part with multiple measures of the programme and it largely builds on the aims set out in Tampere. The first phase in the establishment of a Common European Asylum system is to be finalized and now comes in its second phase to complete

42 Convention relating to the status of refugees of 28 July 1951, adopted by General Assembly Resolution 2198 (XXI).
a common procedure and a uniform status. The other aspirations entail combating illegal employment and the integration of third country nationals.

An analysis of the added value of The Hague programme starts with a comparison of the issues regarding immigration and asylum addressed in the two subsequent programmes. Tampere addresses four issues: partnerships with countries of origin, a Common European Asylum System, fair treatment of third country nationals and the management of migration flows. The Hague holds five migration-related issues: a Common European Asylum system, legal immigration and the fight against illegal employment, integration of third country nationals, the external dimension of asylum and migration policy and the management of migration flows.

A shared issue in both programmes is the Common European Asylum system. The Hague programme envisages a continuation towards the development of the Common System through the finalization of the first procedural phase by 2007 and the initialization of the second phase by 2010. The Commission is charged with the task to monitor the implementation by the member states of Tampere and the development of concrete measures to be taken within the second phase. In close cooperation with the UN High Commissioner for Refugees shall the Commission investigate the joint processing of asylum application outside the EU territory. Legal immigration and the fight against illegal employment is for the first time mentioned in The Hague programme. Legal migration was only hinted at in Tampere when dealing with the management of migration flows. The Council stressed the need to set up information campaigns on the legal migration possibilities. Little more than emphasizing that this area remains under the sovereignty of the Member States is done in The Hague. However, the Commission is invited to prepare a policy plan.

From the list of issues dealing with Migration and asylum the first notable policy expansion is to be situated in the area of third country nationals. Whereas Tampere required a fair treatment of third country nationals, The Hague takes it a step further and requires integration of TCN’s through coordination of the national integration policies and the establishment of Common Basic Principles describing integration as a “continuous, two-way process involving both legally resident Third-country nationals and the host society”. In answer to that, the Council adopted eleven Common Basic Principles in November 2004⁴⁵.

New in The Hague programme is the emphasis laid on the external dimension of the immigration and asylum policy. The Hague recognizes the international nature of these issues and finds that EU policy

should “aim at assisting third countries, in full partnership”, to improve migration management, refugee protection and return policy. This is in contrast with the Tampere programme, which narrowly merely addresses partnerships with countries of origin. The Hague programme fits these partnerships within the broader foreign policy and distinguishes four types of agreements. Firstly does the programme foresee in partnerships with third countries in order for the EU to play a role in matters such as refugee protection and migration management in non-EU countries. Second are the agreements with countries of origin to develop a coherent policy that links migration, development cooperation and humanitarian assistance. These policies should mainly tackle the root causes of immigration, but also ensure refugee protection trough close cooperation with the UNHCR. Third, are agreements with countries of transit which, as a part of the European Neighbourhood Policy, should establish cooperation and capacity-building in the areas of border control and asylum systems. Fourth, do agreements with third countries also include readmission agreements, explicitly called for in The Hague programme as a corollary to a return and readmission policy. The Council in this regard requests an effective policy based on “common standards for persons to be returned in a humane manner and with full respect for their human rights and dignity” and “take into account special concerns with regard to safeguarding public order and security”. These goals are to be complied with through cooperation and assistance, the launch of a European Return fund and the appointment of a special representative for a common readmission policy.

Lastly, The Hague programme addresses the management of migration flows by way of border checks, information systems and visa policy to fight illegal immigration. The Council takes a more pragmatic approach then it did in Tampere and it sets forth concrete measures to be taken. An innovation of great importance regarding readmission policy is that the European Council requests the Council and the Commission to investigate the opportunity to grant visa facilitation when negotiating readmission agreements.

The overall evaluation of the implementation of the programme and action plan is that there have been made considerable advances towards realizing the aims. Most proposed measures were adopted. However, the evaluation is not only positive. There is a general lack of steady progress in the different fields of policy due to the challenges inherent to the pillar-system such as unanimity

---

requirements, absence of a right to take initiative and limited competences for the European Court of Justice and the Commission. Still, the Commission’s institutional scoreboard on the measures to be taken within The Hague programme predominantly indicates the achievement of the action to be taken under the action plan. We can highlight the Global Approach to Migration adopted in 2005 by the European Council. This reflects the external dimension of the Union’s migration policy. This Global Approach focuses on Africa and the Mediterranean and attempts to formulate a response to the challenges of migration from these countries. It has a threefold aim to balance the promotion of mobility and legal migration, the optimizing of the link between migration and development, and the prevention and combating of illegal immigration. In line with the Global Approach to Migration the Commission proposed mobility partnerships between the EU and third countries that are willing to work actively to better manage migration flows. These are opportunities for the Union to fight illegal migration. Mobility partnerships foresee in legal migration opportunities and arrange short-term visa. Commitments include readmission of own nationals, discouraging illegal migration and human trafficking, enhanced border control and the exchange of information. Mobility partnerships accordingly are tailored following the needs and the willingness of every country or geographical area. Today we cannot yet draw conclusions on their potential as these agreements are a recent development. On the verge of the Stockholm programme and under the auspices of the French Presidency, we also highlight the Pact on Immigration and Asylum which was adopted in 2008. The European Council makes five basic commitments in line with the objectives set forth in The Hague programme. The European Council firstly commits itself to organize legal immigration by taking into account the priorities, needs and reception capacities determined by each Member State, but also to encourage integration of third country nationals. The second commitment concerns the control of illegal immigration by ensuring that illegal immigrants effectively return to their countries of origin or of transit. The principles governing this commitment are a greater cooperation within the framework of the Global Approach to Migration between the Member States, the Commission and the countries of origin and of transit, the effective implementation of return decisions and the readmission of own nationals. To that end should readmission agreements be concluded, evaluated and reviewed to ensure an effective policy. Third, should border controls be made more effective. Fourth, the European Council wishes to construct a Europe of asylum through the installation of a Common European Asylum System. The creation of a comprehensive partnership with the countries of origin

51 European Pact on immigration and asylum of 16 October 2008, Council doc. 13440/08.
52 Council doc. 13440/08, 4.
and the countries of transit is set as a fifth and last goal, in order to encourage the synergy between migration and development. Envisaged are framework agreements, measures of capacity-building, the creation of opportunities for legal migration and the implementation of the EU - third country meeting conclusions and making full use of the European Neighbourhood Policy. This pact is to be implemented through concrete action and decisions from the European Parliament, the Council, the Commission and the Member States and should be enforced by The Hague successor programme.

2.5.4 Stockholm

The Stockholm programme can be characterized as a programme with a very broad scope, addressing a variety of areas to create an open and secure Europe serving and protecting citizens. The programme aims for further efforts to make policy areas more coherent and to intensify cooperation with partner countries.

The context in which the Stockholm programme was adopted was the global recession. It revealed the vulnerability of non-EU citizens on the European labour market. Following the recession, the European Member States wanted the EU nationals to have priority over the immigrants on the labour market. Hence, in the Stockholm programme there is no further development of labour migration policy. The second characterizing context for Stockholm was the call of the most vulnerable external border countries - The Quadro Group consisting of Cyprus, Malta, Greece and Italy - for assistance in managing the illegal immigration flows. This context resulted in a comprehensive, more detailed and reactive programme, rather than a programme with long-term goals.

The themes addressed in the Stockholm programme range from citizen’s rights, accessibility of justice, internal security, access to the Union, immigration and asylum and lastly, the external dimension of Freedom, Security and Justice. The latter for the first time envisages the external dimension of the entire Union policy in the Area of Freedom, Security and Justice, requiring more coherence and makes migration management policy a part of the European foreign policy. Besides the previous, the Stockholm programme differs from The Hague in three ways. The 2005 Global approach to migration enjoys increased importance. It is in fact the basis for any further development in the area of immigration. As said, is the Stockholm programme more detailed and

---


reactive than its predecessors. In line with this contention the programme sets some new specific priorities. An example is the problem of the vulnerability of unaccompanied minors. Lastly, was the theme ‘management of migration flows’ divided into visa policy on the one hand and external border management on the other hand.

The title “A Europe of responsibility, solidarity and partnership in migration and asylum matters” announces the chapter on migration and asylum. Generally, Europe seeks to further develop a comprehensive Union migration policy, being ever a key objective for the Union. Several agencies and monitoring offices were already operative, but their employability was in some cases limited. There should be made full use of their potential. The European Pact on immigration and asylum is set forth as a basis to further develop the area. Eventually, the finalization of the Common European Asylum Policy, foreseen to be established in 2012 is an important aspect of this theme.

Stockholm calls for a dynamic and comprehensive migration policy. What has already been accomplished should be further developed and coordinated in accordance with the Global Approach to Migration. In this regard, Stockholm wishes to further develop dialogue and cooperation with other counties such as in Asia and Latin America, using the instruments and the progress already made within the scope of the Global Approach to migration such as the putting into operation of Frontex, the establishment of migration information centres, employment and migration agencies, and so on. A novelty in the plan to deploy the Global Approach is the development of migration profiles of third countries, serving the development of specific migration policies with third countries. Also, mobility partnerships are the main long-term cooperation framework for migration management and their use should be continued and expanded with countries of origin, transit and destination. However, for these measures to be effective, a more coherent European approach is required.

The specific measures to be taken according to the European Council are effective execution of return decisions through mutual recognition of these decisions, assistance for the Member States in their return policies by the European institutions and bodies. In the area of effective action against illegal immigration, smuggling and human trafficking, the readmission policy is still a key element. Therefore, the Stockholm programme pays great attention to readmission agreements. First of all, new readmission agreements should be concluded both on the level of the Union as on the level of the Member States. Existing agreements, clauses and practices should enjoy increased efficiency to benefit an efficient return policy. All in all, there are no great novelties in this instrument. Important is that the Commission is invited to evaluate the existing readmission agreements and those under
negotiation and to develop a mechanism for the monitoring of the implementation of readmission agreements. The Council should adopt a new readmission strategy, based on the Commission’s findings. The agreements being concluded on a voluntary basis, the Council’s strategy should include the third countries unwilling to cooperate in readmitting their own country nationals.

2.6 EU Return policy

Since the Tampere European Council summit of 1999, a common return policy was perceived as a means of dealing with illegal immigration within the scope of a common immigration and asylum policy. “Return and readmission are integral and vital components” of the common policy on immigration and asylum. An effective return policy is a “necessary element of a well managed migration policy.”

An important instrument in the return policy was adopted by the Justice and Home Affairs Council after the 2001 Laken summit, stressing the need for an action plan on illegal immigration, reaffirmed by the 2002 Seville Summit: The Return Action programme. The programme is based on the Green Paper on return of the same year and foresees in the development of both short- and long-term measures, as well as the adoption of common minimum standards in the area of return. The aims following the programme are improved operational co-operation among member states, common minimum standards or guidelines on return and intensified cooperation with third-countries. The first area of measures proposed under the return action programme target the establishment of information systems that allow identification of apprehended irregular migrants: the Visa Information System and the second generation of the Schengen Information System. These systems allow competent authorities to access the available information of certain categories of persons. Minimum standards on return were finally adopted with Directive 2008/115/EC which set time limits to detain a third country national, favours voluntary return, regulates the entry ban and so on. The adoption of the directive required more than a simple call for it in the Return Action Programme; the 2004 Brussels summit requested the establishment of an effective removal and


repatriation policy for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity. Likewise, the Council of Europe expressed its concern on this sensitive issue by adopting the ‘20 guidelines on forced return’ in 2005.\textsuperscript{62} The European Council eventually adopted the Directive on common standards and procedures in Member States for returning illegally staying third-country nationals.\textsuperscript{63} The common minimum standards and procedures to be applied must be in accordance with fundamental rights and general principles of Community and International law. The Directive provides that Member States, when implementing the directive must ‘take due account of’ the principle of non-refoulement, the best interests of the child, family life and the health conditions of the illegal resident. A rather poor protection that is and so, the directive is not free from criticism\textsuperscript{64}. The directive does stipulate procedural safeguards. Where there are agreements between the Community and/or the Member States and third countries, the most favourable regulation for the returnee applies. This provision clearly envisages the readmission agreements.

In sum, the EU Common return policy is an important area within the common immigration and asylum policy. The return policy is not limited to readmission agreements, but today it remains the most important instrument to ensure the irregular migrants return. Nevertheless, there are efforts to take more comprehensive approach to the issue of return. A very recent example thereto are the pilot mobility partnerships, which include readmission provisions but also target the cooperation in the home country to improve conditions for the returnee. This new phenomenon will be addressed further in this dissertation.

\textsuperscript{62} Council of Europe, Forced return, 20 guidelines adopted by the Committee of Ministers, 2005, 74 p.
\textsuperscript{64} For instance the speech by Yasha Maccanico, “Against the outrageous directive!” at the hearing with NGO’s organized by the GUE group, European Parliament, Strasbourg on 12 December 2007. Full-text of the speech retrievable from www.statewatch.org, accessed 28 July 2011.
3. The EU Competence to conclude readmission agreements

3.1 Introduction

Under the EC treaty there was no explicit provision on the competence to conclude readmission agreements. In fact, no explicit provision was needed. The ECJ established in the ERTA case the principle of parallelism between internal and external powers, meaning that where the community has powers in a certain internal area, it should be able to take external measures to attain their objective. The legal basis for the Community’s power on illegal immigration and residence was article 63 § 3 (b) of the EC treaty.

As mentioned in the previous chapter, the Lisbon Treaty reformed the institutional structure, and migration is now dealt with under the Treaty on the Functioning of the EU. Article 79 of this treaty provides in an explicit legal basis for the conclusion of readmission agreements by the Union. This area is subject to shared competence, meaning that the member states are free to make arrangements in areas where the Union did not yet use its powers. The ECJ has not yet ruled upon this issue but there are some arguments in favour of an exclusive competence for the community.

3.2 Implied powers doctrine

The competence for the Community and today the Union to conclude readmission agreements is not clear-cut. Under the EC treaty there was no explicit provision on the competence to conclude readmission agreements. According to the principle of conferral there has to be a legal basis in the Treaty in order for the Community to have competence to act. This legal basis can be explicit or implied.

The option of ‘implied powers’ is typically left open in systems with conferred powers to avoid a too rigid allocation of competences. The principle was first developed back in 1819 by the US Supreme Court. The American federal model grants the federal state a limited set of conferred powers, tempered by the ‘necessary and proper clause’. This clause allows Congress “to make all Laws

---

65 Codified in article 216, §1 TFEU.
which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department thereof”. The scope of this provision has long been debated and finally got a broad interpretation in the case of McCulloch v. Maryland\(^{68}\) where the establishment of a Federal Bank was at discussion. A comparable provision in EC law moderating the principle of conferral is article 235 TEEC.

“If action by the Community should prove necessary to attain, in the course of the operation of the Common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the Assembly, take the appropriate measures.”

The ‘implied powers doctrine’ was developed by the case-law of the European Court of Justice. Implied powers are a reasoning by which the Community can conclude agreements by invoking a substantive legal basis, even though this basis does not mention the conclusion of international agreements. As the Community received internally certain competences, they also need them externally.

The development of the implied powers doctrine starts in 1971 with the AETR judgment\(^{69}\) regarding road transport. The AETR was an international agreement concerning the social aspects of international road transport such as resting times. The Council had adopted Regulation 543/69 covering social aspects of road transport. Whereas the Council, in its proceedings of 20 March 1970, allowed the Member States to negotiate agreements within the framework of the Regulation, the Commission did not agree. The Commission argued that, because of the internal regulation, the Commission was to have competence to conclude these agreements. And so the Commission launched an action for annulment with the ECJ challenging the Council decision that allowed Member States to conclude agreements, provoking the first inter-institutional clash before the Court.

On the one hand, the Commission argued that it was the Commission’s competence to negotiate the Accord Européen sur les Transports Routiers. This contention is based on article 75 TEEC providing Community competence to take appropriate provisions to pursue a framework of common transport policy. In subsidiary order, the Commission argues that at least the conditions of article 235 TEEC are fulfilled.

---

\(^{68}\) 17 U.S. 316 (1819), McCulloch v. Maryland.

\(^{69}\) ECJ, 31 March 1971, 22/70, Commission v. Council, ECR 263.
On the other hand the Council submitted that Regulation 543/69 does not grant external competence to the Community, nor does the fact that Community rules exist in the areas relevant to the AETR imply that these agreements should be concluded by the Community. The Court followed the Commission.

“Such authority arises not only from an express conferment by the Treaty [...] but may equally flow from other provisions of the treaty and from measures adopted, within the framework of those provisions, by the Community institutions. In particular, each time the Community, with a view to implanting a common policy envisaged by the treaty, adopts provisions laying down common rules, whatever form these may take, the Member states no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules.”

The ECJ laid the basis for the ‘implied powers’ doctrine and ruled that if external legislation can affect internal legislation, the Commission is empowered to conclude such an agreement.

The second ECJ decision developing the doctrine through expanding it was the Kramer case. The question at hand was whether the Member States or the Community are competent to take measures with regard to fishing quotas. The Court first establishes that the community has internally the power to “take any measures for the conservation of the biological resources of the sea, measures which include the fixing of catch quotas and their allocation between the different Member States”. The Court secondly declares that the means for the protection of the biological resources are binging legislative measures.

“In these circumstances it follows from the very duties and powers which Community law has established and assigned to the institutions of the Community on the internal level that the Community has authority to enter into international commitments for the conservation of the resources of the sea.”

In Opinion 1/76 the Court gives a final definition of the concept of ‘implied powers’. The Commission asked the Court’s opinion on the reconcilability of the draft agreement establishing a laying-up fund for inland waterway vessels with the TEEC.

“The power to bind the Community vis-à-vis third countries nevertheless flows by implication from the provisions of the Treaty creating the internal power and in so far as the participation of the

---

70ECJ, 14 July 1976, Cornelis Kramer and others, Joined cases 3,4 and 6/76, ECR 1279, §30-33.
Community in the international agreement is, as here, necessary for the attainment of one of the objectives of the community.”

The Community derived its competence to conclude readmission agreements from art 63 §3 TEC.

“For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas: (c) illegal immigration and unauthorized residence, including removal and repatriation of persons residing without authorization”.

Thus, in conformity with the case-law, external powers can be implied. However, article 63 TEC lacks reference to the term readmission. The JHA Council Meeting of May 1999 on the entry into force of the Amsterdam Treaty linked readmission to the term repatriation. As repatriation means “return to the country of origin” and readmission agreements also cover return to transit countries, this term does not extend the Community competence to the latter type of readmission. A broad interpretation of the term and even the paragraph is imposed. The article addresses illegal immigration and unauthorized residence, including repatriation and the Council assumes that the enumeration of measures is not limited to repatriation and removal. Accordingly, based on article 63 §3 TEC, the Community can adopt any measure in the area of illegal immigration and unauthorized residence.

3.3. Express competence after Lisbon

The Lisbon treaty confirms the Union’s competence in this area by providing an express legal basis for the Union to conclude readmission agreements. Art 79, § 3 TFEU reads:

“The Union may conclude agreements with third countries for the readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States”.

---

3.4 Nature of the competence

There is also uncertainty about the nature of the competence to conclude readmission agreements. Is there a division of power between the Community and the Member States? Or is the Community exclusively competent?

The Commission holds that the competence should be exclusive. This position is based on the contention national readmission agreements alongside the European ones would lead to migration flows inside the territory of the EU due to the absence of internal borders. Illegal migrants would go to those Member states who did not conclude a readmission agreement with their country of origin or transit. Moreover, the Commission can use its negotiating weight to ensure the third country takes up the most comprehensive readmission obligations. In spite of these arguments, the Member States and the Council on the other hand want the competence to be shared. Member States were unwilling to give up their competences in the field. The treaty of Amsterdam provided that measures on immigration policy are Community competence but this “shall not prevent any Member State from maintaining or introducing in the areas concerned national provisions which are compatible with this Treaty and with international agreements”. Accordingly, the competence in the area of illegal immigration, including measures on repatriation of illegal residents is a shared competence.

Despite the clear provision in the EC treaty on the shared competence, there is a very important reservation to make in this regard. It was still discussed whether competence in the area of readmission is exclusive or shared. The argumentation goes as follows; the doctrine of implied powers confers an exclusive external competence to the Union if that power is essential for reaching a Community objective. The ERTA case grants exclusive competence to the Community when an agreement by the Member States would affect the Community rules. The recent Opinion 1/03 recaptures this. The Court addresses in his Opinion the competence of the Community to conclude the Lugano Convention. The ECJ is, in conformity with article 218, §11 TFEU competent to issue an opinion on the compatibility of an agreement with the Treaties, including questions on the division of competence. The Court notes that the Community only enjoys conferred powers. The competence to

74 Proposal for a Comprehensive Plan to combat illegal immigration, 14 June 2002, para 76. See also, COM(2001) 672, 25
75 Article 63, § 2 TEC.
76 ECJ, 26 april 1977, Opinion 1/76, Draft Agreement establishing a European laying-up fund for inland waterway vessels, ECR 1977, 741,.
conclude international agreements necessarily finds its basis in the Community law in force. A relationship between the agreement and Community law can be established when the agreement is capable of affecting the Community rules. The *ratio legis* is the importance to guarantee consistency and uniformity in the application of Community rules and as such ensure its effectiveness. Accordingly, the case where an agreement affects Community law establishes exclusive competence for the Community. Besides, the Opinion explicitly qualifies measures “relating to the treatment of nationals of non-member states” as necessarily affecting “the Community rules within the meaning of the ERTA judgment”\(^{78}\). The TEC provisions and the settled ECJ case-law are in conflict. To date there has been no case that dealt with readmission agreements. Nevertheless, Lisbon repeats even firmer that the competence in the Area of Freedom, Security and Justice is a shared one\(^{79}\) but also the increased activity of Member States in the conclusion of bilateral agreements witness a shared competence.\(^{80}\) When the Union exercises its competence in an area where competence is shared with the Member States, the Member States shall withhold of exercising their competence. The Member State’s competence revives when the Union ceases to exercise its competence in that particular area. Accordingly, Member States may not conclude or start negotiating a readmission agreement when at the level of the Union negotiations are ongoing or agreements are concluded with third countries.

Non-compliance qualifies as a violation of the principle of cooperation in good faith and the principle of sincere cooperation\(^{81}\). This principle ensures that Member States assist the EU in complying with its objectives. Difficulties to determine whether the Member States are entitled to initiate negotiations with a certain third country arises particularly in the case where a negotiating mandate was issued by the Council, but no agreement can be reached. Typical examples are the mandates for Morocco, Algeria and China. As time lapses at the EU level, the conclusion of an agreement with these target countries becomes very unlikely. The Member States, eager to make great progress in the readmission policy had already in 2003\(^{82}\) threatened the Commission that they would conclude the agreements themselves if they didn’t make progress any time soon. Spain doesn’t seem to make


\(^{79}\) Art. 4, §2, j) TFEU.

\(^{80}\) The cobweb of national readmission agreements has expanded immensely since the late 1990’ies. See annex 4.

\(^{81}\) Article 4 (3) TEU.

empty promises and concluded bilateral readmission agreements with its most important target countries; Algeria and Morocco. The Commission, although possibly successful, did not initiate an infringement procedure.

3.5 Mixity?

In this regard, we cannot but note the mixed agreements. The notion of mixed agreements was created by the ECJ due to a lack of Treaty provisions and even today the Lisbon Treaty remains silent about this very important external relations instrument. In cases where the Union nor the Member States have exclusive competence on all the themes subject to an international agreement, then the agreement is signed both by the EU and every Member State. This procédé allows to proceed with negotiations without worrying about the division of competences. The downside are the often very long ratification procedures which prevent the timely entry into force of the treaty.

Mixed agreements, although often indispensable to ensure effective Union action in case of a division of competences, also provide the Member States with a powerful tool to keep in control of EU negotiations. By inserting certain elements in an international agreement that require the Member States’ cooperation, the conclusion of a mixed agreement instead of a regular EU agreement is imposed. Member States tend to do so for agreements that are of great importance to them. Traditionally, Member States are reluctant to give up migration policy sovereignty, as witnesses its position in the AFSJ and the continuous refusal to transfer competence to the Union in legal migration. It would therefore not be surprising that the Member States also try to keep an eye on readmission agreements. But the Member States are also eager to see quick results in this area and the lengthy ratification procedure prevents them to force the mixed agreements procedure. It is safe to state that where the Member States want to see quick results, they avoid mixity.
4. EU readmission agreements

4.1 What are readmission agreements?

Readmission agreements involve reciprocal obligations for the European Union and the third country to cooperate in the return of illegal immigrant to their country of origin or transit.

These agreements are part of the larger EU return policy. Besides mutual recognition of decisions on the expulsion of third country nationals, the organization of joint flights, etc. are readmission agreements the main means of executing the common return policy.

4.2 Readmission clauses

Readmission agreements are not the only instruments to ensure an effective return policy. Readmission clauses are an integral part of many association and cooperation agreements concluded by the European Community or today the Union and often provide a framework for the negotiation of readmission agreements.

In 1995 the Council adopted standard clauses of readmission to be considered to be included on a case-by-case basis in all mixed and Community agreements. The parties to the agreement commit themselves to readmit their own nationals and provide a framework to conclude readmission agreements with the Member States, upon their request, to further implement readmission obligations and to agree on specific duties. In this era, readmission agreements were still to be concluded by the Members States since the Community only in 1999 gained competence to do so. Regardless of the incompetence of the Community in this area, the standard clauses could be included in global agreements such as association and cooperation agreements. From the Amsterdam Treaty onwards, these standard clauses changed in the sense that readmission agreements, as foreseen to negotiate in the standard clause, were now to be concluded by the European Community, without prohibiting the conclusion of bilateral readmission agreements with individual Member States with the purpose to handle specific readmission obligations. The standard readmission clauses are to be included in all Community agreements and in agreements between the Community, the Member states and third countries. The 1995 standard readmission clause was

---

inserted in agreements with Armenia, Azerbaijan, Georgia and Uzbekistan. The 1999 clause is a part of the agreements with the ACP countries, Croatia, Egypt, Macedonia, Algeria, Lebanon and Chile.\footnote{C., BILLET, “EC readmission agreements: A prime instrument of the External dimension of the EU's fight against irregular immigration. An assessment after ten years of practice”, EJML 2010, 47.}

The current set of standard clauses\footnote{Consequences of the treaty of Amsterdam on readmission clauses in community agreements and in agreements between the European Community, its member states and third countries, Council Doc. 13409/99.} read as follows:

\textbf{Article A}

\textit{The European Community and State X agree to cooperate in order to prevent and control illegal immigration. To this end:}

- State X agrees to readmit any of its nationals illegally present on the territory of a Member State of the European Union, upon request by the latter and without further formalities;
- and each Member State of the European Union agrees to readmit any of its nationals, as defined for Community purposes, illegally present on the territory of State X, upon request by the latter and without further formalities.

\textit{The Member States of the European Union and State X will also provide their nationals with appropriate identity documents for such purposes.}\footnote{C., BILLET, “EC readmission agreements: A prime instrument of the External dimension of the EU’s fight against irregular Immigration. An assessment after ten years of practice”, EJML 2010, 47.}

\textbf{Article B}

\textit{The Parties agree to conclude upon request an agreement between State X and the European Community regulating the specific obligations for State X and the Member States of the European Community for readmission, including an obligation for the readmission of nationals of other countries and stateless persons.}

\textbf{Article C}

\textit{Pending the conclusion of the agreement with the Community referred to in Article B, State X agrees to conclude, upon request of a Member State, bilateral agreements with individual Member States of the European Community regulating the specific obligations for readmission between State X and the Member State concerned, including an obligation for the readmission of nationals of other countries and stateless persons.}

\textbf{Article D}
The Cooperation Council shall examine what other joint efforts can be made to prevent and control illegal immigration.”

The standard clauses merely hold a general readmission obligation as exists under international law. The general readmission obligation as well as the standard clause have a general wording and do not foresee any practical measures or procedures. Accordingly, effective implementation of the obligations still requires the conclusion of an agreement. On various occasions, the standard clauses were in effect part of Community agreements with third countries. But the Community was in this regard not always successful. In many cases, the Community had to conciliate with less. Steve Peers identifies 6 levels of third country concessions which we will briefly set out here. The first level holds the least achievements, being a statement by the Community to readmit own country nationals, amounting to the sixth level, where the third country applies the internal EC rule. The levels in between range from an agreement to start a dialogue on readmission, a declaration that the third country will readmit its own nationals, a declaration on readmission and the future negotiation of a readmission agreement and the standard European readmission clauses. The question is whether the EU has a clear-cut policy regarding the readmission clauses, in spite of the objective to have the standard clause included in every agreement. The EU strives to create close ties with its direct neighbours. Therefore, the Western Balkan Countries are a traditional target to conclude far-reaching agreements with, including the standard clause. Other ENP countries, both in the East, as in the South have concluded agreements with the EU, holding concessions of at least cooperation “taking into account the principle and practice of readmission”. The more distant countries are, the less interesting for the Union to press for readmission obligations as they will rarely be qualified as possible transit countries. The EU will therefore not press for far-reaching readmission obligations at the risk of prejudicing the conclusion of the main agreement. For instance, relations with African, Caribbean and Pacific countries are subject to the Cotonou agreement. Article 13 of this agreement contains a reciprocal obligation of readmission of own country nationals and opens the door to negotiate readmission agreements, including the obligation to readmit third country nationals or stateless persons whenever one of the parties deems so necessary. Another partner country at a distance is Chile. In spite of the fact that the EU does not have great interest to insert the standard

---

88 For example article 84 of the EU-Russia agreement.  
readmission clause in an agreement with a country at such a distance, the agreement with Chile does contain the 1999 clause.

The European Union’s policy and achievements as regards readmission clauses is not very consistent. Still, there is a scheme of concentric circles varying through the distance of the partner country from the EU’s territory. Once the ENP Circle is surpassed, however, there is little coherence or even a plan to be discovered as regards a uniform readmission clause policy. The readmission clauses may trigger the conclusion of a readmission agreement between that third country and the EU. Still these clauses are usually not sufficient to ensure successful negotiations.

4.3 Targeting countries

The first step that had to be taken towards Community readmission agreements was to target the countries with which negotiations should start. SCIFA, the Strategic Committee on Immigration, Frontiers and Asylum, initially let every member state indicate which countries it deemed necessary to negotiate with. However, this was not perceived as a sufficient ground to select the targeted countries. Other considerations were, paraphrasing:

I. a careful analysis of the appropriateness of a readmission agreement with each of the countries on the list should be undertaken, including consultations with the relevant second pillar bodies;

II. account needed to be taken of the work already done in this area in the framework of the High Level Working Group on Asylum and Migration which had identified, in the Action Plans it had drawn up and which had been adopted by the General Affairs Council in October 1999, the need for readmission agreements to be negotiated with Morocco, Pakistan (in the Action Plan for Afghanistan) and Sri Lanka;

III. the Common Strategy on Russia and the draft common strategy on Ukraine called already for the conclusion of readmission agreements;

IV. readmission agreements could be counterproductive in certain cases; replacing well functioning practical cooperation with a formal set of rules would lead to delays due to the need to adhere to precisely formulated procedures;

V. account should be taken of the specific position of Member States facing particular problems with certain of the countries on the list;

---

VI. a standalone readmission agreement would prove difficult to negotiate in isolation and should be seen in a broader political context.  

The Council eventually followed the suggestions of the HLWG entirely, and also authorised the commission to start negotiations with Morocco, Sri Lanka, Russia and Pakistan in September 2000, Hong Kong and Macao in May 2001, Ukraine in June 2002.  

The second round of targeting countries to start negotiating with third countries was based on the Council’s proposal for a comprehensive plan to combat illegal immigration and trafficking of human beings in the European Union. This plan urged to identify those third-countries “generating illegal immigration”, indicating that this was not the main criterion in the first round of negotiations. The comprehensive plan was adopted by the JHA Council and sets the specified criteria to comply with the plan. Paraphrasing, the criteria are:

I. the migration pressure exerted by flows of persons from or via third countries, together with the number of persons awaiting return, needs to be assessed. The CIREFI Working Party's studies on these trends are instructive here. In addition, account may be taken of relevant obstacles to return, including the information provided by Member States in the framework of the Council conclusions on obtaining travel documents for the repatriation of people who do not fulfil or no longer fulfil entry or residence conditions;

II. given the European Union's forthcoming enlargement, countries with which it is negotiating accession agreements should not be included. However, third countries with which the European Community has concluded Association or Cooperation Agreements containing a readmission clause should be included;

III. in view of the pressure which illegal migration flows exert on the European Union's frontiers, the fact that a third country is adjacent to a Member State should be considered when negotiating such agreements;

IV. when the European Community signs a readmission agreement with a third country, this should involve added value for Member States in bilateral negotiations;

92 For the reasons of the choice of these countries, see N., COLEMAN, European readmission policy, 141-143.
94 Proposal for a comprehensive plan to combat illegal immigration and trafficking of human beings in the European Union, §76.
V. A comprehensive approach to the fight against illegal immigration calls for a geographical balance to be maintained between the various regions of origin and transit of illegal migration flows.95

The Council asks the Commission to draft negotiating mandates for readmission agreements with China, Turkey, Algeria and Albania which were eventually adopted by the end of 2002. Around the same time, November 27th 2002, the first Community readmission agreement was concluded with Hong-Kong 96. The second agreement being with Macao was signed on October 13th 200397 and the third one with Sri Lanka98 dates from June 4th 2004. Lastly was the agreement with Albania99 already concluded in November 2003, but only signed April 14th 2005. These being the only achievements so far, the progress in the readmission negotiations was all but successful. The Commission would in July 2004 submit a report to reveal the difficulties the Commission encounters during the readmission negotiations.100 However, the content of this report is largely classified. The report merely acknowledges that the negotiating third countries are geographically scattered, explaining in part the differences in progress.101 The Commission concludes that the delay in concluding agreements can be for the greatest part explained by the “series of external and internal factors of a political and technical nature which makes the negotiating position of the commission a challenging one”.102 The next Council meeting decides that new negotiation authorisations will only be done on a case-by-case basis, indicating its restraint in giving new authorisations. As main criteria to determine third countries with whom negotiations are wanted, the General Affairs and External Relations Council points to migration pressure and the geographical position, in the sense of creating a buffer zone.103 New negotiating mandates are, accordingly, not adopted until 2006. Negotiations were authorised for the FYROM104, Montenegro105, Serbia106, Bosnia and Herzegovina107 and Moldova108.

95 Criteria for the identification of third countries with which new readmission agreements need to be negotiated, Council Doc., 7990/02, 16 April 2002, §2.
103 N., COLEMAN, European readmission policy, 148.
Note that the selection of target countries is not always in line with the 2002 criteria. Notably point II on the candidate countries, those with whom accession negotiations are running, are not to be included in readmission negotiations. FYROM was granted the candidate status in December 2005\(^{109}\) and a negotiating readmission mandate was issued in November 2006. Even though the opening of accession negotiations was not recommended by the Commission until October 2009, initiating negotiations to conclude a readmission agreement seems to be in contrast with the objective of criterion II.\(^{110}\) The same goes for Turkey which is a candidate country ever since 1999 and for whom a negotiating directive was issued a few months after the 2002 JHA council. Even after the initiation of accession negotiations, the EU would remain to insist on the conclusion of a readmission agreement. As regards the case of Macedonia, the exception embedded in criterion II finds application since the EC-Macedonia Stabilization and association Agreement held a standard readmission clause. Indeed, “third countries with which the European Community has concluded Association or Cooperation Agreements containing a readmission clause should be included” as a target country to conclude a readmission agreement.

In answer to the 2011 Commission evaluation of readmission agreements in force\(^{111}\), the Council was invited to set forth refined criteria to indicate the target countries. In their Conclusions defining the strategy on readmission, the main criterion remains the migratory pressure the EU or a Member State is confronted with.\(^{112}\) After that, the cooperation by a third country on return determines whether it is a target country. The fewer it cooperates on an informal basis, the higher the likelihood the EU will propose to initiate readmission negotiations. Geographical proximity is also an important determinant. The question mainly is whether the third country is situated along a migration route leading to the EU. However, the Council wishes to mainly turn its attention to countries of origin rather than countries of transit. This fits the new return policy of coupling return with other measures, such as the creation of opportunities of legal migration, tackling root causes and the prevention of ‘brain drain’.

\(^{109}\) Presidency Conclusions, 15/16 December 2005.
\(^{110}\) C. Billiet, “EC readmission agreements: A prime instrument of the External dimension of the EU’s fight against irregular Immigration. An assessment after ten years of practice”, *EJML* 2010, 54..
\(^{112}\) Council conclusions defining the European Union trategy on readmission, 8 June 2011, Council Doc. 11260/11.
4.4 Incentives for third countries

4.4.1 Introduction

EU readmission agreements contain reciprocal obligations for both the Member States of the EU as for the third partner country. Nevertheless is the EU confronted with a higher migratory pressure which leads to an unsymmetrical implementation of the agreements. The partner countries are aware of these unequal obligations. Still, readmission agreements continue to be concluded. It is important to understand that the inequality of arms of the parties are a first important explanation for the consent of the third country to take up these obligations. The European Union’s economical and political supremacy over most third targeted countries is a very convincing incentive to hold on to good relations. Billet\(^{113}\) sees proof for this contention in the EU-Russia agreement, as Russia is a powerful nation. The EU-Russia agreement turned out to be quite different in terms of time limits and pragmatism compared to the agreements from around the same time.

4.4.2 Challenges for the third country to take up readmission obligations

The Union’s goal of cooperation with third-countries concerning immigration is not always compatible with the vested interests of the third country. In the area of readmission there are many difficulties regarding every kind of readmission.

Readmission of own state nationals is an obligation under customary international law. This contention is based on every citizen’s right to return to his or her country of origin\(^{114}\), “the corollary of which must be the obligation of the state to allow one to do so”\(^{115}\). Still, readmission of own country nationals can be very burdensome for the home-country. Trauner and Kruse\(^{116}\) distil three challenges. Firstly, the relatives of the irregular immigrant back home may be economically

\(^{113}\) C. Billet, “EC readmission agreements: A prime instrument of the External dimension of the EU’s fight against irregular Immigration. An assessment after ten years of practice”, \textit{EJML} 2010, 68.


\(^{115}\) A. Roig and T. Huddleston, “EC readmission agreements: a re-evaluation of the political impasse”, \textit{EJML} 2007, 364. For an extensive elaboration on the obligation to readmit own nationals see K., Hailbronner, “Readmission agreements and the obligation on states under public international law to readmit their own and foreign nationals”, \textit{ZAORV} 1997, 1-49.

dependent of the money sent home by the immigrant. Cutting these people from this resource because of the return of the migrant can have devastating consequences for these families. The economic logic eventually predicts a deterioration of the economy if the consumer demand-side drops due to large scale readmissions. Secondly, the irregular migrants may, upon their return, prefer to stay in the major cities instead of returning to their originally mostly rural origin, sometimes accompanied by their family. The home-country is then confronted with challenges of urbanization. Thirdly is return often viewed as ineffective due to the intention of the returnee to re-emigrate. Especially the forced returnees show this intention.

*Table 1: intention of returnees to re-emigrate*\(^{117}\)

<table>
<thead>
<tr>
<th>Type of return</th>
<th>Definitely</th>
<th>Probably</th>
<th>Not now</th>
<th>Never</th>
<th>Does not know</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Decided</td>
<td>15.5</td>
<td>20.5</td>
<td>16.0</td>
<td>26.5</td>
<td>21.6</td>
<td>100</td>
</tr>
<tr>
<td>Compelled</td>
<td>32.6</td>
<td>20.1</td>
<td>15.2</td>
<td>14.3</td>
<td>17.9</td>
<td>100</td>
</tr>
</tbody>
</table>

Third Country nationals and stateless persons traditionally pose many difficulties in negotiating their readmission. Major concerns are the burden resting on the often unequipped, both financially and institutionally, transit country to readmit these TCN’s to their country of origin and a feeling of ‘passing the buck’.

**4.4.3 Overview of incentives at the Commission’s disposal**

Europe being an interesting international partner is of course not the only reason why the partner countries decide to concede in the Union’s wishes. For these reasons, the EU had to propose a global development package\(^{118}\) or provide compensatory measures\(^{119}\). These compensatory measures


\(^{118}\) Report on the effectiveness of financial resources available at community level for repatriation of immigrants and rejected asylum seekers, for management of external borders and for asylum and migration projects in third countries, COM (2002) 703 final, 5.

\(^{119}\) Report from the Commission to the Council, the European Parliament, the European Court of Auditors, the Economic and Social Committee and the Committee of the Regions: Tempus (pha.re/cards and tacs), annual report 2000, COM (2003) 323 final, 14.
include visa facilitation, preferential trade access to the EU internal market and Judicial and technical assistance to cooperate on the control of migration flows.\textsuperscript{120, 121}

A first ‘carrot’ that the EU can offer is the prospect of future accession to the EU. In January 2011, the negotiations on an EU-Turkey readmission agreement were finalized. Turkey is accordingly the most recent and the most obvious example of this tool. Evidently the tool of future accession is usually not available during negotiations since most target countries are not eligible for EU membership. The other incentives that the EU has at hand are discussed below. Firstly, the EU can grant financial support and development support to countries that cooperate in combating illegal immigration. Secondly, the negotiations on readmission are often tied to negotiations on visa facilitation. The third and last tool is a broader cooperation with certain third countries in areas not limited to but including readmission obligations. Pilot projects are Mobility Partnerships.

4.4.3.1 Financial cooperation

The EU set up various instruments to provide financial and technical assistance to third countries. The case of Ukraine illustrates the financial commitments signed up for by the EU. A Joint declaration on Technical and Financial Support was attached to the EU-Ukraine readmission agreement providing a Joint Declaration on Technical and Financial Support which states that “the EC is committed to make available financial resources in order to support Ukraine in the implementation of this Agreement. In doing so, special attention will be devoted to capacity building”.\textsuperscript{122}

The EU complies with these commitments trough programmes designed to distribute assistance. These programmes are organized along geography or theme. It would lead us too far to list them all. It suffices to highlight three programmes. The AENEAS programme\textsuperscript{123} was a thematic programme set up in 2004 and intended to be operational until 2008, but was it was shortened to 2006. The objective of the AENEAS programme was to provide assistance to third countries to better manage migration flows through the development of legal migration, ensure international protection for


\textsuperscript{121} J. CASSARINO, The EU Return policy: Premises and implications, EUI, Robert Shumann Centre for advanced studies.


asylum seekers and refugees, create a policy to combat illegal migration and ensure readmission and reintegration of returnees. The programme funded in its three years of operation 107 projects as presented by different applicants. AENEAS was specifically “intended for those third countries actively engaged in preparing or implementing a readmission agreement, initialed, signed or concluded with the European Community”\textsuperscript{124}.

Today, for the period from 2008 until 2013 the European Return Fund\textsuperscript{125} is operational to assist return countries in the integrated management of return migration. The fund does not specifically target countries with which readmission agreements are under negotiation or concluded. Further assistance is since 2007 also provided through the European Neighbourhood Instrument\textsuperscript{126}. This instrument succeeds TACIS for the Eastern neighbours, as well as the Euro-Med Partnership. It assists in a variety of development projects, covering capacity building to address illegal migration. The instruments provide financial compensation to the countries taking up extended readmission obligations. They mainly help to increase the capacity to process readmission obligations and to accommodate returnees.

4.4.3.2 Visa facilitation

Visa facilitation agreements have been the most notable incentives the EU had to offer third countries to cooperate on readmission. Visa facilitation is granted to several partner countries, however not without scepticism from the side of the EU Member States. The largest proportion of eventually illegal migrants enter the Union legally but become irregular because they overstay their visa.\textsuperscript{127} Also the Commission felt that “visa facilitation or the lifting of visa requirements can be a realistic option in exceptional case only (e.g. Hong Kong, Macao); in most cases it is not”\textsuperscript{128}.

Still, visa facilitation agreements can be regarded as beneficial for both the EU as the partner country. The Eastern EU enlargement infringed the former liberalized movement in this region by establishing ‘Fortress Europe’. Some countries had close relationships with their neighbours or had

\textsuperscript{124} Article 1 §2 of the Regulation.
\textsuperscript{128} Green Paper on a Community return policy on illegal residents, COM (2002) 175 final, 23.
minorities living across the border. The new visa requirements for the Eastern neighbours of the new EU member states made it very difficult to travel and visa facilitation agreements were to ease this consequence of EU enlargement.\footnote{F. Trauner and I. Kruse, “EC Visa Facilitation and Readmission agreements: a New Standard EU Foreign Policy Tool?”, EJML 2008, 416.} A second measure trying to cover up the adverse effects of the Eastern enlargement process is the issuing of ‘local border traffic permits’. These permits allow inhabitants of the European Border area to engage in free local border traffic, not exceeding a border zone set at 50 kilometres. This section will, however merely address the visa facilitation agreements in combination with readmission agreements.

Acquiring a visa to enter the EU may be very burdensome and this is why third countries are so eager to obtain facilitation. Illustratively, it was usually not possible to obtain a visa in one visit to the Consulate. In a survey on visa policy in the EU Member states\footnote{J. Boratynski et al., “Visa Policies of European Union Member States, Monitoring Report”, Warsaw, The Stefan Batory Foundation June 2006, 80 p.}, only one fifth of the respondents of the survey could obtain a visa on his first visit. France was the sad champion with up to 9 visits required to obtain a visa. In this regard one must keep in mind that the average distance to the closest Consulate was no less than 300 kilometres.

The Unions leverage on visa consists of two parts. On the one hand there is the well-known visa facilitation that deals with the short-term visa and the conditions for obtaining it; the categories of people who can obtain short-term visa and practical issues such as fees and deadlines. Visa liberalization on the other hand reflects the long-term objective of making access visa-free. In contrast with the importance of visa facilitation, the EU competencies in this area remain rather limited. In fact, the EU is only competent in the area of short-stay visa, i.e. not exceeding 90 days, whereas the Member States remain fully sovereign over long-term visa.

Hong-Kong and Macao’s visa requirements were already lifted before the negotiation of readmission agreements and lifting visa for citizens from Sri Lanka or Albania didn’t seem wise due to security threats. Readmission agreements and visa facilitation were accordingly linked for the first time in the negotiations between the EU and the Russian Federation and with Ukraine because negotiations did not proceed. The negotiation of a readmission agreement with the Russian federation started on 23 January 2003. From October 2004 onwards the negotiations on readmission were held in parallel with negotiations on a visa facilitation agreement. With Ukraine, negotiations on readmission started on 18 November 2002. It was not until 3 years later that ‘back-to-back’ negotiations on visa facilitation were launched by the EU-Ukraine Policy Action Plan of 21 February 2005, as made
possible in The Hague programme. For the partner countries, visa facilitation is a precondition for the conclusion of readmission agreements, whereas for the EU it is the other way around. This different approach of the parties creates the risk of braking negotiations, rather than facilitating them in the sense that both parties would require the other party to advance in the preconditions. Eventually both agreements with both countries were presented as a package deal and were therefore signed simultaneously.

Every subsequently concluded readmission agreement would from the start be negotiated along with a visa facilitation agreement. The automatic linking of readmission with visa facilitation would come to an end with the negotiations with Pakistan. The agreement with Pakistan is the first one since the EC-Russia agreement to be concluded without the ‘package deal’. In the relations with Pakistan it seems that the implementation of the cooperation agreement on partnership and development was made conditional upon the conclusion of a readmission agreement and therefore no promises on visa facilitation were needed. It does, however, turn out that every negotiating partner searches visa facilitation to compensate readmission, but the negotiating mandate not always allows it and raises the need of other incentives such as broader cooperation agreements. For instance, the negotiations with Turkey and Morocco exclusively contain readmission.

What follows is a brief overview of the content of these visa facilitation agreements. Although there are some dissimilarities between the agreements, their contents are largely analogous. The agreements, for example, fix the fee of all visa applications at the sum of €35, set a maximum period of time to take a decision on granting a visa on 10 calendar days. The agreements also establish simplified procedures for certain categories of people and hold a simplification of the documents that are to be presented. The agreements with the Western Balkans, being Serbia, Montenegro, Macedonia, Albania and Bosnia Herzegovina, are the most comprehensive ones as they contain the most categories of persons eligible for visa; they are the only countries that enjoy facilitation for tourists and have a clearer goal of eventually establishing a visa free travel regime. Tough, this is also

---

132 Common Approach to visa facilitation, adopted by EU member states at the level of the Committee of Permanent Representatives of 20 December 2005, Council doc. 16030/05.
135 See Infra and Ibid., 71.
the eventual goal for all the other visa facilitation agreements. With regard to the Western Balkans, the EU wants to speed up the process of visa free travel because of the history of visa free travel of the Western Balkans. The EU shut the borders and imposed visa requirements upon the violent disintegration of the Western Balkan countries. When the situation stabilized, these countries started to lobby to weaken the visa requirements. The Thessaloniki Summit has proven to be a first acknowledgement by the EU in that regard.

“We acknowledge the importance the peoples of the Western Balkans attach to the perspective of liberalization of the EU’s visa regime towards them. (…) The Western Balkan countries welcome the intention of the Commission to hold discussions, within the framework of the Stabilization and Association Process, with each of them, regarding the requirements for how to take these issues forward in concrete terms.”

When negotiations on readmission and visa facilitation were initiated, the Western Balkans were not too keen on settling for visa facilitation. Therefore these agreements explicitly are conceived as “a first concrete step towards the visa free travel regime”. Much to everybody’s surprise, the Council in effect launched the visa liberalization process after the entry into force of the package deals. As a result, on 19 December 2009, The EU became freely accessible for Macedonia, Montenegro and Serbia.

On the other end, the least ambitious visa facilitation agreement is the first one; EC-Russia. The European parliament describes the agreement as “an example of the essentially pragmatic way in which [the EU-Russian] relations are unfolding”. Being a pilot agreement at the time, it served as a learning basis for later agreements. The subsequent agreement with Ukraine took the Russian agreement as an example and only has a slight expansion of the categories of citizens who enjoy facilitated visa procedures. The agreements EU-Moldova and EU-Georgia are very similar, but with Georgia being more extensive regarding the issuance of multiple-entry visa. These agreements balance in between the more limited initial agreements and the far-reaching agreements with the Western Balkans.

4.4.3.3  Mobility partnerships

In spite of the incentives that are at the EU’s disposal, the effective conclusion of readmission agreements remains rather limited. Many emigration or transit countries are reluctant to take up the unbalanced readmission commitments in the absence of sufficient commitments by the EU. The EU’s migration management therefore needed a new tool to enhance its cooperation with target countries.

The 2005 Global Approach to Migration (hereinafter GAM) called for the “need in the short-term for broad-ranging concrete actions”. The GAM initially targets Africa and the Mediterranean after the human disaster that occurred in September 2005 in Ceuta and Melilla, two enclaves on the coast of Morocco and pertaining to Spain. Hundreds or thousands\textsuperscript{138} of migrants attempted to cross Spain’s land borders. Figures indicate up to 14 casualties. The EU leaders recognized the growing problems with illegal migration and met in October 2005 at the Hampton Court that preceded the eventual GAM adopted by the European Council.

The Commission one year GAM evaluation\textsuperscript{139} introduces Mobility Packages as a concrete action and sets these as an objective that could be agreed “once conditions have been met, such as cooperation on illegal migration and effective mechanisms for readmission”. The Commission also suggests to expand the GAM to other regions such as Eastern Europe, Latin America and Asia.

The idea is that Mobility Partnerships provide a political framework - and is as such not legally binding - for initiatives to manage migration “while fully respecting the division of competences as provided by the Treaty”. The competences of the Member States in the area of legal migration will accordingly not be affected. The legal nature of Mobility Partnerships is therefore inevitably very complex as some elements will fall under Community competence and other elements under Member State competence. Ensuring the division of competences also means that the Partnerships are accessible ‘à la carte’. The Member States can choose whether they wish to engage in these partnerships. This opt-in approach hampers consistency and coherence.

Mobility Partnerships, in providing a framework lend themselves to a very new approach. They offer the possibility to combine both legal and illegal immigration “to develop a balanced partnership with third countries adapted to specific EU Member States’ labour market needs” and explore “ways and

\textsuperscript{138} Depending on the source.

\textsuperscript{139} The global approach to migration one year on: towards a comprehensive European migration policy, COM (2006) 735, 7.
means to facilitate circular and temporary migration”. Legal and illegal migration are linked in the mobility partnerships in the sense that the Union wishes to engage in the improvement of the management and even create legal migration possibilities on the condition that the third country makes efforts in the combat of illegal immigration.

In 2007 the Commission issued a Communication on circular migration and mobility partnerships between the European Union and third countries to make proposals on the different forms of legal migration. Following this Communication, the Council suggested to test this new concept and issued negotiation mandates for pilot Mobility Partnerships with Moldova and Cape Verde. By May 2008 the partnerships were concluded. A third pilot partnership was concluded with Georgia by November 2009. Soon we may be also expecting such Partnerships with Armenia and Ghana.

The goal of Mobility Partnerships is migration management in cooperation with third countries. To this end the partnerships frame a triptych of action areas. The first area concerns legal migration and integration, envisaging information campaigns on legal migration channels and opportunities and capacity building in the partner country. The second area concerns linking migration and development, including the mitigation of the adverse effects of ‘brain drain’ and supporting circular and return migration. ‘Brain drain’ means that developing countries subject to emigration lose their highly skilled and innovative citizens. Circular migration is the temporary back-and-forth movement between two or more countries and where the migrant returns to his country of origin. The last area fights illegal immigration and trafficking in human beings trough improving border management in cooperation with EU agencies and cooperation in the readmission of irregular migrants. The framework is to be developed and implemented through the proposition of projects and programmes by the participating Member States, the Commission and the third partner country. The partnerships do foresee some concrete measures, such as the development of a migration profile of the third partner country and the setting up of a Local Monitoring Group.

As regards the voluntary cooperation of the Member States there are great disparities both in the countries that participate in the entire partnership and in the proposals to implement the partnership.

---

141 See Annex for an overview.
Table 2: Mobility Partnerships

<table>
<thead>
<tr>
<th>Third Country</th>
<th>Member states participating</th>
<th>Number of initiatives</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cape Verde</td>
<td>Spain, France, Luxembourg, Portugal and The Netherlands (joined later in 2008).</td>
<td>31</td>
</tr>
<tr>
<td>Moldova</td>
<td>Bulgaria, Cyprus, Czech Republic, France, Germany, Greece, Hungary, Italy, Lithuania, Poland, Romania, Slovenia, Slovakia and Sweden.</td>
<td>64</td>
</tr>
<tr>
<td>Georgia</td>
<td>Belgium, Bulgaria, Czech Republic, Denmark, Germany, Estonia, Greece, France, Italy, Lithuania, Latvia, The Netherlands, Poland, Romania, Sweden and the UK.</td>
<td>17</td>
</tr>
</tbody>
</table>

Generally, initiatives are taken in the categories of monitoring migration flows, management of legal migration and integration, the facilitation of mobility through issuing short-stay visas, linking migration to development through encouraging investment in the country of origin, implementation and technical assistance to establish an asylum system in conformity with the minimum international standards, ensuring effective border management and fight illegal migration. The latter entails return policy and is therefore relevant to the scope of this dissertation. The conclusion of readmission agreements is inevitably one of the concrete proposals.

In the case of Moldova, the signing of a readmission agreement predated the negotiations of a mobility agreement. In this case the readmission agreement constituted in fact a precondition to start negotiations. The Mobility partnership merely sets forth cooperation on readmission and foresees in the further facilitation of visa through further enlarging and developing the Common Visa Application Centre. The case of Cape Verde is a different one. Plans to conclude a readmission agreement

---

agreement between the EU and Cape Verde only emerged after the Mobility Partnership. Execution will be given to article 13 of the Cotonou agreement through the proposal of the Commission to the council to issue a negotiation mandate to initiate negotiations with Cape Verde on a readmission agreement. One year after the Mobility Partnership, the negotiations could start. Until today however, no agreement has been concluded. Negotiations with Georgia to conclude a readmission agreement were initiated shortly after the start of the negotiations of the Mobility Partnership. The Partnership reaffirms the commitment of both parties to conclude agreement on the readmission of persons residing without authorization and the facilitation of the issuance of visas. The monitoring of the implementation of the forthcoming readmission agreement is brought under the frame of the Mobility Partnership.

Mobility Partnerships may be very advantageous, and are accordingly assessed as such by the Commission. The Partnership’s main characteristics are that Member State participation is voluntary and that they are mere political non-binding statements. In these elements lies both its weakness as its strength. Many of the issues dealt with under the framework are in hands of the Member states. These areas include those of interest to the third partner countries such as legal and labour migration. Therefore, during the negotiations which were carried out by the Commission, there was uncertainty about the concessions the Member States would make in this regard leading to rather complicated negotiations. Secondly, does the voluntary participation in Mobility Partnership prejudice a Common EU approach. In order to be successful, great commitment from every party is indispensable. To date, the Partnerships constitute “the most innovative and sophisticated tool [...] of the Global Approach to Migration and contribute significantly to its operationalisation”. Within the Partnership’s framework, on the proposition of a party to it, the parties take initiatives and set up projects to implement the GAM. Only the countries willing to participate do so and as such they allow a multi-speed Europe, with hard-core European pioneers, and the possibility for Member States to accede to the partnership and participate later. The Commission advises to further develop Mobility Partnerships because they allow the deepening of relations with the EU and a target country on a rather broad theme. They would also constitute “a

144 See annexes.
146 RESLOW, N., “The new politics of EU migration policy: analysing the decision-making process of the Mobility Partnerships”, Maastricht University, unpubl., 2010, 15.
valuable framework for increasing transparency, enhancing synergies, triggering cooperation and ensuring more cost-efficient operations.”

4.5 Procedure

The conclusion of readmission agreements is subject to a specific procedure. Article 218 TFEU, previously article 300 TEC indicates the procedure to conclude an international agreement.

Readmission agreements can be concluded by the Commission if it obtains a negotiating mandate, also called a negotiating directive issued by the Council and based on the Commission’s recommendation. A negotiating directive authorizes the Commission to initiate negotiations with a particular third country. The directive makes an outline of the topics that have to be discussed, which notions have to be defined but also mandatory indicates substantive elements that have to included in the readmission agreement. This but also the conferred powers on the EU limit the negotiating leverage of the Commission. The Council does have the power to grant the Commission a specific tool or a certain incentive to alleviate its limited negotiating freedom. The best example is the tying of readmission negotiations with the negotiations of visa facilitation agreements.

The proceedings start with the transmission of a standard draft readmission agreement which forms the basis of the negotiations. The draft agreement is subject to amendments by the Commission and the Member States, for example when during negotiations with a certain third country, the parties agree on a provision beneficial to the Union. To this end, regular informal meetings between the Member States and the Commission are held. This approach adds to the support the Commission wants to obtain from the Member States, as the initiatives are initially supported “from the bottom up”.

The transmitted standard draft agreement is always the latest modified version. The draft is a flexible instrument and accordingly provides the starting point of -sometimes tough- negotiations. The Commission and the third country conclude the negotiations by initialling the agreement. This is the moment when the negotiators are finished. The agreement is afterwards adopted by Council decision. In principle was unanimity voting required on issues subject to title IV TEC. However, only the first four concluded readmission agreements required unanimity. From 2004 onwards, QMV was sufficient due to the expansion of the application of art 251 EC on QMV to several articles under title

---

149 Art. 218, §2 TFEU.
150 COLEMAN, N., European readmission policy, 89.
IV. In essence, only measures in the area of legal migration would remain subject to unanimity voting. Today, the adoption of measures in the area of illegal immigration shall be done in accordance with the ordinary legislative procedure, requiring a mere QMV and after acquiring the consent of the European Parliament. The latter element is a major improvement compared to the previous situation where the EP could only deliver a non-binding opinion. The agreement enters into force as soon as both parties have fulfilled their respective national procedure of conclusion. In practice there are major differences between the time lapse to enter into force. The Western Balkans are the champions, needing only two and a half months to enter into force after the signing.

4.6 Content

4.6.1 Introduction

The Commission strives to conclude uniform readmission agreements. The identical structure of every agreement shows that the Commission to an important extent succeeds in that goal. This uniformity indicates a lack of taking the interests of the third party into account, which oblige the EU to present other incentives to get the agreement concluded.

Readmission agreements start with a preamble and define in their first article certain notions. Next are the agreements structured in eight sections. Section I sets out the readmission obligations of the third contracting party and section II does so in an identical manner for the European Community and later the European Union. Note however, that Ukraine and Pakistan only hold 7 sections, as sections I and II are addressed jointly under the first section. Section III describes the operational readmission procedure by setting time limits, an application procedure, means of evidence and so on. Fourth come the transit operations, fifth the allocation of the costs and section VI holds a non-affection clause along with specific provisions to protect the personal data. Section VII ensures the application and implementation of the agreement by setting up a joint readmission committee and opening the possibility to conclude bilateral implementing protocols. The last and eight section is entitled “final provisions" and addresses the territorial application of the agreement, its entry into force, duration and termination and provides that the annexes form an integral part of the agreement. The annexes contain common lists of documents that prove nationality or the fulfilment

151 Council decision 2004/927/EC of 22 December 2004 providing for certain areas covered by Title IV of Part Three of the Treaty establishing the European Community to be governed by the procedure laid down in article 251 of that treaty, OJ L 396 of 31 December 2004, 45-46.
152 Article 79 §2, c) TFEU.
153 Article 294 §8 TFEU.
of the conditions for readmission. The annexes also contain a model document to launch the readmission application.

### 4.6.2 Territorial application

The readmission agreement applies to the contracting third country and to the EU’s Member States. However, Denmark, the United Kingdom and Ireland are special cases.

The preamble already reminds the partners of the situation with Denmark and also the first article defines a Member State as “any Member State of the European Union, with the exception of the Kingdom of Denmark”. Denmark abstains from title V of part 3 TFEU, former title IV TEC, and is therefore not a party to readmission agreements concluded by the EU. In 1992 Denmark obtained four opt-outs, one of them concerning Justice and Home Affairs. The opt-out remained in place also after the Lisbon Treaty but the Protocol foresees that, in case of an affirmative Danish referendum, the abstention can be changed into Danish participation on a case-by-case basis, like the opt-outs of Ireland and the UK. To alleviate the current opt-out of Denmark, the contracting parties make a joint declaration that repeats Denmark’s exemption but also encourages Denmark and the third partner country to conclude a bilateral readmission agreement. Similar joint declarations are inserted for certain non-EU Member States who nevertheless have a very close relationship with the EU: Norway, Iceland and Switzerland. A joint declaration on Switzerland was only inserted from the agreements with the Western Balkans onwards, except for the agreement with Pakistan because of the late Swiss cooperation in matters of asylum and the Schengen convention.

Also the position of the UK and Ireland deserves some attention, although it is not until the latest readmission agreement that their situation is addressed in the preamble. Following protocol n° 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, these countries are free to opt-in or to opt-out from any agreement in the AFSJ. Within three months after the proposal of the agreement in the Council, the UK and Ireland are to notify the President of the Council of participation. Even when they decide to opt-out, they are free to participate in any later stage. This situation is a lot more flexible than the arrangement with Denmark. Because the UK and Ireland only have to notify after proposal to the Council, the readmission agreement does not contain any reference to these countries. It is the concluding

---

154 Protocol n°5 on the position of Denmark as attached to the Treaty of Amsterdam.
155 Art 7-8 Protocol n°22 on the position of Denmark as attached to the TFEU.
Council decision that addresses this. The United Kingdom participates in every EU readmission agreement, contrary to Ireland who only participates in the agreement with Hong-Kong. Of course the opt-outs are detrimental to a coherent EU approach. This pick and choose approach has allowed the UK to free ride, as it participates in every readmission agreement and thus not being different from any other member state, it does not participate in the back-to-back visa facilitation agreements.

4.6.3 Preamble

The preamble sets out the objective of the agreement. The parties to the agreement wish to strengthen their cooperation in order to effectively combat illegal immigration. More specifically does the agreement establish “on the basis of reciprocity, rapid and effective procedures” to return persons who do not fulfil the conditions for entry into, presence in, or residence on the territory of either of the contracting parties. The agreement with Sri Lanka is the only one additionally indicating the specific interest of the Community to have agreement on readmission with the partner country. The agreement with Sri Lanka targets the increased criminal groups that mainly engage in smuggling practices. These groups severely concern the Community. Furthermore, the preamble also makes some primary remarks, emphasising its non-affection clause and reminding of the situation with Denmark.

The first article of a readmission agreement defines relevant concepts. Traditionally these include the terms “national”, “third country national”, “stateless person”, “Member State”, “visa” and so on. The definitions are largely the same in every agreement, but the concepts that are defined may vary according to the partner country profile. For instance only a few agreements define “border region”. We will see later that these agreements contain an accelerated readmission procedure which raises the need to define the term.

4.6.4 Readmission obligations

4.6.4.1 Reciprocal obligations

Sections I and II of the agreement set out the readmission obligations in a reciprocal manner. The different provisions may vary in wording, but the essence is the same. There are two types of returnees, own nationals and non-nationals. Both types of returnees are to be readmitted by the partner country if these persons do not or no longer fulfil the conditions in force for entry into, presence in, or residence on the territory of the requesting state.
The first type includes the persons that are nationals and the former nationals of the readmitting state. Former nationals are persons who were deprived of or have renounced their nationality. The Russian readmission agreement holds a very pragmatic and therefore very clear wording of the kind of person envisaged. Article 2, §1, 2 states that the Russian Federation shall readmit those who renounced the Russian nationality without afterwards acquiring residence authorization or the nationality of a member state. The same goes the other way around in article 4 §1. However, there is no obligation for the partner country to readmit a former national if that person was promised naturalization in the requesting state. That person is necessarily not yet naturalized, because otherwise the agreement would not find application.

The second category consists of third country nationals and stateless persons. In principle there are no readmission obligations in this category, unless such a person held a valid visa or residence authorization as issued by the requested state or unlawfully entered the territory of the requesting state directly from the requested country. Save the case of Albania, readmission obligations are limited to direct arrivals. To understand the meaning of travelling directly from the requested country to the requesting country, one might find inspiration in the agreements with Sri Lanka and Pakistan where direct arrival is defined in article 3, §1, b). “A person comes directly from [the requested state] within the meaning of this subparagraph if he or she arrived on the territory of the Member States by air or ship without having entered another country in between”. A direct remark that has to be made is the exemption for mere airside transit via an international airport. This is a ‘transit without entering’ the territory of the requested state and does not raise readmission obligations. The second exception for the readmission of third country nationals and stateless persons is when the requesting state has issued a visa or a residence authorization for the TCN or stateless person, unless he or she holds a visa or residence authorization from the requested state which has a longer period of validity.

The Commission evaluated the EU readmission agreements as requested by the Council in the Stockholm programme. The evaluation should comprise the existing EU readmission agreements, the ones under ongoing negotiation and the Commission had to propose a mechanism to monitor the implementation of the agreements. The Commission consequently did so, and in February 2011 the long-expected Commission Communication came out in the form of a rather limited fifteen paged report. From the obtained data, the Commission drew some recommendations for the Council to

---

156 The agreements with Macao and Hong Kong do not refer to nationals but to permanent residents.
157 As worded in article 3,§2 a) of the agreement with Macao.
propose a new strategy as also requested in the Stockholm programme. The Evaluation came out along with four Commission Staff working Documents, providing the Eurostat data, the data gathered from the Member States through a questionnaire, a state of play and an evaluation of EU readmission agreements implementing protocols signed or concluded by the Member States under the EU agreements in force.

The Commission based its evaluation on the data gathered in the Member states through a questionnaire\(^{159}\), assessing data and feedback. Twenty-one Member States have cooperated with the commission and provided data per third country that has concluded a readmission agreement with the Union. The assessed countries are Albania, Bosnia and Herzegovina, Serbia, FYROM, Montenegro, Russia, Ukraine, Moldova and Sri Lanka. The Member States had to provide information on the number of applications for own and third country nationals, the number of and type of response, the number of accelerated procedures and an assessment of effectiveness. The figures obtained following the questionnaire are not entirely reliable because some very important ‘migration destination countries’ such as Greece and Spain did not submit any data to the Commission. Other missing countries are Latvia, Malta, Bulgaria, the Netherlands, Finland and Portugal. The Commission further adds that some Member States could only estimate the number of readmission applications per third country per year. Other, more reliable data is available from Eurostat,\(^{160}\) a Directorate-General of the European Commission and the provider of a European Statistics database. The statistics used by the Commission in this regard are the third country nationals apprehended in the Union, the return decisions issued in the Member States for the third country nationals and the number of third country nationals that in effect returned. It is important to note that data are only available for the third country nationals from Albania, Bosnia and Herzegovina, Serbia, Montenegro, FYROM, Russia, Moldova, Ukraine and Sri Lanka for the years 2006-2009.

It is in this regard that the Commission already makes the first recommendation, namely that the Eurostat data should provide a reliable basis to draw conclusions. For that purpose Frontex could play a role in the gathering of statistical data.

Readmission agreements contain provisions both on the readmission of own country nationals, reflecting an obligation under international law, and the readmission of third country nationals who have transited through the territory of the contracting party. Experience during the negotiations teaches us that the former is usually not subject to great discussion and bargaining. This is all the

\(^{159}\) Evaluation of EU readmission agreements: The aggregated data for the chosen categories gathered by the Commission from the MS on the basis of a questionnaire, SEC (2011) 210.

more the case when it comes to provisions on the readmission of transiting third country nationals or stateless persons. The third countries feel that they should be responsible and therefore should not carry the burden to readmit this category of illegal migrants. Clauses on the readmission of third country nationals have made it difficult if not impossible to conclude readmission agreements with certain countries, whereas their importance when assessing their application is marginal. Only 63 applications for the readmission of third country nationals have been done by all the Member States under all the readmission agreements, excluding Ukraine. That country knows a remarkably high number of applications for readmission of TCN’s. In 2008 and 2009 the country received 1725 applications for the readmission of own country nationals and no less than 1175 applications for the readmission of third country nationals. These figures show great disparities between the effective need to have include provisions on the readmission of third country nationals. Therefore the need for TCN clauses should be carefully investigated for every country. In line with this recommendation, the Commission suggests that new negotiating directives should indicate whether TCN clauses are desirable. The Council should make this assessment on the basis of geographical position and the potential risk of transit migration.

The difficulty to persuade third countries to include TCN clauses, which is why the negotiations may be very time-consuming, is reflected in the great incentives these countries ask for and the discrepancy with the limited available Community means. Again it is usually preferable to at least have an agreement on the readmission of own country nationals instead of taking up heavy commitments. This could, however, negatively affect the willingness of the transit countries that would require the inclusion of TCN clauses in order to be of any benefit to the Community. An alternative concession the Commission proposes is that the EU commits itself to first try to readmit the third county nationals to their country of origin. Also, the Member States tend to be more exigent on European readmission agreements, requiring always inclusion of TCN clauses. The Commission calls on the Member States to “support the Commission’s readmission negotiating efforts more whole-heartedly and not lose sight of the overall interest that a concluded European readmission agreement represents for the entire EU”

Concerning the readmission of own country nationals, being in practice by far the most important category, the Commission seems to be pleased with the contribution of European readmission agreements to the combat of illegal immigration. 20.1% of the apprehended illegal immigrants came from countries with which the EU had concluded a readmission agreement. Still, this encouraging number in light of the limited number of agreements concluded up until 2009 reveals a downward trend. The data for the previous years are 2006: 23.4%, 2007: 26.9% and 2008: 21%. Having these
figures at hand we will compare the effectively returned third country nationals to their country of origin, but not without recalling the insecure reliability of the figures. In 2006 the Eurostat data indicate an actual return of immigrants originating from a contracting country of 42.3% of all the TCN returns. That number amounts to 53.5% in 2007 but again decreases in 2008 and 2009 to 44.6% and 40.5% respectively. These percentages are off course correlated with the increase and decrease of the percentage of apprehended immigrants originating from a contracting country in respect of the total number of apprehended immigrants.

4.6.4.2 Evidence

Whether the immigrant holds the nationality of the requested state or whether he or she can be qualified as a TCN or Stateless person who should be readmitted can be evidenced by way of two types of evidence. On the one hand there is simple proof and on the other hand *prima facie* evidence. When documents that prove nationality are furnished, the partner countries in principle will without further investigation recognize nationality. *Prima facie* evidence provides a presumption that nationality is established unless the requested country can prove otherwise. Evidence is addressed in the third section under readmission procedure, but we will examine them here to ensure coherence. Article 8 of the readmission agreement addresses the means of evidence regarding nationality and simply refers to the annexes to the agreement that list the documents of evidence. Article 9 contains the means of evidence regarding third country nationals and stateless persons. The documents to be furnished may usually have expired, but may not be forged.

The documents to be provided that serve as proof of nationality are quite limited. But the means of providing *prima facie* evidence of nationality are legion. Which documents serve as proof and which ones serve as *prima facie* evidence differs between the different agreements. For instance seaman’s registration books provide proof of nationality in the agreement with Hong Kong, whereas these merely serve as *prima facie* evidence and are therefore rebuttable in the agreement with Serbia. Since official documents are *per se* related to the partner country, the document lists are always subject to negotiation when discussing a readmission agreement. In contrast to Coleman’s findings, there is no clear line to be drawn on the expansion or allocation of the document lists. To the contrary it seems that the lists truly reflect each country's particularity.

There is a consensus in annex 1 that passports *sensu lato* and identity cards provide proof of nationality. *Prima facie* evidence listed in annex 2 can be provided by photocopies of the documents that constitute proof of nationality, driving licenses, birth certificates, citizenship certificates, service

---

cards, statements by witnesses or the person concerned, along with the identification of the language spoken as determined by official tests. The Pakistani and Georgian agreements reflect the modern era with provisions on computerized identity cards, biometric data and the possibilities offered by the Visa Information System.\footnote{Only in the agreement with Georgia.} Annex 1 traditionally holds one document list that applies to both party countries. However, in some agreements the document lists are distinct for both parties. These are the agreements with Hong-Kong, Macao, Serbia and Montenegro. The agreements with the first two countries specifically indicate the documents per country. The EU clearly makes some concessions and accepts more documents to constitute proof of nationality then the other party, accordingly increasing its readmission obligations. From the agreement with Sri Lanka onwards the obligations as regards accepting documents are truly reciprocal; there is one document list applicable to both parties. Serbia and Montenegro re-introduce distinct lists, and prove that every list is negotiated on the basis of every country’s characteristics. Serbia distinguishes whether documents are valid as proof or \textit{prima facie} evidence according to the date they were issued. In 1992, the Former Republic of Yugoslavia was created after the violent dissolution. Identity cards and their photocopies issued between that moment and 2002 can be used as \textit{prima facie} evidence. Identity cards issued after that date constitute valid proof of nationality. Passports issued between 1992 and 1996 provide \textit{prima facie} evidence, and those issued after 1996 constitute proof of nationality. The 1996 date comes from the new law on travel documents of Serbia. Montenegro formed with Serbia, since 1992 the Former Yugoslav Republic and since 2003 the State Union of Serbia and Montenegro. In 2006 both countries became independent. Montenegro, in spite of the shared history with Serbia, preferred different dates to distinguish the value of the evidence. Identity Cards issued before the new law on identity cards in 1994 just serve as \textit{prima facie} evidence, whereas those issued after that date are proof of nationality. Passports dating from before 1997 with the entry into force of the new law on passports constitute rebuttable evidence of nationality. The ‘blue passports’ from 1997 onwards are solid proof. The other nine readmission agreements have single document lists.

The next sets of document lists indicate the documents required to evidence that a TCN or stateless person meets the conditions to raise a readmission obligation. The division is the same as for own country nationals. Annex 3 indicates the documents that prove nationality and Annex 4 lists the documents that provide rebuttable proof. Again there is a limited hard-core set of documents to provide proof. Agreements with Russia, Ukraine, Pakistan and Georgia contain the shortest list of documents of proof. They require a visa or a residence permit issued by the requested state or evidence of entry or departure, preferably by stamps in the travel document. The other agreements
are far more lenient and accept any kind of paper-based evidence that demonstrates that the person concerned has been present on or travelled through the requested state. This given may be established through furnishing certificates, proof on having used a travel agency, bills such as hotel bills or credit card receipts and travel tickets or passenger lists of any transportation vehicle. The non-paper based evidence are statements of border authority staff or official statements done by the person concerned in judicial or administrative procedures. Note that this type of evidence shall in a contradictory manner presume nationality in the agreements with the four ‘strict’ partners, as is also the case for certain other documents and statements. Annex 4 allows as evidence firstly, a description of the circumstances of interception of the illegal migrant. For example interception by government officials at the border or interception in a truck whose point of departure was the readmitting country, may constitute valuable evidence. Furthermore can an international organization provide information relating to the identity or place of stay of the person concerned. Lastly, can statements be taken into account, both from the person concerned as from persons from his or her surroundings such as family members and travelling companions.

Readmission agreements have in fact as main aim the establishment of these lists. Efforts were already made for that purpose in 1995 when the Council agreed on a standard Protocol on means of proof to be attached to readmission agreements.\(^{163}\) In the past, requested countries were too eager to refuse readmission based on technical or practical objections. These detailed document lists eliminate a substantial part of difficulties in the readmission process.

Coleman,\(^{164}\) however, warns that there are still challenges left and points at unwilling or undocumented migrants. Those cases only have limited means of evidence such as statements of family members and travel companions, information provided by international organizations or official statements of border authorities. The latest readmission agreements already provide some answers to these difficulties by allowing the appointment of nationality through biometric data in the case with Pakistan and the Visa Information System\(^ {165}\) with Georgia. This central database collects fingerprints and relevant information such as sex and country of origin about each visa applicant who wishes to obtain a short-stay visa or a transit permit for the Schengen Area. It is needless to indicate how valuable this information may prove to be.

---


\(^{164}\) N., Coleman, European readmission policy, 99.

4.6.4.3 **Travel documents**

As soon as nationality or fulfilment of the conditions for the readmission of third country nationals and stateless persons is established and the request of the requesting state is received, the requested state must provide the returnee with a travel document in order for that person to return. In principle this will be a national document from the requested state. If that country fails to provide such a document within a certain time limit\(^{166}\) that is usually 14 days, then that country will be deemed to accept the EU standard travel document. This provision does not allow an unwilling requested stated to prevent implementation of the agreement. A similar safeguard to ensure execution of the readmission, which may be to the detriment of the returnee\(^{167}\), is also inserted in the readmission application procedure which goes as follows.

4.6.4.4 **Readmission application**

The readmission of a person to his country of origin or transit is only done after a prior communication. After the discovery that a person does not or no longer qualifies to be present on the territory of the requesting state, that state shall lodge a readmission application with the requested state within a certain time limit, not exceeding one year. Note that for unspecified legal or factual obstacles the requesting state may request an extension of that time limit. The formal procedure as set out does not have to be applied in every situation. When the returnee is in possession of a valid travel document, a written communication addressed to the requested state party suffices to return that person.\(^{168}\) Up until the conclusion of the agreement with Albania the return had to be voluntary in this case.

The readmission application is done by a common form as annexed to the agreement and consists of two parts, the first one indicating the “particulars of the person to be readmitted” and the second one containing the evidence on which the requesting country bases its application. Evidently, the person to be readmitted has to be identified. However, calling it ‘evident’ may be misplaced. Many, but not all, agreements require the requesting country to indicate the person’s particularities ‘to the extent possible’. The agreement accordingly allows the state parties some discretion in the selection of data that will be transmitted. Traditionally should the form contain the person’s name, sex, civil status, place of birth, nationality but also physical characteristics that allow identification. Due to the mentioned discretion, it would theoretically be possible to lodge a readmission application for a

\(^{166}\) See annex 3.

\(^{167}\) See *infra*.

\(^{168}\) Article 6, §2 or article 4, §2.
person whose name is unknown, as long as there is sufficient evidence that this person meets the conditions for readmission. This discretion does leave room for possible disputes whether the partner country in fact did try to identify the person ‘to the extent possible’ and accordingly risks defeating the purpose of the readmission agreement. Some partner countries have a considerably high percentage of refusals compared to the total number of applications. For instance Serbia and Montenegro refused nearly 30% of their readmission applications in 2008 and 2009.169 Russia even exceeds that number between 2007 and 2009 to 34% of refused applications.170 Unfortunately, these figures do not indicate the motives to refuse a readmission application. Therefore we cannot make valuable conclusions as to whether the wording of describing the returnee’s particularities ‘to the extent possible’ poses problems. Nor can we deduce from the table any correlation between the discretion and the number of refusals.

Table 3: correlation between the discretion to identify the returnee and the number of refusals of readmission applications

<table>
<thead>
<tr>
<th>Country</th>
<th>‘to the extent possible’</th>
<th>% of refusals171</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sri Lanka</td>
<td>Yes</td>
<td>1%</td>
</tr>
<tr>
<td>Albania</td>
<td>Yes</td>
<td>2%</td>
</tr>
<tr>
<td>Moldova</td>
<td>Yes</td>
<td>7.5%</td>
</tr>
<tr>
<td>Bosnia Herzegovina</td>
<td>Yes</td>
<td>9%</td>
</tr>
<tr>
<td>Macedonia</td>
<td>Yes</td>
<td>16%</td>
</tr>
<tr>
<td>Serbia</td>
<td>Yes</td>
<td>27%</td>
</tr>
<tr>
<td>Ukraine</td>
<td>No</td>
<td>7%</td>
</tr>
<tr>
<td>Montenegro</td>
<td>No</td>
<td>29%</td>
</tr>
<tr>
<td>Russia</td>
<td>No</td>
<td>34%</td>
</tr>
</tbody>
</table>

The second requirement for a complete readmission application is the indication of the evidence on which the requesting country based its establishment of nationality or that the conditions for TCN and stateless persons are fulfilled.172 The requesting state should provide additional information whenever applicable. The requesting state on the one hand should provide information on the returnee’s health condition. The application should accordingly contain a statement indicating whether the person to be readmitted may need

---

172 See supra.
help or care. The person concerned must consent to that statement. On the other hand the partner country must indicate “any other protection, security measure or information concerning the health of the person which may be necessary in the individual transfer case”\textsuperscript{173}.

4.6.4.5 \textit{Reply to the application}

As soon as a complete readmission application reaches the competent authorities of the readmitting state, these have to reply without ‘undue delay’ and not exceeding a certain time limit.\textsuperscript{174} It is the date of receipt that launches the time limit countdown. The requested country may accept the application, issue a motivated refusal or not reply. In case of the latter, the requesting country will be deemed to have accepted to readmit the person concerned. This is the second situation\textsuperscript{175} where in case of a lack of response, the requested country is deemed to concede the request. In this regard it is important to note that no, save one, readmission agreement provides for the confirmation of receipt of the readmission application. The only exception is Russia, whose time limit to reply to the procedure only starts running after a confirmed application. When also the travel document does not require cooperation from the requested state, it may very well be that the receiving country is unaware that the person concerned is being returned. This possible lack of preparation of the return of the returnee can be detrimental to that person. Situations where the migrant has no one to rely on are not uncommon. Illustratively, nearly 50% of the MI.RE.M survey of Algerian, Moroccan and Tunisian compelled return migrants indicate that their financial situation has deteriorated compared to before they migrated to a third country. The main problems return migrants are confronted with are difficulties of reintegration such as continuous unemployment, low wages but also difficulties with the public authorities and a lack of an efficient Public Healthcare System.\textsuperscript{176} Accordingly, return migrants need to prepare their return carefully. The only protection against unknown and unprepared return provided by readmission agreements are the concrete arrangements both parties have to make to facilitate the readmission. The partner countries must set a transfer date, the manner and point of entry. This provision in article 9 or article 11 reduces the chances of entirely unknown readmissions. Nevertheless it seems as if an extra safeguard, such as a confirmation, should be built in.

\textsuperscript{173} Article 7, §2, b) or article 5, §2, b) of the agreement.

\textsuperscript{174} See annex and article 10 §2 or article 8 §2 of the agreement.

\textsuperscript{175} See \textit{supra} on the EU standard travel document.

4.6.4.6 Transmission of the person to be readmitted

When the readmission application was successful, the requested state must issue a valid travel document within a certain period of time. After issuance, a new time limit starts running for the effective readmission of the person concerned. The contracting parties must make arrangements to that end. As a rule the, transportation of the returnee will be done by air, without excluding transportation by land and sometimes by sea. The use of carriers and security staff may not be restricted to those of the requesting state. Authorized staff to carry out the transmission can be either requested state or requesting state staff. The use of joint flights may be a very convenient tool to carry out the transmissions. The Council Decision of 2004 allows the organization of joint flights for removals from the territory of two or more Member States of third country nationals who are subjects of individual removal orders.

4.6.4.7 Accelerated procedure

Some readmission agreements also contain an accelerated procedure that finds application when a person has illegally crossed the border, coming directly from the territory of the requested state and has been apprehended in the border region of the requesting state. The key criteria are illegal border crossing and apprehension in the border area. Border area, as defined in the first article of the agreement, is the area which extends up to 5 kilometres in the agreement with Georgia and 30 kilometres in every other agreement, including international airports and seaports where applicable. The agreements that contain this accelerated procedure are Russia, Ukraine, Macedonia, Serbia, Moldova and Georgia. The accelerated readmission procedure is similar to the regular procedure, except for the applicable time limits governing the lodging of the procedure, the reply to the application and in some cases the time limit in which the person’s transmission is to be effectuated. The requesting state must submit the application within 2 working days after the apprehension of the illegal migrant. A reply by the requested state has to be issued within 2 working days after receipt of the application. The agreement with Russia furthermore requires the transmission of the person concerned within 2 working days after the receipt of a positive reply to the application. The other readmission agreements do not contain an accelerated transmission.

177 Article 9 or 11 of the agreement.
4.6.4.8  Re-readmission

Especially with regard to this accelerated procedure, but not without importance for the regular readmission application is the provision on readmission in error. In the case the requested state can subsequently, and usually within three months\footnote{The readmission agreement with Georgia is more lenient and sets the time limit at six months for own country nationals, and at 12 months for Third country nationals and stateless persons.} after the transfer, establish that the requirements to trigger a readmission obligation, as usually set out in articles 2 to 5 of the readmission agreement, are not met. The requesting state is in such a case bound to take back the erroneous readmitted person in conformity with the rules of procedure applicable to any other readmission application. The re-readmission clause was only comprised in the agreements from the one with Albania onwards. From then on the provision was inserted in the standard text of EC readmission agreements.\footnote{N., COLEMAN, \textit{European readmission policy}, 101.}

4.6.4.9  Transit operations

Each readmission agreement contains a second procedure, namely the transit procedure. This procedure allows third country nationals and stateless persons to be returned, to transit the territory of a partner country if the readmission in the country of destination is assured. This feature is furthermore limited to situations where the person concerned cannot be readmitted directly. The situations triggering the possible application of the transit procedure are cases of return by land trough the partner country or countries of destination where no direct flight is available. Unnecessary transit trough a partner country for the sole reason of pressing the costs of the transmission of the person concerned is in principle excluded from this possibility.

The procedure goes as follows. If a partner country wishes to expel an illegal migrant, it may need to transit that person trough a partner country. The requesting state submits to the requested state’s competent authorities an application for transit by using a common form as attached to the readmission agreement. This form indicates 4 types of information. The requesting state first of all has to furnish general information concerning the transit such as the type of transit and the country of destination. The requesting state should also indicate more detailed information on the particular transmission such as the exact border crossing point, date and time of transfer and the possible use of escorts. The transmitted person is to be identified, requiring the same information indicating the particularities of the person concerned as if it were a regular readmission application. Lastly, the requesting state must make two declarations. The first one declaring that readmission in the country
of destination is assured, and the second one declaring that they are not aware of any reason to refuse the application. Upon reception of the application, the requested state must confirm the transit or issue a motivated refusal, both in writing. The requested state may refuse the transit for several reasons. As regards risks for the returnee in the country of destination or any subsequent transit country, the requested state may refuse transit if the person concerned could be subjected to criminal persecution or criminal sanctions. From the agreement with Albania onwards the requested state can also refuse if the person concerned risks being subjected to torture or to inhuman or degrading treatment or punishment or the death penalty or risk persecution on discriminatory grounds such as race, religion, nationality or risks political conviction. As regards the requested state, it may refuse transit if the person concerned is subject to criminal persecution or sanctions in the requested state or any other country or transit. Lastly, the readmission agreement allows refusal on grounds of public health, domestic security, public order or other national interests. These grounds for refusal may be invoked by the requested state, but in no way imposes any investigation of these concerns. So, what at first sight may be beneficial to the position of the returnee seems at a closer examination only in the interest of the requested state.

In case there are, according to the requested state, no such concerns, that state shall confirm the transit. Depending on the readmission agreement at issue, there may or may not be time limits to answer. The transit procedure will be finalized by mutual consultations arranging assistance in the operation. The partner countries are free to make any practical arrangements, save if the transit operation takes place by air. In this case, the returnee and his escorts will be exempted from obtaining an airport transit visa. Should the requested state, however, note circumstances that allow refusal of the transit or that readmission in the country of destination or an onward journey into the next country of transit is not assured, may revoke any authorization that it has issued.

The costs shall be borne by the requesting state until the border of the country of destination. This arrangement goes both for operations of transit as for operations of readmission.

4.6.4.10 Implementation

Implementation of the agreement is assured by the Joint Readmission Committee that monitors the situation, and can take binding decisions and make recommendations. The purpose is to assist the contracting parties in the application and interpretation of the readmission agreement. The Committee is composed of representatives of both contracting parties. The European Union shall be represented by the European Commission that will enjoy the assistance of Member State experts. The practical organization of the Committee is in its own hands, for it is invited to establish its own
rules of procedure and working language. Upon the request of one of the contracting parties, and in practice twice a year, the Committee will meet.

Its competences mainly lie in making practical technical arrangements to ensure a uniform implementation. It may for instance be useful to adopt additional common forms. The Committee may in this area take binding decisions, as is often also the case for amending the Annexes. Mainly the first readmission agreements grant the Committee broader competences to take binding decisions on amending the annexes. As regards the text of the readmission agreement, the Committee may suggest proposals for amendment that may be adopted by the consent of both contracting parties. In order to make these recommendations and to take these decisions, the Committees main task is to monitor the application of the agreement. Implementation by the parties may require legislative efforts, capacity-building of governmental structures and the development of accommodation facilities for returnees. The Commission may set up specific programmes to that end, such as the GUMIRA project in Ukraine and Moldova as carried out by the International organization of Migration.

A second means to ensure implementation of the agreement is the conclusion of bilateral implementing protocols. These are a possibility and are not strictly necessary for the implementation of the agreement. They intend to facilitate a specific and limited set of practical arrangements. The protocols may indicate the competent national authorities and contact points, define border crossing points and may indicate other means of evidence then those set out in the annexes to the agreement. A protocol can also set conditions for escorted returns. The Joint Committee has a role with regard to the implementing protocols. Firstly, the protocols can only enter into force after notification to the Committee. Secondly shall the Committee regularly exchange information on the implementing protocols. Although these protocols are concluded between an individual Member State and the third country, the monitoring of its implementation is done jointly with the Community agreement. This is not surprising since, save in the relations with Pakistan, any other Member State may request the application of the additional protocol in his relation with that third country.

With regard to the third countries with which European readmission agreements are concluded, the majority of the Member States applies the agreements. However, many member states felt the need to implement these agreements through protocols, even where this is not mandatory. The Commission takes the opportunity in its 2011 evaluation to stress that readmission agreements are in principle self-executing and that bilateral implementing protocols at the most can be of value to

---

181 N., COLEMAN, European readmission policy, 106.
facilitate their execution. The Member States may not claim the non-applicability of readmission agreements as “the MS need to apply EURAs for all their returns”.

4.6.4.11 Data protection

Every readmission agreement contains a clause on data protection. Its purpose is to make these agreements in conformity with the European directive\textsuperscript{182} on data protection and the domestic laws of both contracting partner countries. The clause assures that the processing of personal data of the readmitted person will be subject to those rules but also lists the principles the processing of personal data has to respect. Personal data must be processed fairly and lawfully, be adequately and accurately collected for a certain legitimate purpose. They may not be kept longer than necessary nor may they be kept if the processing did not comply with the provisions from the article on data protection. Only the competent authorities have access to the information. The personal data may only contain information on the particulars of the person concerned, his or her identity card or passport, the returnee’s stop-overs and itineraries and other information to make identification possible. The provision to a large extent recaptures the principles listed in article 6 of the European directive and makes a link with the situation at hand.

4.6.4.12 Non-affection clause

The non-affection clause addresses the readmission agreements’ relation to other international obligations. First, as emphasised in the preamble, the clause holds that the readmission agreement is without prejudice to rights, obligations and responsibilities arising from international law. Secondly the readmission agreement does not prevent the return of a person under other formal or informal arrangements. Indeed, some countries have been quite successful to maintain good relations in the facilitation of readmission with certain third countries. For instance The Netherlands have a successful informal readmission practice with Bulgaria and Rumania. They have established a lenient return procedure by charter flights and The Netherlands guarantee a swift re-readmission policy.\textsuperscript{183} Although favourable for the requesting country, informal readmission practices raise human rights concerns\textsuperscript{184}. Neither the agreement nor the practices are usually transparent. Accordingly, the persons readmitted are a vulnerable group. This point can be illustrated by the events of May 2009.

\textsuperscript{183} N., COLEMAN, \textit{European readmission policy}, 102.
\textsuperscript{184} Report: readmission agreements: a mechanism for returning illegal migrants, Committee on Migration refugees and population of the Council of Europe, Rapporteur Strik, Doc. 12168, § 32.
Italy had intercepted some 230 people on the Mediterranean Sea and sent them back to Libya without properly assessing whether these migrants were in need of protection.185 Presumably, this collective return was made possible by the to a certain extent secretive Italian-Libyan readmission agreement.186 The question is, however, whether it is the Italian return decision that violated these migrants’ rights, or the facilitating readmission agreement that made the effectuation possible.

The non-affection clause underlines that there is no obligation for the parties to the agreement to apply it. However, the provisions of the readmission agreement shall take precedence over any bilateral arrangement or agreement on the readmission of persons in so far as these are incompatible with the Community agreement.187

There are some things to be said about the first paragraph of the non-affection clause. It starts with a catch-all phrase and subsequently lists the international instruments that in particular have to be respected. Generally, these are the Geneva refugee Convention188, the International Conventions determining the state responsible for examining application for asylum lodged189, ECHR190, the Convention of 10 December against torture and other cruel, inhuman or degrading treatment, International Conventions on extradition191 and transit and multilateral International Conventions and agreements on the readmission of foreign nationals. Which international legal instruments, if at all, are explicitly referred to is not very consistent. To the contrary, some countries refused to refer to any instrument in particular. Others refused to refer to those which they are not party to themselves, even if this would not create any additional obligation for the partner country. The countries that lack any explicit reference to crucial instruments to respect human rights are Hong Kong, Macao, Sri Lanka and Pakistan. This bare clause is by many deemed insufficient, not in the least by the European Parliament192, and it is therefore startling that the agreement with Pakistan does not contain reference to the protection of human rights. Moreover, is this single non-affection clause

185 “UNCHR deeply concerned over returns from Italy to Libya”, Press releases 7 May 2009.
186 Report: readmission agreements: a mechanism for returning illegal migrants, Committee on Migration refugees and population of the Council of Europe, Rapporteur Strik, Doc. 12168, § 49.
187 Article 18 or 20 of the readmission agreement.
189 For instance the Dublin II regulation, Council regulation (EC), No 343/2003, 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodges in one of the Member States by a third country national.
190 The European convention of 4 November 1950 for the protection of Human rights and fundamental freedoms.
191 Such as the European Convention on extradition of 13 December 1957
the main safeguard for the respect for human rights in the readmission agreements. Ms. Malmström, EU Commissioner for Home Affairs, can, for instance, only refer to this clause when answering fierce questions from the Members of the European Parliament before they have to vote on the readmission agreement with Pakistan.\footnote{Parliamentary Debates, 20 September 2010, A7-0231/2010.}

### 4.6.4.13 Final provisions

This overview on the content of readmission agreements can be concluded with the final provisions. They address the territorial application\footnote{See supra.}, declare that the annexes form an integral part of the readmission agreement and finally elaborate on the entry into force, duration and termination of the agreement.

After the agreement is concluded, the contracting parties shall ratify it in accordance with their respective national procedures. “On the first day of the second month following the date on which the Contracting Parties notify each other that the procedures [...] have been concluded”\footnote{Article 20 or 22 of the agreement.} shall the agreement enter into force for an unlimited period.

Some agreements foresee in a delayed entry into force of certain provisions, usually the sensitive ones concerning the readmission of third country nationals and stateless persons. This is the case for Albania with a 2 year delay, Russia containing a 3 year delay and Ukraine with a 2 year postponement.

Each agreement furthermore allows the denunciation of the agreement taking a time lapse of 6 months into account after notification. The agreements did not use to contain the possibility to suspend the readmission agreement, for example due to human rights violations. Nor do the agreements that were concluded after the ones with Bosnia-Herzegovina, Serbia, Montenegro and Macedonia contain a clause that allows suspension of the agreement. Concerns may also rise when the situation in the requested state changes between the return decision and the readmission application. Think, for instances of cases of state succession as occurred in the Former Republic of Yugoslavia of which the readmission agreements with Montenegro and Serbia are excellent examples. Radical political changes in a country must also be watched with care and suspicion. They may give rise to the need to suspend the readmission agreement. However, one may argue that such an explicit clause would be unnecessary, since the non-affection clause implicitly requires suspension
in case of a violation of obligations under international law. In my opinion, the non-affection clause does not really imply a suspension of the agreement in case of a violation of certain values, but simply a not making use of the agreement. Eventually, the individual Member States are the ones that make of the Union’s readmission agreements, but they are not required to do so. On the other hand, the question rises whether a suspension of the agreement is a wise or useful measure to take. Suspension of an agreement is normally perceived as a way for the EU to punish his partner. In the particular case of readmission, suspension can hardly be qualified as a punishment since it dismisses the partner from its burdensome obligations. Nevertheless, the Commission currently suggest to insert a suspension clause which would “provide for a temporary suspension [with reciprocal effect] of the agreement in the event of persistent and serious risk of violation of human rights of readmitted persons.”

4.6.5 Reflections

It may be useful to try to divide the agreements in different categories. Kruse distinguishes between countries of origin containing China, Pakistan and Sri Lanka, countries of transit as Hong Kong and Macao and mixed countries including Russia, Ukraine, Turkey, Albania, Morocco and Algeria. I would like to add, however, that Pakistan can hardly be identified as a pure country of origin. The agreement with Pakistan to a very important extent envisages the readmission of Afghan nationals who transited Pakistan. This is all the more obvious since the mandate for the conclusion of a community agreement was suggested in the 1999 Action Plan for Afghanistan.

Personally, I hoped that a useful grouping of the agreements could be done according to geography; the Central and Eastern European Countries, the European Neighbourhood Countries and the countries at a large distance. After carefully examining every agreement, I conclude that only the agreements with the CEEC’s may be considered a homogenous group. Besides the Western Balkan countries, it appears that we can put together two more countries, as if they were a tandem; the agreements with Hong Kong and Macao. These were the first European Readmission agreements ever to be concluded, and are also of the least importance. Everything depends on the context really. Hong Kong and Macao had requested to lift the visa requirements for their permanent residents but Europe was only willing to concede in this request if readmission agreements would be concluded as a safeguard. In March 2001 the Council had adopted the visa Regulation lifting the requirements

---

196 COM (2011) 76, 12.
198 N. COLEMAN, European readmission policy, 167.
for these countries and the Commission would immediately invite them to start the negotiations.\textsuperscript{200} Both agreements are very similar. Since they were the first ones, they are subject to some child diseases such as a poor non-affection clause.

The other readmission agreements, not in the least the ones still under negotiation, are stand-alone cases. Sri Lanka was an interesting target country as they were not very cooperative in the readmission of their own country nationals.\textsuperscript{201} The agreement with this country is also one of the early agreements and barely differs from the first two. Sri Lanka did obtain different time limits. Note that Sri Lanka is a pure country of origin. Blind to this given, the Council insisted the Commission to include obligations on the readmission of third country nationals and on a transit procedure.\textsuperscript{202} So, although very irrelevant in the relations with Sri Lanka, the Council preferred to maintain the negotiation of a standard agreement. Not persisting in uniformity would jeopardize the Commission’s negotiation leverage in future cases and the example of Sri Lanka could be used to argue that the agreements do not necessarily contain certain provisions. Since the traditionally difficult negotiations of readmission obligations for TCN’s and Stateless persons were not very relevant to Sri Lanka as they would not create burdensome implementing measures, the agreement was concluded swiftly, only needing two negotiation rounds.

Next in line is the agreement with Albania. The country being at the borders of the continent and having a very instable and corrupt government, it is an important source of illegal migration and transit. Albania is a rather easy prey for the EU since Albania is very dependent on the EU. Moreover, the country has been cooperative with the individual Member States by concluding bilateral readmission agreements.\textsuperscript{203} The EURA with Albania is the first one to answer the European Parliament’s worries on the lack of reference to human rights and specifically refugee rights. Due to the country’s lack of governmental institutions, it obtained a delay of 2 years, although 5 were requested, to implement the readmission obligations for third country nationals and stateless persons.

\textsuperscript{199} Council regulation (EC) N° 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing external borders and those whose nationals are exempt from that requirement, \textit{OJ} L 81 of 21 March 2001, 1.


\textsuperscript{202} N. COLEMAN, \textit{European readmission policy}, 166.

The most distinct readmission agreement of all is the one with Russia. We have already pointed out that this is the first and only powerful negotiating partner. The negotiations were very difficult and would only advance if the EU finally allowed the back-to-back visa facilitation negotiations. The biggest challenge was evidently the readmission of TCN’s. And Russia had good reasons to worry. The enormous size of Russian territory makes the borders often uncontrollable, not in the least in the southern Russian area where the border is porous. Confusion may also arise for former Soviet Union nationals. They are easily identified as if they were Russian nationals, for instance because they hold documents of the ex-soviet union. In sum, Russia feared a massive readmission burden. Accordingly, Russia attempted and succeeded to limit the time in which an application after discovery is to be lodged and extended, at least compared to the previous two agreements, the time to reply and to investigate the application. If the country wishing to readmit a person managed to respect the short time limits, then they may not delay the effective transmission of the person concerned, as Russia managed the time limit to do so by half. The agreement with Russia is very clear and detailed and leaves little room for extensive interpretations, and so adds to its pragmatism. In spite of the short time limits, the agreement may very well serve as an example, noting among others an expansion of human rights protection. Furthermore, Russia is also the second in the row of three countries that obtained a postponement of the entry into force on the provisions on the readmission of TCN’s, allowing them to adapt to the expected high increase of readmission applications.

Along with Russia, also Ukraine was an important target. Both agreements are very similar, except for the time limits that were decided upon. Ukraine is also the last country that obtained a delayed entry into force of obligations to readmit others than own country nationals. Ukraine has similar objections to the conclusion of readmission agreements, such as weak borders, but is in spite of that willing to negotiate as Ukraine wants a good relationship. The country aspires EU membership.

The agreements with the Western Balkans, including Moldova are quite homogenous and their conclusion only required 2 negotiation rounds, mainly grace to the immediate back-to-back coupling of the negotiations with a visa facilitation agreement.

Pakistan however takes us back in time in every single meaning. The agreement has extended time limits and does not refer to any human rights protection instrument. Pakistan was a rather tough customer that was not willing to conclude such an agreement. The war in Afghanistan already severely pressed its capacities to shelter refugees that it didn’t want any more Afghans on its

204 Ibid. 162.

territory. Indeed the purpose of the readmission agreement was, as set out earlier, to readmit Afghan illegal migrants. In 2001 the Commission transmitted the standard draft readmission agreement and was eager to set up a first meeting. However, at the same time the Cooperation Agreement with Pakistan was signed, but its ratification was made conditional upon the conclusion of a readmission agreement. Pakistan refused to do so as long as the Cooperation Agreement was not secured. Eventually Europe admitted to Pakistan’s demands and the European Parliament approved the CA in April 2004. At last, readmission negotiations could start. The negotiations were not coupled to visa facilitation agreements and so, the EU had to make more concessions as regards the content.

Lastly is the Agreement with Georgia that holds the to-date most far-reaching readmission obligations and did not pose problems to come to a conclusion quickly. The EU-Georgia relations already started in 1992 and intensified ever since. In 1999 a Partnership and Cooperation Agreement and in 2006 the European Neighbourhood Policy Action Plan for Georgia entered into force. This Action Plan served the purpose to “[s]trengthen the dialogue and cooperation in preventing and fighting against illegal migration, which could possibly lead in the future to an EC-Georgia agreement on readmission; exchange of experience and expertise about the practical implications of such an agreement”\(^{206}\). Following the September extraordinary Council meeting that “decided to step up the EU’s relations with Georgia”\(^ {207} \) the Council mandated the Commission that same month to initiate readmission and visa facilitation negotiations. These rather speedy developments should be seen against the background of the 2008 South Ossetia War. Ever since Georgia’s independence from Russia, the EU was determined to limit Russian influence in the newly independent countries, without jeopardizing a good relationship. However, during the events of 2008, the EU chose the Georgian side by strongly condemning “Russia’s unilateral decision to recognize the independence of Abkhazia and South Ossetia.”\(^ {208}\) The EU would provide financial aid and decide on the postponement of talks on a new partnership with Russia until Russia withdraws its troops. Measures on visa facilitation allow the Georgians to tighten the ties with the EU. Off course this could not go without a safeguard to combat illegal migration to the EU and so, the negotiations for both agreements would go hand in hand.

\(^{206}\) EU/Georgia action plan, 19.


5. Human Rights considerations

5.1 Introduction

“On May 5, I wrote an application for asylum. I gave it to a lawyer and she gave it to the guard and the guard had to give it to the Migration Service. The lawyer told me I should hear back in two to three weeks. After one month, I asked the IOM guy, and he said that the application was still with the guard.... After that I asked to talk to the head of Chop but it never happened. I saw that lawyer again. She said, “If the guards don’t want your application, it’s not my problem.”

There is a translator called [name withheld]. He works for Migration Services. When he was in Chop, he told us he could stop applications. He wants US$700 to US$750 to pass the application to the Migration Services. I wrote an application and didn’t pay him and I never got replies. I don’t know about the right to appeal. I know if you pay, you will not get rejected. [Name withheld] works in Chop and for the Migration Service and takes money. Those who can’t pay get rejected. I know two Palestinians who paid US$750 each and got released.”

The European readmission agreements are all but free from criticism. NGO’s and the human rights watchdog, the Council of Europe have repeatedly warned for the agreements to lead to human rights infringements. Evidently, third country nationals and stateless persons are more susceptible to violations of their fundamental rights. The testimony above is an excerpt from an interview carried out by Human Rights Watch in June 2010. The HRW investigation studies the challenges which illegal migrants, that are apprehended in Ukraine or in another country but were returned to Ukraine, have to face. One of the main concerns is that protection seekers will not be granted asylum, nor is their asylum application properly investigated. On the one hand this testimony shows the unwillingness, unless bribed, of border guards to pass asylum applications to the migration authorities. On the other hand does Ukraine lack a functioning asylum system. Due to continual reforms of the asylum system during the past ten years, the quantity and quality of asylum decisions deteriorated.210 Between August 2009 and August 2010 there was no functioning authority at all entitled to grant


73
asylum. This “shutdown” provoked the massive judicial backlog. These two elements endanger the right to asylum and may give rise to infringements of the prohibition of refoulement. To understand how the implementation of readmission agreements may infringe the principle of non-refoulement, it is necessary to first discuss the EU human rights framework, the right to asylum, the Dublin regulation and the safe third country policy.

5.2 EU human rights framework

The EU human rights framework consist of three main sources; the Charter of fundamental rights, the European Convention for the protection of human rights and fundamental freedoms and the general principles of EU-law. This framework is set out in article 6 TEU.

The Charter of Fundamental Rights became legally binding upon the European institutions and on the Member States when implementing Union law after the entry into force of the Lisbon Treaty. Before Lisbon, the Charter was not legally binding and merely fulfilled a subsidiary role ‘reaffirming’ the general principles. Today the Charter has “the same legal value as the treaties” and so has become the primary European Human Rights instrument. It was adopted on the 2002 European Council in Nice and lays down civil, political, economic, social and societal rights that were already embedded in the ECHR or resulting “from the constitutional traditions and international obligations common to the Member States, the Community Treaties, [...] the Social Charters [...] and the case-law of the Court of justice of the European Communities and of the European Court of Human rights”. In sum, the Charter of Fundamental rights consolidates the rights enshrined in a variety of instruments. This does not prejudice the continued importance of the other instruments. To the contrary, it is a tale of complementarity. Article 53 provides that “[n]othing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party.

212 The member states only have to respect fundamental Human Rights as protected by Union law when acting under Union Law. This is a consolidation of European Court’s judgments such as in Case C-292/97 of 13 April 2000, § 37.
213 Article 51, §1 of the Charter.
216 Preamble of the Charter.
including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States’ constitutions”. The protection that is granted in the Charter shall be no less then and in conformity with the provisions of the ECHR. The ECHR has to be interpreted in its extensive sense because it includes the protocols to the ECHR and the judgments of the European Court of justice and the European Court of Human Rights.

The second human rights instrument is the European Convention for the Protection of human rights which was adopted in Rome on 4 November 1950. The EU’s Member States are all party to the Convention, but the EU is not. Accordingly, to the extent that Member States implemented Union acts, this had to be in conformity with the ECHR and could be subject to judicial review by the Strasbourg Court, but the EU itself was not subject to the provisions of the convention. Thanks to granting the EU legal personality, the Union is finally entitled to accede to the ECHR. As such article 6, §2 TEU obliges the Union to do so. EU accession to the Convention means that individuals, after exhausting local remedies, will be able to lodge proceedings against the EU directly before the ECtHR in Strasbourg and accordingly contributes to enhanced human rights protection. However, we are not there yet. Some preliminary measures needed to be taken to facilitate accession. Protocol N° 14 to the ECHR that entered into force on 1 June 2010 amends the Convention and provides a legal basis for the EU to accede to it in article 59, §2. The EU-side also required an implementing protocol. Protocol 8 to the Treaties sets out four measures to “preserve the specific characteristics of the Union and Union law”. The parties must first of all make specific arrangements for the Union to participate in the ECHR controlling bodies. A concern is the double representation of the Union’s Member States, once in their own capacity and once as part of the EU. A Second requirement is ensuring the appropriate application of proceedings by non-Member States and individuals to the Union and its Member States. Third shall accession to the Convention not affect the existing reservations of the individual Member States to the ECHR, nor shall it affect the Union’s powers and competences. Lastly, the EU has its own mechanisms to resolve disputes between Member States concerning EU law. This shall not be affected by the ECHR and so the European Court of Justice remains exclusively competent to settle disputes between Member States in conformity with article 344 TFEU.

---

217 Article 52, §1 of the Charter and explanations thereto.
218 Explanations by the Convention relating to the Charter of Fundamental Rights, convent 49 of 11 October 2000
General principles of the EU constitute the third basic source of human rights protection. The treaties first referred to human rights in the treaty of Amsterdam; article 6 (2) TEU.

“The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.” The wording is identical to current article 6 (3) TEU. The European Court of Justice’s case-law dating back to 1984, already recognized the ECHR as a primary source of fundamental rights. The relevance of including the ECHR as a source of the general principles of EU law in the Lisbon Treaty might seem superfluous in light of the mandatory EU accession to the Convention. However, until the effective accession to the convention this provision is still relevant. Moreover, it is important to note that EU accession to the ECHR is not extended to the additional protocols to the convention. The EU can, after accession, decide on a case-by-case basis to which, if not all, protocols it shall join. Due to article 6 (3) TEU, these protocols may still constitute general principles of EU law.

220 The International Covenant on Civil and Political Rights is another international legal instrument that is ratified by every Union Member State and which is sometimes referred to by the ECJ.

221 In light of human rights violations in the area of returning migrants, the Geneva Convention on the protection of refugees constitutes a specific instrument providing human rights safeguards. The convention is referred to in article 78 TFEU on EU Asylum Policy and in article 18 of the Charter of Fundamental Rights on guaranteeing the right to asylum “with due respect for the rules of the Geneva convention and its protocol. These references grant the Geneva Convention a prominent place among the instruments embedding general principles of EU law.


221 Not all Protocols were ratified by every Member State, so it is uncertain whether the ECJ would regard them as general principles. See S. PEERS, EU Justice and Home Affairs law, New York, Oxford University Press, 2011, 97.

5.3 Human Rights violations

5.3.1 Introduction

It is undisputed that illegal immigrants enjoy human rights protection. Illustratively, article 1 ECHR reads:

“The High Contracting Parties shall secure to anyone within their jurisdiction the right and freedoms defined in section I [that contains the rights and freedoms] of this convention.”

Readmission agreements are criticized for not respecting the returnee’s fundamental rights. The common infringements the readmission agreements are reproached for, are the risk to be subject to torture or inhuman or degrading treatment and, broader, a breach of the principle of non-refoulement. Moreover, the Migrant’s right to asylum may be prejudiced when implementing a readmission agreement.

NGO’s report on various situations where migrants are faced with these infringements. The case of Ukraine is a very worrying one, all the more since the country received in 2008 and 2009 the second most readmission applications of the assessed countries by the Commission. Moreover, are 40% of the total readmission applications procedures initiated for third country nationals, whereas figures for other countries indicate a negligible number of applications for TCN’s. The latter are the most vulnerable group to be readmitted. They often lack sufficient ties with the readmitting country and risk to be subject to chain refoulement to their country of origin.

5.3.2 The Right to Asylum

5.3.2.1 Scope and content of the right to asylum

The right to asylum is granted in article 18 of the charter of fundamental rights. Two directives fill in this protection: one containing minimum standards for the qualification as a refugee or as person

---


who otherwise needs international protection, as well as the content of the protection granted\(^{225}\) and the other one on minimum standards on procedures for granting or withdrawing refugee status\(^{226}\). Entitled to being granted a refugee status are third country nationals “who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 [on exclusion] does not apply”\(^{227}\).

5.3.2.2 **The Dublin Regulation**

The Dublin Convention is a convention determining the state responsible for examining applications for asylum lodged in one of the Member States of the European Communities.\(^{228}\) It was concluded in 1990 but only entered into force on 1 September 1997. The Convention had the objective to harmonize the European asylum policies and to safeguard the area without internal frontiers, allowing the free movement of persons. The Convention was in 2003 replaced by a Community instrument, the Dublin II regulation\(^{229}\) but maintained its purpose.

The Dublin Regulation avoids subsequent or simultaneous multiple requests for asylum and appoints the Members State responsible to investigate the asylum request and holds obligations as to the quality of the investigation of asylum applications. The asylum application will only be examined by a single member state, allowing another member state to reject the asylum application. The regulation holds a set of criteria to decide which member state is responsible for the investigation. The “authorization principle” lays at the basis of these criteria in the sense that “the more a member

---


\(^{227}\) Article 2 (c) Council Directive 2004/83/EC.


\(^{229}\) Council Regulation (EC) N° 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 50 of 25 February 2003, 1-10.
State has consented to the penetration of its territory by an asylum seeker, the more it is responsible.”

The criteria to appoint the state responsible to examine the asylum application are listed in articles 6 to 14 and are “applied in the order in which they are set out”. Of paramount importance for the allocation of responsibility are the criteria on family reunification. The presence of family members having a refugee status and who are legally residing on the territory of a Member State or the presence of a family member who has a pending refugee application in a certain Member State, indicates the country responsible for the examination of the asylum seekers application. Second in line is the Member State that granted the asylum seeker a visa or a residence permit. If the asylum seeker holds more than one visa or residence permit issued by different Member States, then the duration of the validity will be determining. Criteria on border-crossing are the third determinant of responsibility. These appoint the Member State where the asylum seeker has first irregularly crossed the EU borders, however limited to 12 months after the border-crossing. Still, also legal entry is envisaged, namely in the case where a third-country nationals applies for asylum in a Member State that does not require the asylum seeker to hold a visa. Fourth, if the asylum application is made in transit, then the state of the airport where the application is done shall be responsible. Should it, however, appear that no responsibility can be allocated to a certain Member State under these criteria, then the “default criterion” applies; the first Member State where the application is lodged will have to investigate the asylum application.

The responsible state as appointed by these criteria must examine the asylum application. This obligation is nevertheless hollowed since the obligation to investigate is prefixed by the possibility to send the asylum seeker to a third safe country.

5.3.3 The safe third country rule

The Safe Third Country Rule allows a country to deny an asylum application on the grounds that the protection seeker has or reasonably could have found protection in another country. This rule has been part of the national legislation of EU countries, but became a Common policy after the adoption of Directive 2005/85/EC\textsuperscript{232}, hereinafter referred to as the Procedures Directive. The controversy the Directive was subject to, not in the least the provisions on a safe third country policy, could not

\textsuperscript{231} Article 5 Dublin Regulation.
prevent the Directive to be adopted after 5 years of negotiations. In principle, the state seized by the asylum application is under the obligation to investigate it. The Procedures Directive formulates some exceptions to this principle, one of which relating to the safe third country rule. This will be discussed, however not without first indicating the other exceptions.

When a final decision concerning an application was reached, any subsequent identical asylum application will be inadmissible, as well as applications that can be joined. The Dublin Regulation appoints the EU Member State responsible to investigate an asylum application. Evidently, if this set of rules indicates a Member State, then this is a ground for the Member State seized of the application to deny its investigation. A member state may furthermore declare inadmissible the asylum application if another Member State has already granted a certain protection; refugee status, equivalents of a refugee status or another type of protection subject to the principle of non-refoulement. Outside the EU territory, a state may declare the application for asylum inadmissible when a protection seeker has already found refugee protection or an equivalent thereof in a third country. The refugee seeker must be readmitted to the “first country of asylum”.

The last justification to refuse an asylum investigation is when the asylum seeker could obtain ‘protection elsewhere’. The protection seeker could have found protection in a safe third country, which is necessarily not a Member State. The Procedures Directive only allows a country to be considered as a safe third country if the asylum seeker will be treated in accordance with certain principles. Whether these criteria are met is subject to the discretionary appreciation of the Member State that invokes this concept. Once the Member State is ‘satisfied’ that the safe third country concept is applicable to a certain country, it should be assessed whether the country is also safe for the particular applicant. The country must “as a minimum, (...) permit the applicant to challenge the application of the safe third country concept on the grounds that he/she would be subject to torture, cruel, inhuman or degrading treatment”.

---

235 Art. 25 §2 (g) Procedures Directive.
236 Art. 25 §1 Procedures Directive.
237 Art. 25 §2 (a) Procedures Directive.
238 Art. 25 §2 (d) Procedures Directive.
239 Art. 25 §2 (d) Procedures Directive.
240 Art. 25 §2 (b) and art. 26 Procedures Directive.
241 Art. 27 §2 (c) Procedures Directive.
There is, however, another category of safe third countries. These are not subject to the Member States’ appraisal, but constitute a list of European safe third countries which is drawn up by the Council.\textsuperscript{242} Granting a certain third country this “super safe third country status”\textsuperscript{243} requires more stringent criteria.

A Member State may consider a third country as being a ‘regular’ safe third country if:

(a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;

(b) the principle of non-refoulement in accordance with the Geneva Convention is respected;

(c) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and

(d) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.\textsuperscript{244}

In setting these conditions, the Directive rephrases the human rights protection which asylum seekers are entitled to. As such they embed human rights as guaranteed by the ECHR and the Geneva Convention. The third country does not have to be party to these legal instruments, it suffices that they act ‘in accordance’ with these instruments. This is different for the European safe third countries, which are required to be party to both the Geneva Convention and the ECHR. A third country may only be considered as a ‘super safe third country’ if:

(a) it has ratified and observes the provisions of the Geneva Convention without any geographical limitations;

(b) it has in place an asylum procedure prescribed by law;

(c) it has ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms and observes its provisions, including the standards relating to effective remedies; and

(d) it has been so designated by the Council in accordance with paragraph 3.\textsuperscript{245}

\textsuperscript{242} Art. 36 Procedures Directive.
\textsuperscript{243} N., COLEMAN, European readmission policy, 291.
\textsuperscript{244} Art. 27 §1 Procedures Directive.
\textsuperscript{245} Art. 36 §2 Procedures Directive.
Besides the requirements of adherence to international human rights instruments, the European safe third countries must also have “an asylum procedure prescribed by law”, whereas the access to an asylum procedure following article 27 (d) must be a ‘possibility’. The legal instruments referred to implicitly or explicitly are for both types of safe third countries the same. They differ in formalism. Member State discretionary considerations are based on effective obedience to certain international standards, whereas a European safe third country must have ratified these instruments. This is only logical as they are perceived as safer and their ‘safe’ label is more fixed due to the procedure required to modify the list.

A Member State may find an asylum application inadmissible based on the ground that the asylum seeker may be referred to a safe third country. The Directive only requires that there is a connection which would be “reasonable for that person to go to that country”. A mere transit through a certain country may prove sufficient to establish such a ‘connection’. Member States often maintain higher human rights safeguards, not only as regards the required ‘connection’, but also regarding the safe third country criteria. Accordingly, is this provision not in line with the Directive’s aim to harmonize the European Asylum procedures, since the Directive sets low common standards. There may still be a big difference between the standards maintained in the different Member States. Moreover, critics fear a general decrease of human rights protection due to these low European standards.

The safe third country policy is strongly criticized for insufficiently taking into account third country national’s vulnerability. Case studies have, moreover, irrefutably established persistent refugee rights violations of supposed safe countries. Should the Member State’s safe country qualification, hypothetically, be correct then refugee rights may still be prejudiced. Neither the EU nor its Member States have control over that third country’s own safe third country or safe country of origin policy which may very well be not in accordance with the European minimum standards. Under such conditions, refugee seekers may again see their asylum application declared inadmissible and be referred to another country where his refugee rights may be endangered.

5.3.4 The principle of non-refoulement

The principle of non-refoulement protects asylum seekers from being returned to a country where he risks human rights infringements. It is a non-derogable norm of customary international law, since the prohibition is expressed in many international or regional legislative instruments\textsuperscript{246} and reflects

\textsuperscript{246} Article 6 ICCPR, article 2 (3) of the 1969 OAU Convention Governing Specific aspects of refugee Protection in Africa.
opinion juris\textsuperscript{247}. The principle was first expressed in the 1933 Convention relating to the Status of refugees in article 33 (1).

“No contracting state shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on the account of his race, religion, nationality, membership of a particular social group or political opinion”.

Whereas this prohibition stands on its own, it is often qualified as infringing the prohibition of torture or cruel, inhuman or degrading treatment or punishment and also as an infringement to the right to life.\textsuperscript{248} As such, the prohibition of refouler is broadly supported in various legal instruments; article 3 of the UN Convention against Torture, article 3 ECHR and article 19 (2) of the Charter of fundamental rights.

### 5.3.5 How readmission agreements may infringe human rights

A requesting country may not send a third country national back to any country where he or she risks the envisaged threats. Article 33 of the Geneva Convention provides that they may not “in any manner whatsoever” be returned to frontiers or territories where the returnee may be threatened. This obligation is, accordingly, not limited to the requesting state’s own acts. The state must also prevent that the partner country expels the returnee to another country where he or she faces those risks. The risk of chain-refoulement affects readmitted third country nationals, who may be further returned to their country of origin or transit. The problem that may arise is twofold, infringement of the right to asylum and of the prohibition of refoulement.

The protection seeker’s right to asylum may be jeopardised. An EU Member State may declare an asylum application inadmissible on the grounds that the applicant could have found ‘protection elsewhere’. The readmitting country, appointed by the EU Common safe third country policy, may further readmit the returned TCN to another country, of origin or not, without the protection seeker has been granted an investigation of his asylum application. In this regard it is important to bring the ‘accelerated procedure’ under the reader’s attention. Under certain conditions, a party to a readmission agreement may request the readmission of an irregular immigrant within two working


days after his apprehension. Two days are arguably insufficient to prepare a complete asylum application in the country where the asylum seeker was apprehended. The Commission acknowledges that the access to asylum procedures and respect for the principle of *non-refoulement* “are by no means waived by the accelerated procedure [but] there is potential for deficiencies in practice.”\(^{249}\) To alleviate these concerns, the Commission suggests practical measures on the level of the border guards. The Practical Handbook for Border Guards\(^{250}\) is to highlight the importance of identifying protection seekers and requiring implementation thereof before effective application of the accelerated procedure.

Moreover, the protection seeker may be returned to a country where his life or freedom would be threatened and as such, his readmission may infringe the principle of *non-refoulement*. Even if a third country may be considered as a safe third country because it normally adheres to the fundamental human rights, a member state is still under the obligation to investigate whether that particular case would not give rise to torture or cruel, inhuman or degrading treatment or punishment. An asylum application that has never been properly investigated is therefore an infringement of the prohibition of *refoulement an sich*.

The violation of the prohibition of *refoulement* may be triggered by different practices. Irregular migrants that are returned to a third country may face other challenges then deprivation of life or liberty on discriminatory grounds or torture. Upon arrival in the readmitting country, the irregular migrant may often face detention.

> “The court decided I should be kept for six months. I have not been to a court and I never had a lawyer in Chop.”\(^{251}\)

Detention of an irregular migrant is not uncommon. The Procedures Directive foresees in this feature, as does often national legislation of partner countries in readmission.

In 2005, Human Rights Watch witnessed appalling detention conditions in Ukraine.\(^{252}\) Although these conditions improved over the years, the returnees are still subjected to arbitrary detention. Arbitrary detention is detention contrary to the basic human rights provisions. In principle, illegal migrants

---

\(^{249}\) COM (2011) 76, 10.


\(^{251}\) Human Rights Watch, *Buffeted in the borderland, the treatment of migrants and asylum seekers in Ukraine*, 2010, 70.

may only be restricted in their movements if that is strictly necessary\(^{253}\) and it must be subject to judicial review. The irregular migrant “must be brought promptly before a judge or other authority”\(^ {254}\) when he is detained. The quote reveals a different practice with difficult access to judicial authorities. Furthermore does Human Rights Watch unwrap consecutive detentions, a practice which is found contrary to the right of liberty and security\(^ {255}\) and may be qualified as infringing the prohibition of non-refoulement. The same goes for practices without taking due measures regarding unaccompanied minors. This is a very vulnerable group which is in return procedures often ignored. In any readmission agreement is express notification of the returnee being an asylum seeker, a victim of human trafficking or an unaccompanied minor required. Accordingly the readmitting country may be unaware of the needs of the returnee and as such infringe the protective measures they are entitled to, which may amount to an inhuman or degrading treatment.\(^ {256}\)

5.4 Human rights safeguards

Returnees are not free from human rights infringements and therefore, the European readmission agreements are criticized. Still, readmission agreements contain safeguards to prevent human rights infringements. First, there are the non-affection clauses and secondly should the joint readmission committee monitor its implementation, including respect for fundamental rights. Lastly, may a suspension clause alleviate human rights concerns.

5.4.1 Non-affection clauses

Non-affection clauses provide that the underlying agreement will not prejudice the rights, obligations and responsibilities arising from international law. We have noted earlier that some agreements enlist the international legal instruments which at least must be respected, others do not specify and maintain a catch-all clause. The latter, among which the recent agreement with Pakistan, are subject

\(^{253}\) Art. 31 Geneva Convention, art. 9 International Covenant on Civil and Political Rights, Art. 9 Universal Declaration of Human Rights and art. 18 §1 Procedures Directive.


\(^{256}\) For instance, European Court of Human Rights, 12 October 2006, N° 13178/03, Mubilanzila Mayeka and Kaniki Mitunga v.Belgium. § 103. The court ruled on the detention of an unaccompanied minor. “The Court notes that the second applicant was detained in a closed centre intended for illegal immigrants in the same conditions as adults; these conditions were consequently not adapted to the position of extreme vulnerability in which she found herself as a result of her position as an unaccompanied foreign minor".
to critique by human rights watchdogs as being too vague. Others feel that they should be conceived as triggering the application of any relevant international instrument. Moreover does the non-affection clause, even when explicitly invoking certain international legal instruments, not confer any international obligation on the contracting party which it did not already adhere to. This would make express referral to legal instruments superfluous. Such assumption renders the readmission agreement with Pakistan problematic. The country is not a party to the Geneva Convention or its protocol, nor is the country subjected to the ICCPR or ICESC. On the other hand, it can be argued that a non-affection clause specifying compliance to certain standards does not bind the party to these instruments, but it may compel the party to de facto respect certain minimum standards. This assertion does not find support by the Commission. To the contrary, the Commission admits mea culpa in its 2011 evaluation of readmission agreements and acknowledges that these agreements lack a confirmation from the part of the partner country that they will treat third country nationals in compliance with the key international human rights conventions. Therefore it recommends that “if the readmitting country has not ratified the key international human rights conventions, the EURA should explicitly oblige the country to comply with the standards set out in those international conventions.” As such, the Commission does not entirely give in to the widespread critiques on human rights safeguards. The Commission approaches readmission agreements as procedural instruments that improve “cooperation between administrations”. The member states eventually implement the European readmission agreements and therefore the Commission assumes that they are ‘neutral’ as regards human rights considerations. Any return decision issued by a Member State is or should presumably be in conformity with the European migration and asylum acquis and the international legal instruments as ratified by the member states. This view does not require the readmission agreement to contain anything more than a general non-affection clause, “confirming the applicability of and respect for instruments of human rights.” The Commission moreover claims that it is ill-placed to force human rights safeguards on the contracting party. They contend that readmission agreements are per se to the detriment of the contracting party and beneficial to the EU. Accordingly, by urging the targeted partner country to respect human rights, they might not agree on any readmission agreement, which would be worse for the returnees. The Commission claims to choose the ‘least bad’ solution.

257 For instance the letter by the independent experts network Trans Europe Experts and the euro African network Migreurop adressed to MEP Claude Moraes, “Readmission agreement EU-Pakistan. The European Parliament has to deny its approval”,
258 N., COLEMAN, European readmission policy, 306.
260 COM (2011) 76, 10.
261 COM (2011) 76, 11.
Including human rights protection in a readmission agreement raises a last concern which was earlier addressed when assessing the usual absence of a suspension clause.\textsuperscript{262} The EU assumes that a contracting party will persistently try to readmit fewer persons. A suspension of the agreement dismisses the readmitting country to further do so and therefore may actually constitute an incentive for that party to provoke a suspension. The same goes for the non-affection clause. The requested state wants to limit unwanted returns and may to that end violate the human rights requirements to prevent so.

5.4.2 Joint Readmission Committees

Every readmission agreement sets up a Joint Readmission Committee which is composed of representatives of both parties. The EU will be represented by the Commission. Their task is to monitor the implementation of the agreement and as such is the ideal body to ensure human rights compliance. The Commission 2011 evaluation ascribes this body great potential to act as a control mechanism which is to date largely lacking.\textsuperscript{263} In effect, the Committees are foremost designed to facilitate the implementation of the agreement, by concluding technical arrangements and amending the annexes which list the documents that may provide evidence of nationality and transit. Capacity building and making recommendations in that regard may certainly pertain to the Committee’s tasks. However, it was not designed to ensure compliance with human rights standards. As is the case when concluding readmission agreements, the Commission may deem itself ill-placed to be exigent on this issue.

The lack of a post return monitoring mechanism does not entirely have to be resolved by the Joint Readmission Committee. In its current form it would not be able to carry out a thorough monitoring task of human rights compliance. The Commission proposes to launch a pilot project, in cooperation with a “principal international organization” to monitor the returnee’s situation in the receiving country. The findings should be reported to the JRC who may then adopt measures or recommendations for improvements.\textsuperscript{264}

\textsuperscript{262} See supra.
\textsuperscript{263} COM (2011) 76, 11.
\textsuperscript{264} COM (2011) 76, 13-14.
5.4.3 Transition or suspension clause

A suspension clause would delay any return of third country nationals from the EU to another country until that country provides effective protection and guaranteed human rights. 265 So far, no readmission agreement contains such a clause. 266 We have noted earlier that this may have the unwanted effect that the partner country would deliberately violate principles giving rise to suspension of the agreement to ease its readmission burden. The EU accordingly always chose the path ensuring readmission facilitation, rather than safeguarding the returnee’s fundamental rights. The continuous critique on this policy made the Commission revise its priorities and currently declares that Member States should respect the fundamental rights and should suspend any implementation of readmission agreements with countries disrespecting these values. 267 The agreements in force do not provide for a suspension. Therefore, unilaterally suspending the reciprocal readmission obligations would breach the agreement. At the most, the member states may refrain from launching readmission applications with these countries but they may not refuse to perform their obligations vis-à-vis the third country. Because of the unbalanced readmission obligations resting on both parties, the practical relevance of this distinction is negligible.

Furthermore the Commission acknowledges the need to insert a reciprocal suspension clause. If the partner country does not respect certain values or legal instruments, the readmission agreement no longer, at least temporarily, confers any obligations upon the countries. The country that breaches the returnee’s human rights also loses the benefits of the agreement. Again its practical relevance may be limited.

5.5 The beginning of the end? Concluding remarks.

This chapter set out the European Union’s human rights framework. It consists of three main legal instruments; the Charter of Fundamental Rights, The European Convention of Human Rights and the general principles of EU law. They protect a refugee’s right to asylum and firmly subscribe the principle of non-refoulement. These two human rights risk to be infringed when returning an irregular migrant, even when done trough a European readmission agreement. The existing agreements lack sufficient human rights safeguards, certainly in light of the targeted vulnerable group, and as such is their conclusion not without controversy.

266 See Supra.
267 COM (2011) 76, 12.
The Commission and its supporters have three justifications for the poor human rights protection. The first one is that readmission agreements are ‘human rights neutral’ since they are exclusively procedural in nature. The decision of expulsion of an irregular migrant is a purely national matter, which is assumed to be in conformity with certain fundamental rights standards. Therefore, reiteration of the returnee’s fundamental rights in a readmission agreement is unnecessary and would only repeat, not constitute his legal position. The second argument reflects a policy choice in favour of effective readmission over human rights safeguards. The Commission would be ill-placed to ensure human rights conformity since she already is the underdog. Every potential partner country is in principle unwilling to take up burdensome readmission obligations. The EU suffers great migratory pressure and therefore readmission applications will usually be one-way traffic. Requiring heavy human rights safeguards would prevent any readmission agreement to be concluded. It is the Commission’s position, which used to be by the UN High Commissioner for Refugees, that readmission agreements are beneficial for the status of returnees. The existence of a formal readmission agreement is preferred over mere readmission practices which suffer from a lack of transparency. \(^\text{268}\) Lastly do readmission agreements not foresee in suspension clauses since these could constitute an incentive for the partner country to provoke a suspension since that can, in their case, hardly be conceived as a punishment.

Critics feel that the expulsion decision and effective return of an irregular migrant is one process and that therefore every link in that process must safeguard the returnee’s rights. Readmission agreements should not facilitate the execution of return decisions that are contrary to European standards.

Both viewpoints merit consideration and the Commission now hesitantly shifts to the attainment of higher standards in their agreements, at the risk of having to make more concessions to the partner country. In my opinion this can only be done when readmission obligations are part of a broader framework of cooperation between the EU and a partner country. Mobility Partnerships are excellent candidates to fulfil this task as they are designed to be in every party’s interest. Indeed, the Commission recently proposed “that the incentives the EU’s disposal be developed into a coherent mobility package which should be offered to the negotiating third country at the outset of negotiations.” \(^\text{269}\) However, its à la carte character could in this hypothesis not be maintained, as it

\(^{268}\) “Agreement among States in this context would enhance the international protection of refugees by leading to the orderly handling of asylum applications and could help to reduce the misuse of asylum procedures in connection with irregular migration.” UN High Commissioner for Refugees, UNHCR Position on Readmission Agreements, ‘Protection Elsewhere’ and Asylum Policy, 1 August 1994, 3 European Series 2, p. 465., available at: http://www.unhcr.org/refworld/docid/3ae6b31cb8.html [accessed 13 August 2011].

\(^{269}\) COM (2011) 76, 14.
would be a step backwards from the current Common policy. The Commission has clearly chosen a new approach towards readmission and return. They no longer stand alone, but will be subject to an integrated approach of measures stimulating conditions in the home country and reintegration measures. What is more, the Commission recommends that “[S]tand-alone negotiating directives should no longer be proposed”, allowing the EU more clout for creative and far-reaching solutions, with adequate human rights protection. A prelude on the end of the contemporary readmission policy?

In answer to the Commission’s evaluation, the Council formulated a new strategy on readmission. However, it is not as radical as the Commission’s position. The Council does not necessarily exclude future readmission agreements outside a broader framework. The agreements currently under negotiation and the countries for which a negotiation mandate is still outstanding, should still be negotiated and concluded. Moreover, unlike the expectations the Commission has raised in this regard the Council calls to explore “the opportunity of launching new negotiations with third countries.”

The primary determinant to target third countries remains the migratory pressure the country represents, but also its extent of cooperation and geographical position. Furthermore should any negotiation on a visa facilitation agreement be held in parallel with readmission negotiations. Furthermore has the council decided that or will continue to incorporate the accelerated procedure and the provisions on transit procedures into every negotiation mandate. Only in exceptional cases will this procedure be omitted from the readmission agreement if they are “unlikely to be used in practice”.

Note that the Council does not even mention the possible omission of readmission obligations for third country nationals. In case like Sri Lanka, these provisions are not relevant. Nevertheless, the Council chooses to maintain its entire draft readmission agreement. The Council only seems to give in a little on the compensatory measures it will allow the Commission to offer the partner country. They foresee more flexible mandates, but also open the door for other incentives besides the classical visa facilitation agreements and financial and technical cooperation. The Council hints at concluding readmission agreements within the framework of the new Mobility Partnerships.

In sum it remains to be seen whether the hesitant Commission _mea culpa_ heralds a change in the current European readmission policy. Still the Commission will have a greater variety of incentives to offer its negotiating partner, which may allow her to obtain firmer human rights guarantees.

270 Council conclusions defining the European Union strategy on readmission of 8 June 2011, Council doc. 11260/11.
271 Council doc. 11260/11, §1.
272 Council doc. 11260/11, §8.
273 Ibid.
Conclusions

Readmission agreements are all but a recent tool to try to cope with migratory pressure and the challenges it brings along. Dating back to the nineteenth century, these earliest readmission agreements have little in common with the contemporary version which notably differs in finality. It was not until the 1970’s that the phenomenon of migration started to make countries of destination nervous. The countries suffering migratory pressure fight an ever fiercer battle against illegal migration. The parallel development of a Europe without internal borders provoked a shift, although gradually, of illegal migration policy from the national to the European level.

Illegal migration must be addressed through a range of measures dealing with the root causes, border control and effective return of illegal and as such unwanted immigrants. Besides some flanking measures, the main instruments to ensure return of irregular migrants are formal and informal readmission procedures. Formal procedures, as established through the conclusion of readmission agreements, are preferable as they are more transparent, are likely to be in conformity with human rights and are more reliable for the country requesting readmission. Accordingly, EU competence to conclude such agreements could not be postponed. The implementation of the Schengen acquis in the Community acquis happened with simultaneous extended competences for the European Community. For many years, this competence had to be deduced from the wording: “the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas: (c) illegal immigration and unauthorized residence, including removal and repatriation of persons residing without authorization” (article 63 §3 TEC). The implied powers doctrine allowed to interpret this provision in such a way that the Community was competent to conclude international agreements concerning ‘repatriation’. This leaves the question of the relation between Community agreements and national agreements. As soon as the Community assumed its powers in relation to a certain country then, the competence of the Member States is exhausted. Existing agreements can only remain in force when they are in conformity with the Community readmission agreements. As such, the competence to conclude readmission agreements is a shared one.

Today, Community readmission agreements have been concluded with Hong Kong, Macao, Sri Lanka, Albania, Russia, Ukraine, Moldova, Bosnia-Herzegovina, Serbia, Montenegro, Macedonia, Pakistan and Georgia. This list witnesses a scattered geographical policy, that is if there is a coherent policy at all. Initially, the Member States could indicate which countries they would like to have an agreement with. It is only in a later stage that defined criteria were developed. The new criteria maintain the
migratory pressure which the EU or a Member State is faced with as the first determinant to target a certain third country. Moreover, do these new criteria primarily target countries of origin, rather than transit countries.

Every readmission agreement is based on a standard draft agreement provided by the EU. Therefore, every agreement has the same structure and the same basic reciprocal readmission obligations. Room for negotiation is only left open for time limits and for the kind of documents that have a certain value to provide evidence of nationality or transit. The most distinguishable agreement is the one with Russia. It is a pragmatic agreement with tight time limits for every step in the procedure. All in all, it is not possible to draw up categories of European readmission agreements. Geography and content taken together, there is only one homogenous group of Community readmission agreements; the agreements with the Western Balkans. The European readmission policy fluctuates according to the context. The EU does often not have the power to impose its will on a third country as witnessed by the unwillingness of several countries for which the Council has issued negotiating mandates to start the negotiations. The willingness of both parties to make certain concessions and the trumps at hand are the only determinants of the outcome of the negotiations. The EU may assign the cooperating country visa facilitation, financial cooperation or, more recently can set up inclusive cooperation frameworks. The concessions the EU has to make may be quite burdensome, but can be conceived as in proportion with the de facto readmission obligations for the third country. Usually, readmission of own country nationals is easily obtained. Readmission of third country nationals who transited the territory is much more difficult to obtain from a partner country and therefore explain the often lengthy negotiations. Should the Council not be as persistent to include TCN readmission obligations, the negotiations may have advance much more. On the other hand, deviation from the standard readmission form may prejudice any subsequent negotiation with a country which would require the inclusion of readmission of third country nationals.

An illegal migrant, after a final expulsion decision, can be returned through the procedures set out in the readmission agreement and in its implementing protocols. Within a certain time limit the requesting country may lodge a readmission application on the grounds that the returnee is national of that third country or has transited it. Readmission raises some human rights concerns, the most important ones being respect for the right to asylum and the principle of non-refoulement. The right to asylum may be infringed if a Member State returns a protection seeker to a safe third country with which the protection seeker has a connection, without investigation his or her asylum application, based on the assumption that the protection seeker could have obtained protection there. It is not unthinkable that the safe third country does not investigate the asylum application either. Readmission agreements do not provide any protection in this regard. It should be considered to be
inserted in any future agreement that a readmission application must explicitly mention the special status of the returnee, foremost whether he is an asylum seeker, but also if the returnee belongs to another vulnerable category, such as an unaccompanied minor. The prohibition of *refoulement* means that no-one shall be expelled to a place where his life or freedom is endangered. This principle of customary international law may not always be respected. Notably the accelerated readmission procedure is subject to persistent critique because it would not allow an asylum application to be lodged, nor allow investigation of the threats the returnee may face when being sent to his country of origin or transit.

Proponents of readmission agreements insist that these agreements are human rights neutral and that they merely facilitate the execution of a national expulsion decision which should be in conformity with national and international norms. Opponents consider return as a process in which every link must ensure minimum fundamental rights standards. The Commission seems to give in and proposes to enhance human rights protection through explicit provisions in the readmission agreements, ensuring respect for human rights. To meet this aim, the Commission suggest not to propose the negotiation of single readmission agreements, but rather to develop a framework for every targeted country which is to the benefit of every country involved, including a reciprocal suspension clause. This sounds like the end of European readmission agreements as we know them today. The Council, in answer to an invitation of the Commission does not seem to support the Commission’s diligence. In fact, the only change the Council responds to is granting the Commission a more flexible mandate, with an increase in variety of incentives to offer its negotiation partner. This would allow the European negotiators to enhance their negotiating leverage. However, it is unlikely that European readmission agreements as we know them today will change any time soon.
## Annex 1: List of EU readmission agreements and mandates

### a. *Agreements in force*

<table>
<thead>
<tr>
<th>Country</th>
<th>Mandate received</th>
<th>First round</th>
<th>Agreement signed</th>
<th>Entry into force</th>
<th>Coupled with visa facilitation agreement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hong Kong</td>
<td>April 2001</td>
<td>October 2001</td>
<td>27 November 2002</td>
<td>1 March 2004</td>
<td>No</td>
</tr>
<tr>
<td>Macao</td>
<td>April 2001</td>
<td>October 2001</td>
<td>13 October 2003</td>
<td>1 June 2004</td>
<td>No</td>
</tr>
<tr>
<td>Sri Lanka</td>
<td>September 2000</td>
<td>July 2001</td>
<td>4 June 2004</td>
<td>1 May 2005</td>
<td>No</td>
</tr>
<tr>
<td>Albania</td>
<td>November 2002</td>
<td>May 2003</td>
<td>14 April 2005</td>
<td>1 May 2006</td>
<td>Visa facilitation was offered to Albania after the readmission agreement had already entered into force.</td>
</tr>
<tr>
<td>Russia</td>
<td>September 2000</td>
<td>January 2003</td>
<td>25 May 2006</td>
<td>1 June 2007</td>
<td>Visa facilitation was offered when readmission negotiations had already started but were not progressing.</td>
</tr>
<tr>
<td>Ukraine</td>
<td>June 2002</td>
<td>18 November 2002</td>
<td>18 June 2007</td>
<td>1 January 2008</td>
<td>Visa facilitation was offered when readmission negotiations had already started but were not progressing.</td>
</tr>
<tr>
<td>FYROM</td>
<td>November 2006</td>
<td>1 December 2006</td>
<td>18 September 2007</td>
<td>1 January 2008</td>
<td>Yes</td>
</tr>
<tr>
<td>Bosnia &amp; Herzegovina</td>
<td>November 2006</td>
<td>20 December 2006</td>
<td>18 September 2007</td>
<td>1 January 2008</td>
<td>Yes</td>
</tr>
<tr>
<td>Montenegro</td>
<td>November 2006</td>
<td>15 December 2006</td>
<td>18 September 2007</td>
<td>1 January 2008</td>
<td>Yes</td>
</tr>
<tr>
<td>Serbia</td>
<td>November 2006</td>
<td>4 December 2006</td>
<td>18 September 2007</td>
<td>1 January 2008</td>
<td>Yes</td>
</tr>
<tr>
<td>Moldova</td>
<td>December 2006</td>
<td>9 February 2007</td>
<td>10 October 2007</td>
<td>1 January 2008</td>
<td>Yes</td>
</tr>
<tr>
<td>Pakistan</td>
<td>September 2000</td>
<td>April 2004</td>
<td>26 October 2009</td>
<td>1 December 2010</td>
<td>No</td>
</tr>
<tr>
<td>Georgia</td>
<td>November 2008</td>
<td>2 April 2009</td>
<td>22 November 2010</td>
<td>1 March 2010</td>
<td>Yes</td>
</tr>
</tbody>
</table>
### b. *Negotiations finalised*

<table>
<thead>
<tr>
<th>Country</th>
<th>Mandate received</th>
<th>First round</th>
<th>Final round</th>
<th>Coupled with visa facilitation agreement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Turkey</td>
<td>November 2002</td>
<td>May 2005</td>
<td>14 January 2011</td>
<td>No</td>
</tr>
</tbody>
</table>

### c. *Ongoing negotiations an negotiations not yet formally launched*

<table>
<thead>
<tr>
<th>Country</th>
<th>Mandate received</th>
<th>First round</th>
<th>Last round to date</th>
<th>Coupled with visa facilitation agreement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Morocco</td>
<td>September 2000</td>
<td>April 2003</td>
<td>15&lt;sup&gt;th&lt;/sup&gt; formal round on 10 May 2010</td>
<td>No</td>
</tr>
<tr>
<td>Cape Verde</td>
<td>June 2009</td>
<td>13 July 2009</td>
<td>12 October 2010</td>
<td>Yes</td>
</tr>
<tr>
<td>China</td>
<td>November 2002</td>
<td></td>
<td></td>
<td>No</td>
</tr>
<tr>
<td>Algeria</td>
<td>November 2002</td>
<td></td>
<td></td>
<td>No</td>
</tr>
<tr>
<td>Belarus</td>
<td>February 2011</td>
<td></td>
<td></td>
<td>Yes</td>
</tr>
</tbody>
</table>

*Source: DG Home Affairs*


Accessed 15 August 2011
## Annex 2: List of EU Mobility Partnerships

<table>
<thead>
<tr>
<th>Third Country</th>
<th>Mandate</th>
<th>Date of signature</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cape Verde</td>
<td>12/2007</td>
<td>05/03/2008</td>
</tr>
<tr>
<td>Georgia</td>
<td>06/2008</td>
<td>30/11/2009</td>
</tr>
<tr>
<td>Moldova</td>
<td>12/2007</td>
<td>05/06/2008</td>
</tr>
<tr>
<td>Senegal</td>
<td>06/2008</td>
<td></td>
</tr>
</tbody>
</table>

Source: MI.RE.M
http://www.mirem.eu/datasets/agreements/european-union
Accessed 11 July 2011
**Annex 3: Table Time limits**

<table>
<thead>
<tr>
<th>Country</th>
<th>Application¹</th>
<th>Reply²</th>
<th>Travel documents³</th>
<th>Validity⁴</th>
<th>Transfer after reply⁵</th>
<th>Re-readmission⁶</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hong Kong</td>
<td>1 year</td>
<td>1 month</td>
<td>14 - 15</td>
<td>6 months</td>
<td>3 months</td>
<td></td>
</tr>
<tr>
<td>Macao</td>
<td>1 year</td>
<td>1 month</td>
<td>14 - 15</td>
<td>6 months</td>
<td>3 months</td>
<td></td>
</tr>
<tr>
<td>Sri Lanka</td>
<td>1 year</td>
<td>15-30 d.</td>
<td>30 days</td>
<td>6 months</td>
<td>3 months</td>
<td></td>
</tr>
<tr>
<td>Albania</td>
<td>1 year</td>
<td>14 days</td>
<td>14-30 days</td>
<td>6 months</td>
<td>3 months</td>
<td>3 months</td>
</tr>
<tr>
<td>Russia</td>
<td>180 days</td>
<td>25 days</td>
<td>30 days</td>
<td>30 days</td>
<td>90 days</td>
<td></td>
</tr>
<tr>
<td>Ukraine</td>
<td>1 year</td>
<td>14 days</td>
<td>14 days</td>
<td>6 months</td>
<td>Without delay</td>
<td>3 months</td>
</tr>
<tr>
<td>Serbia</td>
<td>1 year</td>
<td>10 days</td>
<td>3-14</td>
<td>3 months</td>
<td>3 months</td>
<td>3 months</td>
</tr>
<tr>
<td>Montenegro</td>
<td>1 year</td>
<td>12 days</td>
<td>3-14</td>
<td>3 months</td>
<td>3 months</td>
<td>3 months</td>
</tr>
<tr>
<td>Bosnia-Herzegovina</td>
<td>1 year</td>
<td>10 days</td>
<td>3-14</td>
<td>20 days –</td>
<td>3 months</td>
<td>3 months</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>3 months EU</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Macedonia</td>
<td>1 year</td>
<td>14 days</td>
<td>3-14</td>
<td>30 days</td>
<td>3 months</td>
<td>3 months</td>
</tr>
<tr>
<td>Moldova</td>
<td>6 months</td>
<td>11 days</td>
<td>3-14</td>
<td>3 months</td>
<td>3 months</td>
<td>3 months</td>
</tr>
<tr>
<td>Pakistan</td>
<td>1 year</td>
<td>30 days</td>
<td>14 days</td>
<td>6 months</td>
<td>3 months</td>
<td>3 months</td>
</tr>
<tr>
<td>Georgia</td>
<td>6 months</td>
<td>12 days</td>
<td>3 days</td>
<td>90 days</td>
<td>3 months</td>
<td>6-12 months</td>
</tr>
</tbody>
</table>

¹ Time limit to lodge a readmission application with the requested state after the discovery that the person concerned does not, or does no longer, fulfil the conditions in force for entry, presence or residence.

² Time limit for the readmission agreement to be replied by the requested state after receipt of the application.

³ After the requested state has given a positive reply to the readmission application, that state must issue valid travel documents that are required for the return of the person concerned within a
certain time limit. The first number indicates the normal time limit. If the person to be readmitted cannot be transmitted within the period of validity of the travel document (4), then the requested state must issue a new travel within the time limit indicated in the second number. If the table only mentions one number, then the time limit for both is the same.

4 Validity of the travel document.

5 The period in which the person to be readmitted must effectively be transferred.

6 Time limit in which the readmitting country, after the transfer can establish that the conditions for readmission were not fulfilled. The requesting state must take back the returnee
Annex 4: Cobweb of national readmission agreements from the late 1990’s until 2009
Annex 5: Dutch resumé

Deze masterproef heeft Europese overnameovereenkomsten als onderwerp. In een eerste hoofdstuk wordt de context ervan geschetst, met name een overzicht van nationale overnameovereenkomsten en een uiteenzetting van het Europees migratie beleid waarbinnen overnameovereenkomsten kaderen.

Deze masterproef tracht vervolgens twee vragen te beantwoorden. Enerzijds stelt de vraag zich of het Europees overnamebeleid een werkelijk afgelijnd beleid is. We onderzoeken of bepaalde criteria dienen in acht genomen worden om de landen aan te wijzen waarmee een overnameovereenkomst wenselijk is. Verder kijken we na of de geografische verspreiding van de partnerlanden zich vertaald heeft in onderscheiden overnameovereenkomsten. De tweede grote vraag die ons bezig houdt zijn de mensenrechtelijke implicaties van deze overeenkomsten. Het terugsturen van migranten naar landen van doorgang of van origine gaat steeds gepaard met kritiek. Deze masterproef gaat na welke de voornaamste bezorgdheden zijn en wat de mogelijke oplossingen kunnen zijn.
Bibliography

Treaties


Convention concerning the Transfer of the control of persons towards external borders of the Benelux territory of 11 April 1960.


International agreements


Council of Europe

Council of Europe, forced return, 20 guidelines adopted by the committee of ministers, 2005, 74 p.

Council of Europe, Report: readmission agreements: a mechanism for returning illegal migrants, Committee on Migration refugees and population of the Council of Europe, Rapporteur Strik, Doc. 12168.


Acts of the institutions of the European Union

Legislation


Council regulation (EC) N° 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing external borders and those whose nationals are exempt from that requirement, OJ L 81 of 21 March 2001, 1-7.


**European Council**

Presidency Conclusions Edinburgh Council of 12 December 1992, Declaration on principles of governing external aspects of migration policy, SN 456/92.


**Commission documents**

Commission Communication to the Council and the European Parliament on Immigration, SEC (91) 1855.

Communication on immigration and asylum policies, COM (94) 23.


Report from the Commission to the Council, the European Parliament, the European Court of Auditors, the Economic and Social Committee and the Committee of the Regions: TACIS, COM (2003) 323.

Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Study on the links between legal and illegal migration, COM (2004) 412.


The global approach to migration one year on: towards a comprehensive European migration policy, COM (2006) 735.


Proposal for a Council Regulation terminating the partial interim review pursuant to Article 11(3) of Regulation (EC) No 384/96 of the anti-dumping duty on imports of ammonium nitrate originating in Russia, COM (2008) 76.


Mobility partnerships as a tool of the Global Approach to Migration, SEC (2009) 1240, 7

Evaluation of EU readmission agreements, COM (2011), 76,


Evaluation of EU readmission agreements: The aggregated data for the chosen categories gathered by the Commission from the MS on the basis of a questionnaire SEC (2011) 210.

Council documents


Council Conclusions on clauses to be inserted in future mixed agreements of 22 January 1996, Council doc. 4272/96.


High-level working group on asylum and migration, Adoption of the report to the European Council in Nice of 29 November 2000, Council doc. 13993/00.


Criteria for the identification of third countries with which new readmission agreements need to be negotiated of 16 April 2002, Council doc.7990/02.

Modification of the terms of reference of the high level working group on asylum and migration of 30 May 2002, Council doc. 9433/02.


Common Approach to visa facilitation, adopted by EU member states at the level of the Committee of Permanent Representatives of 20 December 2005, Council doc. 16030/05.


European pact on immigration and asylum of 16 October 2008, Council doc. 13440/08.


Council conclusions defining the European Union strategy on readmission of 8 June 2011, Council Doc. 11260/11,

EU/Georgia action plan, available at: 

**Parliamentary documents**

UNHCR Reports


Case-law


ECJ, 14 July 1976, Cornelis Kramer and others, Joined cases 3,4 and 6/76, ECR 1279.

ECJ, 26 April 1977, Opinion 1/76, Draft Agreement establishing a European laying-up fund for inland waterway vessels, ECR 741.


European Court of Human Rights, 12 October 2006, N° 13178/03, Mubilanzila Mayeka and Kaniki Mitunga v. Belgium.


Doctrine


HAILBRONNER, K. “Readmission agreements and the obligation on states under public international law to readmit their own and foreign nationals”, *zaorv* 1997, 1-49.


Press


“UNCHR deeply concerned over returns from Italy to Libya”, Press releases 7 May 2009