

The European Union readmission policy after Lisbon

MARIAGIULIA GIUFFRÈ

PhD Candidate at the School of International Studies
University of Trento, Italy



The author would like to thank prof. Antonino Ali for his comments on the earlier draft of this paper and the Faculty of Law of the Lund University for allowing her to conduct part of her research on EU readmission policy at its premises.

Abstract

This article conducts a brief historical excursus on the evolution of the EU's readmission policy through the analysis of readmission agreements, meant as its main legal instruments. The Lisbon Treaty is herein portrayed as an historical watershed in the recognition of both an express competence of the Union with regard to measures aimed to address the readmission of irregular migrants, and a new role of the Parliament entrusted with the fundamental power to be consulted before a readmission agreement is definitively concluded by the Council. Finally, while a scrutiny of the close relationship between national and supranational readmission strategies reveals the unwillingness of Member States to renounce their national readmission policies, a preliminary assessment of the potential role of the Charter of Fundamental Rights in the field of return of irregular migrants after Lisbon is performed.

Introduction

The issue of the return of irregular migrants has become an underlying component of the EU immigration and asylum policy, which has been progressively defined and consolidated after the entry into force of the Maastricht, Amsterdam and the Lisbon Treaties¹. The need to create a common European Union (EU) return policy has been, then, repeatedly asserted in several European Councils with the aim to emphasise readmission and return as key tools in the battle against illegal migration. This article purports to conduct a brief historical excursus on the evolution of the EU's readmission policy from the outset to the current developments through the analysis of readmission agreements, meant as its main legal instruments. Before scrutinising the premises and implications of

the consolidation of the EU's readmission policy, terminological clarifications are needed. The operational indicative definition proposed in November 2002 by the European Council in its Return Action Programme² considers return as "the process of going back to one's country of origin, transit, or another third country, including preparation and implementation. It may be voluntary or enforced." Readmission concerns, instead, "the act by a state accepting the re-entry of an individual (own national, third country national, or stateless person) who has been found illegally entering to, being present in, or residing in another state" (Annex I). The three actors involved in the repatriation process are the State that requests readmission (requesting State), the State that is requested to readmit (requested State), and the person to be readmitted (either irregular migrant or rejected asylum seeker, meant as an individual who is not in need of international pro-

¹ Treaty of Amsterdam, 2 October 1997, entry into force on 1 May 1999; Treaty of Lisbon, 13 December 2007, entry into force on 1 December 2009.

² Brussels European Council, 25 November 2002

tection). For the purpose of this study, the term illegal is used in relation to a condition and not to a person, while the terms irregular (with no regular/legal status in the host country) and undocumented (without the required papers) migrant are accepted as synonyms and extended to include also persons who illegally cross an international border without valid documents.³

Section I of the article provides a brief historical overview on the EU readmission policy, including the institutional framework, issues of competence, and an outline of the main legal instruments; Section II canvasses the broad subject of readmission agreements—designed to create a set of procedures and obligations between the contracting parties on the return of irregular migrants—by revealing how these treaties have gained notable importance and visibility since the early nineties in shaping the external relations policy of the EU and in stimulating debate on their implications for the human rights of migrants subjected to a return decision.⁴ The primary aim of Section III is to shed light on the developments of the EU's readmission policy triggered by the entry into force of the Lisbon Treaty, which strengthens the power of the European Parliament in the conclusion of such agreements and confer the EU's explicit competence in the field of readmission. An investigation of the tight relationship between national and supranational readmission strategies is also conducted as the EU's asylum and return policies constitute the general framework placed above and beyond the panoply of bilateral accords stipulated at an intergovernmental level by EU Member States and third countries.

It would go too far comprehensively to analyse the complex issue of the impact of readmission agreements on the human rights of returned migrants and asylum seekers. Nevertheless, Section IV purports to perform a preliminary assessment of the potential impact of the Charter of Fundamental Rights (CFR), which, after Lisbon, ranks as the primary Union Law on the readmission practice of the EU.

EU readmission policy before Lisbon: institutional framework and competences

Visa, migration, and asylum are relatively new components of European policy-making. While, indeed, the Treaty of Rome did not contain any provisions on the

harmonisation of these matters, the Maastricht Treaty attributed such issues to the intergovernmental cooperation within the third pillar (Justice and Home Affairs) of the Treaty on EU (TEU).⁵ The Treaty of Amsterdam, which constitutes a series of amendments and additions to the Maastricht Treaty, shifted immigration, asylum, and civil law issues from the third to the first pillar and conferred express power to the European Community (EC)—as set out in Article 63(3) (b) of the EC Treaty (TEC) (Title IV)—to address the issue of “illegal immigration and illegal residence, including repatriation of illegal residents.”⁶ Decisions to conclude readmission agreements—the main instruments used by the EU to facilitate the return of people who have entered or stayed illegally in the EU—have been adopted on the basis of the mentioned article. With the entry into force of the Treaty of Amsterdam in 1999 the European Community (EC) has been empowered to enter in its own name into such agreements, thus letting Member States expel people, with no title to stay, from the territory of the EU.

According to the jurisprudence of the European Court of Justice (ECJ), in those cases in which no explicit external competence is mentioned in the Treaty, competence in external matters, including the power to conclude international agreements, can be derived from explicit internal competence.⁷ Furthermore, when EC law has created powers for the EC within its internal system in order to attain a specific objective, the EC has authority to conclude international agreements if they are necessary for the attainment of that objective, even in the absence of any internal measure.⁸

Regarding the decision-making process, Article 67 TEC provided a shared initiative of the Commission and the Member States, unanimity in the Council, and previous consultation of the European Parliament. However, with the entry into force of the Hague Programme in 2005,⁹ the decision-making rules have been subjected to the initiative of the Commission, qualified majority voting of the Council and co-decision with the European Parliament.¹⁰

5 Only two aspects in visa policy in Article 100c were incorporated in the Treaty of the European Community (TEC). See, (Niemann, 2006: 187)

6 See generally on this issue, (Hailbronner 1998; Monar 1998)

7 This is the so-called principle of parallelism between internal and external powers as set out in the ERTA case, 31 March 1971, para 16.

8 Opinion 1/76 [Re Rhine Navigation Case]

9 The Hague Programme, 4-5 November 2004

10 Council Decision 2004/927/EC, 22 December 2004. See also, (Peers 2005)

3 On the concept of “irregular migrant”, see Guild 2004: 3.

4 See generally, (Coleman 2009: 111-138; Marchegiani 2008; Trauner and Kruse 2008)

In October 1999, the European Council adopted the Tampere Programme to implement the provisions of the Treaty of Amsterdam in the area of asylum and migration.¹¹ Key elements of the Tampere Programme were the creation of a Common European Asylum System (Section II), the fair treatment of third-country nationals (Section III), partnership with countries of origin of migrants on political, human rights and development issues (Section I), and a more efficient management of migration flows, including measures to tackle illegal immigration as part of a common return policy (Section IV). Both the conclusion of readmission agreements and a work of assistance to countries of origin and transit to promote voluntary over forced return also fell within this programmatic framework. The same objectives were, then, stressed in The Hague Programme (2005-2010) which contains a wide range of initiatives to build up a “strong” return and readmission strategy. The measures proposed by the Hague Programme include, for instance, the “Returns Directive”, the creation of a European Return Fund by 2007, the conclusion of Community readmission agreements, the development of common integrated country and region specific return programmes, and the appointment by the Commission of a Special Representative for a common readmission policy (para 1.6.4).¹² This five-years JHA Programme is aimed to define the premises for both efficiently countering illegal immigration and harmonizing and consolidating asylum and migration legislation through a comprehensive approach embracing all stages of the global phenomenon of human movement across borders, with respect to the root causes of migration, entry and admission, integration, and return policies (para 1.2). Such a global approach to migration can be ensured only through a common analysis of migratory trends in all their aspects by means of a strong and coordinated effort between those responsible for the development of asylum and migration policy and those engaged in all other policy fields relevant to these areas (para 1.2).

Likewise, the December 2001 Laeken European Council emphasised return policy as a crucial instrument in the battle against illegal migration and human-trafficking, and viewed the conclusion of EC readmission agreements as a suitable strategy to secure the effective removal of illegal migrants.¹³ Subsequently, the

Commission issued a Green Paper on return policy, which focused on forced and assisted repatriation of persons residing illegally in the European Union.¹⁴ Hardly surprising, a vast range of instruments are part of the EU’s return policy, such as the Council Directives on the mutual recognition of decisions on the expulsion of third country nationals,¹⁵ assistance in the cases of transit for the purposes of removal by air,¹⁶ Council Decisions on the organization of joint flights for removals of third country nationals,¹⁷ on financing expulsion measures,¹⁸ and on the establishment of an information and coordination network for Member States’ migration management services.¹⁹ The return policy also encompasses readmission agreements between the EU and non-EU third countries, which will constitute the main object of study of the following analysis.

Content and purpose of EU readmission agreements

Within the framework of the EU’s return policy, several readmission agreements have been signed between the Union and third countries as means of facilitating the return of persons illegally residing within the borders of one of the Member States. As a result of the April 2002 Green Paper on a Community Return Policy on Illegal Residents, readmission was subsumed into the common return policy. The main objectives of this policy are to fight illegal immigration and expand the number of safe third countries around the EU able to take the burden of migrants expelled and removed from the EU’s Member States. After the Al Qaeda’s attacks in September 2001, even more restrictive control measures have been adopted under Title IV of the Treaty on the European Community (TEC) in a climate in which migrants and asylum seekers are increasingly perceived as a threat to international peace and stability. If, therefore, EU Member States have attempted to elaborate harmonized solutions such as the progressive creation of the Common European Asylum System (CEAS),²⁰ they have also employed new logics

11 Tampere European Council, 15-16 October 1999

12 See also, (Caritas Report 2007)

13 Laeken European Council, 14-15 December 2001

14 Green Paper, 10 April 2002, followed, then, by a detailed Council Action Plan and a parallel Action Plan on external border control.

15 Council Directive 2001/40/EC, 28 May 2001

16 Council Directive 2003/110/EC, 25 November 2003

17 Council Decision 2004/573/EC, 29 April 2004

18 Council Decision 2004/191/EC, 23 February 2004

19 Council Decision 2005/267/EC, 16 March 2005

20 The aim of the CEAS is to establish common asylum procedures and equivalent conditions for persons in need of international protection valid throughout the EU.

of reinforcement of EU frontiers control, criminalization of migrants (Bigo 2004: 61), and acceleration of the procedures for returning foreigners who have an irregular status to their countries of origin or transit.²¹ In general terms, readmission agreements are bilateral or multilateral treaties setting standards and procedures indicating how return of irregular migrants is to be conducted. They generally concern the return of own nationals or third country nationals,²² means of establishing nationality, time limits for requests for readmission, transit arrangements, exchange of personal data, costs of transport, national authorities in charge of cooperating on the removal of immigrants, and a “non affection clause” regulating the relations between the agreement and other international obligations arising from international law, including human rights. The last Section generally lists final provisions clarifying both the territorial scope of the agreement and the confirmation that it does not apply to the territory of Denmark. Nonetheless, a recommendation is made that the third-country and Denmark conclude a bilateral accord on readmission in the same terms as the EU agreement.

Denmark as well as the UK and Ireland are embedded in a flexible system of “ins” and “outs” in respect to asylum, immigration, civil, policing, and criminal matters. The Lisbon Treaty brings asylum and immigration together with all matters on police cooperation and on civil and criminal law into a shared competence, entitled “Area of Freedom, Security and Justice” (AFSJ), which was created with the Amsterdam Treaty and constitutes now the Title V of Part III of the Treaty on the Functioning of the EU (TFEU) (Articles 67-89). The UK and Ireland have opt-outs from the entire AFSJ (Protocol on the position of the UK and Ireland in respect of the AFSJ). Thus, they are not bound by any legal instrument adopted under the EU’s AFSJ, and no judgment of the ECJ interpreting such acts is applicable to them (Article 2).²³ However, in accordance

with Article 3(1) of the Protocol, the UK and Ireland have the possibility to “opt in” and participate in the adoption and application of any proposed measure, within 3 months of the Commission’s publication of a proposal in the AFSJ.²⁴ Unlike the UK and Ireland, Denmark is not entitled to either “opt in” or participate in the adoption of any measure under Title V of Part III of the TFEU (Articles 1 and 2 of the Protocol on the Position of Denmark). Therefore, the UK and Ireland have a wider discretion than Denmark in deciding whether and when opting in or out a readmission agreement concluded by the EU. They are not obliged to act together, and while so far the UK has participated in all treaties on readmission concluded by the EU with third countries—including the most recent one with Pakistan—Ireland has only joined the accord with Hong Kong.

While the Maastricht Treaty did not set out any opt-outs for the UK and Ireland from EU JHA cooperation, the Treaty of Amsterdam attached to the TEU and the TEC three Protocols establishing an opt-out regime for these two countries from the following aspects of the EU Justice and Home Affairs law: the Schengen acquis, border controls measures, and immigration, asylum and civil law legislation (Peers 2009: 3-4).

With regard to the pre-Lisbon procedure leading to the conclusion of a readmission agreement, only the Commission and the Council were involved. Following a recommendation from the Commission, the Council adopted a directive authorising the Commission to negotiate a treaty with a third country (Article 300 TEC). In performing this function, the Commission attempted to take a homogeneous approach by adopting an informal standard draft readmission agreement as a model to be followed in drafting subsequent accords. The latter, along with the Council’s directive, represented the content the Community unilaterally relied upon as the starting point of negotiations. Since the June 2002 Seville European Council, the progress in the field of readmission and return issues has been discontinuous, gathering speed only over the last years. At the time of writing (November 2010), the Commission has received a total of eighteen nego-

21 Between 2005 and 2007, actual removals of unlawfully residing third country nationals within the EU were 756,796. Source: Centre for information, discussion and exchange on the crossing of frontiers and immigration (CIREFI).

22 In the readmission context, the use of term “third country national” refers to a person who does not possess the nationality of any of the contracting parties to a readmission agreement.

23 Pursuant to Article 1 of the Protocol on the Application of certain aspects of Article 26 TFEU, nothing in EU law affects the right of the UK and Ireland to exercise controls over people coming from abroad. See (Peers 2009)

24 For a detailed review on the Lisbon Treaty and the Protocols affecting the UK, Ireland, and Denmark—which would be beyond the scope of this paper—see (Fletcher 2009: 89-95; Chalmers, Davies, and Monti 2010: 491-492)

tiating mandates from the Council,²⁵ but only twelve readmission agreements have become operative (Albania, Bosnia and Herzegovina, FYROM, Hong Kong, Macao, Moldova, Montenegro, Pakistan, Russia, Serbia, Sri Lanka, and Ukraine).

Repatriation schemes leading to a bilateral accord have been launched with those countries considered as a priority for the EU on the basis of a double standard elaborated by the General Affairs and External Relations (GAER) Council in November 2004.²⁶ The decisive selection criteria are the following: “[first], migration pressure on particular Member States, as well as the EU as a whole; [second], the geographical position of countries, including considerations of regional coherence and neighbourhood” (para 3). These factors have been employed by the Community in selecting States with which negotiating readmission agreements and have been considered by the Council as “the most important criteria for determining, on a case by case basis, with which further countries readmission agreements should be concluded.” (para 3) The common readmission policy is aimed to pursuing different kinds of objectives. First, the fight against unauthorised immigration by facilitating the return of nationals as well as third country nationals illegally residing in the territory of the EU through the issuance, for instance, of travel documents. In this regard, it may be added that readmission agreements for the return of third country nationals are usually based on transit through the territory of the requested States. Second, the establishment of a “buffer zone” of third countries responsible both to readmit immigrants from the EU and to intercept migrants en route to the EU (Coleman 2009: 61). Third, the promotion of readmission agreements between third countries themselves (in-

cluding transit and source countries), thereby broadening the number of States able to receive migrants. Further, the EU encourages third countries’ readmission negotiations through the so-called AENAS Regulation, which enables the Union to fund projects and supply technical and financial support.²⁷

The draft Constitutional Treaty signed in Rome on 29 October 2004 provided the EU with an explicit legal basis for concluding “agreements [...] for the readmission of third country nationals residing without authorisation, to their countries of origin or provenance” (Article III-267(3)).²⁸ Nevertheless, it did not rapidly enter into force because of its rejection by referendum in France and the Netherlands. It means that until December 2009, marking the date of adoption of the Lisbon Treaty, the 1999 Treaty of Amsterdam has offered the legal reference frame for the conclusion of readmission agreements at the EU level. Indeed, with the Treaty of Amsterdam the Community acquired competence to sign such agreements with third countries while issues regarding visa, immigration, asylum, and other policies related to the free movement of persons were transferred from the third to the first pillar (Title IV). Pursuant to Article 63(3)(b) TEC, “the Council [...] shall [...] adopt [...] measures on immigration policy within the area of illegal immigration and illegal residence, including repatriation of illegal residents”. Given the lack of reference to “readmission” in both the Treaty establishing the European Community (TEC) and the Treaty on the EU (TEU), the competence to conclude readmission agreements could be derived from a broad interpretation of the term “repatriation”, which is meant to include also the readmission of migrants to transit countries (Billet 2010: 60).

The issue of the division of competences in the camp of readmission is not without controversy. On the one hand, the Commission has traditionally claimed the exclusive power of the Community to negotiate and conclude these international bilateral treaties. This view is in line with the stance of the Legal Service of the Council, which pinpoints how the existence of inter-state policies of readmission would risk to create potential distortions in an area without internal border controls and with free movement of persons where readmission policies of other EU Member States can be circumvented by secondary movements of illegal

25 In September 2000, the Council adopted a first set of directives for the negotiation of readmission agreements with Morocco, Pakistan, Russia and Sri Lanka; in May 2001 and in June 2002 new directives were adopted for negotiating respectively with Hong Kong and Macao, and with Ukraine. In November 2002 the Council added directives for Albania, Algeria, China, and Turkey, followed by mandates for Bosnia and Herzegovina, Macedonia, Moldova, Montenegro and Serbia. In the JHA Council meeting of 4 and 5 June 2009, the Council adopted two decisions authorising the Commission to open negotiations with the Republic of Cape Verde for the conclusion of agreements on facilitation of issuance of short-stay visas and on readmission. Finally, on 28 November 2008, the Council gave the European Commission the mandate to start the negotiations of the readmission agreement with Georgia. Signed in November 2010, it will enter into force on 1 March 2011 (See, Table 1)

26 Draft Council Conclusions, 2 November 2004

27 AENEAS Regulation, 18 March 2004

28 Treaty establishing a Constitution for Europe, signed at Rome on 29 October 2004. See generally, (Monar 2005: 9)

migrants to another EU country.²⁹ Moreover, an often quoted argument is that the conclusion of an EU readmission agreement can have an added value represented by the political and normative weight of the Union in encouraging third countries to accept and fulfil readmission obligations.³⁰ Nonetheless, the JHA meeting of 27 and 28 May 1999 reconfirmed the issue of allotment of competences as an enduring punctum dolens in the path of cooperation between the EU and its Member States since the latter reasserted their unwillingness to renounce national readmission schemes:³¹ competence remained, therefore, shared as moulded in more specific terms in the Lisbon Treaty.

The Lisbon Treaty and the relationship between interstate and EU readmission agreements

The EU's readmission policy constitutes the general framework placed above and beyond the broad cobweb of formal and informal bilateral readmission agreements stipulated by EU Member States with third countries. A close relationship between national and supranational return policies is undisputable and is also corroborated by the fact that Member States continue to pursue their readmission procedures in parallel with the EU's strategy. In this vein, also paragraph 7 of the Preamble of the "Returns Directive" underlines "the need for Community and bilateral readmission agreements with third countries to facilitate the return process."

Readmission has, therefore, turned out to be an underlying component of EU immigration and asylum policy, which has been progressively defined and consolidated after the entry into force of both the Amsterdam and the Lisbon Treaties. Also the "Stockholm Programme – an open and secure Europe serving and protecting the citizens", adopted in December 2009, portrays readmission agreements as a building block in EU migration management.

In the context of a common immigration policy, "the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the area of illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation" (Article 79(2)(c)). The Lisbon Treaty has also modified

the legal basis for the conclusion of international agreements in the field of readmission. Article 79(3), indeed, expressly gives authority to the EU to stipulate agreements with third States for the readmission of third-country nationals who do not or who no longer fulfil the conditions for entry, presence, or residence in one of the Member States. If the substance of this Article is not new, having the EC already brokered treaties on this subject with eleven countries worldwide (Migration Watch UK 2008), the Lisbon Treaty represents, however, a turning-point in the recognition of an explicit competence of the Union with regard to measures designed to addressing the readmission of irregular migrants. A cross-reading of Articles 207 and 218 of the Treaty on the Functioning of the EU (TFEU) spells out the procedures to be followed for adopting an agreement with a third country: as a first step, the Council gives a mandate to the Commission to negotiate the treaty. Next, after negotiations are conducted by the Commission on the basis of the guidelines received from the Council—which appoints a special committee for assisting the Commission in this task—a compromise is reached and the Council, on a proposal by the negotiator, shall adopt a decision authorising the signing of the agreement. Finally, the Commission will sign the agreement in the name of the EU as the Lisbon Treaty has eventually endowed the Union with legal personality (Article 47 TEU). It is also worth observing that EU readmission agreements do not require separate ratification by Member States' governments or parliaments.

While, in pursuance of Article 300(3) TEC, the European Parliament was only consulted and its role was limited to delivering a non-binding opinion after both parties had already signed the agreement, the Lisbon Treaty provides that the Council, on a proposal by the negotiator, shall adopt the decision concluding the accord only after obtaining the consent of the European Parliament (Article 218(6)(a) TFEU). This new empowerment undoubtedly is one of the most important innovations of the Treaty and the fact that under Article 218(10), "the European Parliament shall be immediately and fully informed at all stages of the procedure" implies the capacity of this body, when dealing with readmission agreements, to gather information and data during the negotiation process with regard to the structure and content of the accords as well as their implications for the rights of migrants and asylum seekers.

The issue of division of competences has sparked a

29 Council Doc 665/99, 10 March 1999; see, (Migration News Sheet 1999: 1)

30 Proposal for a Comprehensive Plan to combat illegal immigration, 14 June 2002, para 76. See also, COM(2001) 672 final, 25

31 Council Presidency Conclusion, 27-28 May 1999

heated debate over the years, and Member States have openly contested an alleged exclusive competence of the EU. However, what counts is that the Lisbon Treaty does not bestow upon the Union the exclusive power to negotiate readmission agreements since Article 4(2)(j) of the TFEU incorporates “Freedom, Security and Justice”—which clearly encompasses also readmission—in the field of shared competence. The relationship between the EU and Member States, however, continues to be grounded on the principle of “sincere cooperation” enshrined in Article 4(3) of the TEU, which reads as follows:

pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives.

Therefore, as supported also by customary practice, competence would remain shared with Member States, which are, thus, able to continue to conclude such arrangements on a bilateral basis. Although the European Commission is responsible for the negotiation of readmission agreements, the overall phase of implementation, including the decision to return an irregular migrant, the issuance of a request of readmission and the enforcement of a removal order rests entirely with the Member States.³²

Previous State-negotiated bilateral agreements are still in force and used, but, by virtue of the ‘safeguard clause’, EU readmission agreements take precedence over State-negotiated ones in case of incompatibilities. When, then, a third country is concurrently bound by obligations deriving from readmission agreements concluded with both the EU and single Member States at a bilateral level, the conflict could be solved by referring to the third contracting State. Indeed, the third country by accepting the ‘safeguard clause’ can be deemed as implicitly renouncing to apply provisions in conflict with the agreement signed with the

EU. Saying that, the treaty concluded at a bilateral level continues, however, to be in force (Marchegiani 2008: 332).

It is often mistakenly assumed that the role of Member States is totally dismissed once the Commission and the Council independently decide to negotiate and conclude an EU readmission agreement, thereby overlooking the fact that the mandate of the Commission only consists in “brokering the agreement” (Casarino 2010: 18). Indeed, as Karel Kovanda lucidly put it in 2006

EC readmission policies and agreements fall under the external dimension. They set out reciprocal obligations binding the Community on the one hand and the partner country on the other hand. But once an agreement is negotiated, the Community responsibility is over. Its day-to-day implementation, the actual decision about sending a person back and the actual operation it involves—all this is entirely within the competence of our Member States.³³

The JHA Council of May 1999 sustained that a Member State must always notify the Council of its intention to negotiate a bilateral readmission arrangement, and can carry on with the process only if the Community has not already stipulated a treaty with the concerned third State or “has not concluded a mandate for negotiating such an agreement.” Exceptions are represented by the case in which Member States require more detailed arrangements to compensate a Community agreement or a negotiating mandate containing only general statements. However, “Member States may no longer conclude agreements if these might be detrimental to existing Community agreements” (JHA Council 1999). To put it differently, they “shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence” (Article 2(2) of the TFEU). Should a State contravene this obligation, an infringement procedure could be brought by the Commission to the ECJ under Article 258 of the TFEU. To date, no Member State has stipulated a readmission agreement with a third country with which the EU has already concluded a treaty. Nevertheless, Spain signed readmission arrangements with Morocco and Algeria even if the Commission

³² Letter dated 23 March 2009 from the European Commission, DG Justice, Freedom and Security to the President of Migreurope

³³ See, <http://www.eurasyllum.org/Portal/April2006.htm>

had already concluded a mandate for negotiating agreements with these countries.³⁴ If such a practice may be considered at variance with the principle of cooperation in good faith,³⁵ it is also true that the Commission, up to now, has never referred the matter to the ECJ under the Treaty infringement procedure. Member States have also a duty to notify the Commission, the Council, and the Parliament their negotiations as well as the current status of implementation of their arrangements (either formal or informal). At the same time, EU readmission agreements contain monitoring mechanisms that could be strengthened to guarantee a constant updating on the implementation process in each Member State. As a general rule, the agreements concluded at the EU level sets up a Joint Readmission Committee (JRC) comprising representatives of the European Commission as well as experts from the Member States and representatives of the partner third countries that should be involved in the analysis of the implementation and interpretation of the accords. Overseeing how readmission agreements are translated at the domestic level also entails the duty to gauge whether governments effectively comply with their international and European human rights obligations with regard to people returned to countries of origin or transit on the basis of readmission agreements. These EU instruments only provide for the inclusion of a so-called “non affection clause”, which generically refers to the commitment of governments to make the treaty consistent with international obligations arising from international law. Advocates of readmission agreements do not question whether these arrangements are consistent with human rights since they do not provide a legal basis for rejection. In their view, human rights considerations should arise only when taking the return decision, not when enforcing such a decision with the help of a readmission agreement (Coleman 2009). Nevertheless, concerns have been expressed by NGOs, International Organisations, and scholarship with regard to the existence of a causality link between the application of these accords and the likelihood of human rights violations for returned irregular migrants and asylum seekers (Council of Europe 2010: 2). Such an approach

34 While the mandates for the EC agreements with Algeria and Morocco were given in 2002 and 2000, respectively, the agreement between Spain and Algeria entered into force on 18 February 2004 whereas that one with Morocco was signed on 6 March 2007.

35 See, e.g, *Commission v. Luxembourg Case*, 2 June 2005, para 60.

is consonant with the idea that readmission agreements are part of the whole process of return of irregular migrants that, in each single phase, must be consistent with human rights. A thorough investigation of the compatibility of readmission agreements with refugee and human rights law would be beyond the frontiers of this article since the argument of the dearth of human rights safeguards in the text of the accords is open to counter arguments that cannot be deeply revisited and articulated within the boundaries of this contribution. Nonetheless, in the next section, an attempt is made to expound the potential role of the CFR in the field of readmission as, with the entry into force of the Lisbon Treaty, it has become part of the core EU legislation.

The Charter of Fundamental Rights: a preliminary assessment after Lisbon

The Charter of Fundamental Rights (CFR) is a “regional supranational instrument” reinforcing the protection of migrants and asylum seekers in international and European law (Gil Bazo 2008: 33). It sets out a whole range of civil, juridical, economic, and social rights and has become legally binding with the entry into force of the Lisbon Treaty on 1 December 2009. Since the meaning of the rights enshrined in this Convention depends on how the ECJ interprets them in particular cases, it is difficult to assess a priori the impact this instrument could have on returned asylum seekers and irregular migrants. Nevertheless, it is important to realise that the incorporation of the CFR in the Treaty of Lisbon expands the power of the ECJ to interpret whether both the EU institutions and Member States follow human rights standards in making and implementing EU law, respectively (Migration Watch UK 2008).³⁶ Indeed, while the Charter is certainly applied to EU institutions, it is also relevant for Member States implementing EU law. Additionally, the Lisbon Treaty also extends the ECJ’s jurisdiction over asylum and im-

36 It also worth observing that the Protocol on the Application of the CFR to Poland and to the United Kingdom states in Article 1 that “[t]he Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.

In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom, except in so far as Poland or the United Kingdom has provided for such rights in its national law’. See, (Barnard 2008)

migration policy,³⁷ provides for the gradual introduction of an integrated management system for external borders (Article 77(1)(c) TFEU), and empowers the EU to develop common policies for asylum and immigration (Article 78(2) TFEU). With regard to the legal effect of the Charter, it ranks now as primary Union Law and compliance with it has become a requirement for the validity and legality of the EU's secondary legislation in the field of migration and asylum. Moreover, as established in Article 51 of the Charter, its scope of application is limited to the areas in which Member States are implementing Union Law and it "does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties."³⁸ Yet, although the TEU, as amended by the Lisbon Treaty, sets out that the Charter will have "the same legal value as the treaties", it does not constitute, properly speaking, a treaty as a matter of international law since it is not an agreement between States. Indeed, in accordance with the Article 1(a) of the Vienna Convention on the Law of Treaties, "a treaty is an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." On the contrary, the CFR has been neither signed nor ratified by the Member States, and its provisions have not been included in the Lisbon Treaty.³⁹ The Charter will have, therefore, the same legal value as the treaties as a matter of Union law but its relation with other international human rights instruments is not governed by the Vienna Convention (Gil Bazo 2008: 35).

Pursuant to Article 52(4) of the Charter,

insofar as this Charter contains rights, which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision

37 ECJ's jurisdiction in immigration, asylum and civil law applies equally to all Member States, including the UK and Ireland, but only in so far as they have opted into the legislation. See, (Peers 2009: 12)

38 Art 6(1) TEU as amended by the Lisbon Treaty also states that the Charter "does not extend in any way the competences of the Union as defined in the Treaties"

39 The CFR was signed and proclaimed by the Presidents of the European Parliament, the Council and the Commission on behalf of their institutions at the European Council meeting in Nice on 7 December 2000.

shall not prevent Union law from providing more extensive protection.

According to the "Explanations" relating to the CFR,

the reference to the ECHR covers both the Convention and the Protocols to it. The meaning and the scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case law of the European Court of Human Rights and by the Court of Justice of the European Union. The last sentence of the paragraph is designed to allow the Union to guarantee more extensive protection. In any event, the level of protection afforded by the Charter may never be lower than that guaranteed by the ECHR.

It emerges, therefore, that Charter provisions should be interpreted and applied in accordance with the ECHR principles as determined by the jurisprudence of the Courts of Strasbourg and Luxembourg.

Other international human rights tools can be considered as sources of inspiration for Charter provisions. According to Article 53,

nothing 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 or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

The reading of the Article 53 indicates how the Charter tends to expand rather than restrict human rights protection in the Union by recognising also the relevance of international agreements to which Member States are party for interpreting and enhancing human rights principles as enshrined in the Charter itself.

From this brief analysis of the CFR, conclusions may be drawn which are of relevance for showing how human rights obligations fall upon the EU and its Member States when both drafting and enforcing readmission agreements with non-EU third countries, which are not necessarily bound by the same international and European human rights instruments and do not always offer legal safeguards comparable to those granted by States within the EU milieu.

Concluding Observations

This paper conducted a brief historical excursus on the evolution of the EU readmission policy through the analysis of readmission agreements, meant as its main legal instruments. Over the last years, there has been a change in the perception of the relations of the EU Member States with third countries, which have become, indeed, the beneficiaries of compensatory measures offered by the EU to enhance their cooperation in fighting illegal immigration. If on the one hand, this cooperative framework shows that provisions adopted by Brussels can no longer be shaped only by domestic security concerns, on the other, the EU's return policy and EU readmission agreements continue to be viewed by most third countries' governments as responding predominantly to the interests and securitarian policies of the EU Member States.

Retracing the main stages of the readmission policy, the Maastricht Treaty attributed immigration, asylum, and civil law issues to the intergovernmental cooperation pillar while the Amsterdam Treaty shifted such matters from the third to the first pillar and conferred express power to the EC to address the issue of "illegal immigration and illegal residence, including repatriation of illegal residents" (63(3)(b) TEC). However, given the lack of reference to "readmission" in both the TEC and TEU, the competence to conclude readmission agreements could only be derived from a broad interpretation of the term "repatriation". Conversely, the Lisbon Treaty modifies the legal basis for the conclusion of international agreements germane to readmission and expressly grants authority to the EU to conclude agreements with third States for the readmission 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 (Article 79(3) TFEU). In this vein, the Lisbon Treaty represents an historical turning point in the recognition of both a specific competence of the EU with regard to measures addressing the readmission of irregular migrants, and the new role of the Parliament entrusted with the underlying power to be consulted before a readmission agreement is definitively concluded by the Council.

Although an EU-negotiated treaty can have an added value represented by the political and normative weight of the Union in encouraging third countries to accept and fulfil readmission obligations,⁴⁰ Mem-

ber States have often expressed their unwillingness to renounce their national readmission policies: competence, therefore, has always remained shared, both before and after Lisbon.

Finally, a brief examination of the potential role of the CFR in the field of readmission has been carried out showing how the incorporation of this instrument in the Treaty of Lisbon expands the power of the ECJ to interpret whether both the EU institutions and Member States follow human rights standards in making and implementing EU law, respectively. As also recommended by the Parliamentary Assembly of the Council of Europe, the EU should ensure that readmission agreements and return policies are consistent with relevant human rights standards, including the CFR, which, with the entry into force of the Lisbon Treaty, has become part of the core EU legislation. Taking readmission agreements as a key component of the "return toolbox", further studies should, however, be designed to investigate what impact they have on the policies of the Member States of the EU as well as on the rights of migrants and refugees returned by means of these accords to either their countries of origin or transit.

As already stated, the predominant doctrine deems standard readmission agreements are executive instruments, which serve to enforce a national decision of expulsion or removal and do not provide a legal basis for rejection. It is, indeed, in the initial phase of formulation of an expulsion decision that human rights-related considerations should be made by governments. Nonetheless, human rights concerns should be taken into account in all the phases of the return process, from the issuance of the expulsion decision to the enforcement of such an order. No claim is made here to explore in depth the complex relationship between readmission agreements and human rights, still an open issue in the doctrine.

However, as a matter of public international law, it is particularly important to interpret the value of references to human rights and democracy in the preamble of any readmission agreement in order to gauge whether they are either mere assumptions on which the accord is predicated or real objectives of the treaty. A recurrent objection moved to the possible incorporation of stringent human rights clauses in the text of readmission agreements is grounded on the fact that EU Member States are already bound by human rights principles deriving from international customary and treaty law as well as from European law. Therefore,

40 Proposal for a Comprehensive Plan to combat illegal immigration and trafficking of human being in the EU, 14 June 2002, para 76.

adding in the text of such accords (those concluded by either single Member States or the EU) further legal safeguards concerning refugees and asylum seekers would amount to a superfluous reiteration. These issues remain moving targets for analysis, as the political debate within the EU is still in a formative phase, and as such they cannot be explored in full here. Nonetheless, it is of utmost importance to clarify that EU Member States and non-EU third countries are not necessarily bound by the same international and European human rights instruments, in particular with regard to the *acquis communautaire* (in primis the Charter of Fundamental Rights and the European Convention on Human Rights). As practice shows, third countries do not always offer the same legal safeguards granted by EU Member States, and the jurisdictional reach of supranational judges will be limited in case of violations of fundamental rights committed by readmitting countries. Thus, if inclusion of precise safeguards for refugees could be a replication for EU Member States, it might constitute, instead, a fundamental benchmark for third countries. Further, legally binding human rights clauses would create more onerous obligations than those deriving from general international law. In this case, the inclusion in the text of bilateral treaties linked to readmission of specific obligations referring to the protec-

tion of human rights and refugee rights would be doubly beneficial: if on the one hand, it would increase legal certainty for both governments involved, it would also be in line with Article 60(1) of the Vienna Convention on the Law of Treaties which provides that a material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

In conclusion, it may be observed how both the EU and Member States have developed different readmission strategies with third countries of origin or transit of migrants, often within the framework of restrictive and securitarian policies, which confirm how the debate on agreements linked to readmission and their implications for the rights of asylum seekers is, essentially, a political debate involving national security and identity concerns. Therefore, the real danger, in the era of the "war on terror", is that States start to unduly emphasise uncertain and flexible national security interests to the detriment of the protection of migrants' fundamental rights. The opportunity to conduct intensive research upon such an issue can be lucidly explained through the words of Louis Henkin: 'how [a State] behaves even in its own territory, [is] no longer [...] its own business: it has become a matter of international concern, of international politics, and of international law' (Henkin 1999: 4).

1. List of EU readmission agreements⁴¹

Third country	Mandate	Date of signature	Entry into force
Albania	November 2002	14 April 2005	1 May 2006
Algeria	November 2002		
Bosnia and Herzegovina	November 2006	18 September 2007	1 January 2008
Cape Verde	June 2009		
China	November 2002		
Georgia	September 2008	22 November 2010	1 March 2011
FYROM	November 2006	18 September 2007	1 January 2008
Hong Kong	April 2001	27 November 2002	1 March 2004
Macao	April 2001	13 October 2003	1 June 2004
Moldova	December 2006	10 October 2007	1 January 2008
Montenegro	November 2006	18 September 2007	1 January 2008
Morocco	September 2000		
Pakistan	September 2000	26 October 2009	1 December 2010
Russia	September 2000	25 May 2006	1 June 2007
Serbia	November 2006	18 September 2007	1 January 2008
Sri Lanka	September 2000	4 June 2004	1 May 2005
Turkey	November 2002		
Ukraine	June 2002	18 June 2007	1 January 2008

⁴¹ This table, updated to January 2010, is drawn from the following website: <http://www.mirem.eu/datasets/agreements/index/european-union> More recent updates are mine.

BIBLIOGRAPHY

- Barnard, C. (1995). 'The "Opt-Out" for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?', in S. Griller and J. Ziller (eds.), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* Wien: Springer.
- Bigo, D. (2004). 'Criminalization of "Migrants": The Side Effect of the Will to Control the Frontiers and the Sovereign Illusion', in B. Bogusz, R. Cholewinski, A. Cygan and E. Szyszczak (eds), *Irregular Migration and Human Rights: Theoretical, European, and International Perspectives*. Martinus Nijhoff Publishers
- Billet, C. (2010). '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' *European Journal of Migration and Law*, 12, pp 45-79
- Caritas Report on EU Return Policy: Past, Present and Future of the European Union's Common Return Policy, 26 April 2007, available at <http://www.erso-project.eu/about-erso/eu-return-policy>
- Cassarino, J.P. (2010). *Readmission Policy in the European Union*. Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, Civil Liberties, Justice and Home Affairs, Brussels, European Parliament.
- Chalmers, D, Davies, G, and G. Monti. (2010). *European Union Law: Cases and Materials*. Cambridge: Cambridge University Press
- Coleman, N., (2009). *European Readmission Policy: Third Country Interests and Refugee Rights*. Martinus Nijhoff
- Fletcher, M. (2009). 'Schengen, the European Court of Justice and Flexibility Under the Lisbon Treaty: Balancing the United Kingdom's "Ins" and "Outs"' *European Constitutional Law Review*, 5
- Gil-Bazo, M. (2008). 'The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union's Law' *27 Refugee Survey Quarterly*, 3
- Guild, E. (2004). 'Who is an Irregular Migrant?', in Bogusz, B., Cholewinski R., Cygan, A., and E. Szyszczak (eds), *Irregular Migration and Human Rights*. The Hague: Kluwer
- Hailbronner, K. (1998). 'European Immigration and Asylum Law under the Amsterdam Treaty' *Common Market Law Review*
- Henkin L. (1999). Lecture: The Robert L. Levine Distinguished Lecture Series, 'That "S" Word: Sovereignty and Globalization, and Human Rights, Et Cetera', *Fordham Law Review*, 68(1)
- Kovanda, K. Special Representative for Readmission Policies at DG Relex, during an interview made by Euroasylum, available at <http://www.euroasylum.org/Portal/April2006.htm>
- Marchegiani M., 'Competenze Comunitarie e Prerogative degli Stati in Materia di Immigrazione Irregolare, con Particolare Riferimento alla Questione delle Politiche di Riammissione' in Benvenuti, P. (ed), *Flussi migratori e Fruizione dei Diritti Fondamentali*. Il Sirente
- Migration Watch UK. (2008). *The Lisbon European Union Reform Treaty Impact on Asylum and Immigration Policy*, available at <http://www.migration-watchuk.org/Briefingpaper/document/82>
- Monar, J (1998). 'Justice and Home Affairs in the Treaty of Amsterdam: Reform at the Price of Fragmentation' *European Law Review*
- Monar, J. (2005). 'Justice and Home Affairs in the EU Constitutional Treaty. What Added Value for the "Area of Freedom, Security and Justice?"' *European Constitutional Law Review*, 1
- Niemann, A. (2006). *Explaining Decisions in the European Union*. Cambridge University Press
- Peers, S. (2005). 'Transforming Decision-making on EC Immigration and Asylum Law' *European Law Review*, 30
- Peers, S. (26 June 2009). 'UK and Irish Opt-outs from EU Justice and Home Affairs (JHA) Law', available at <http://www.statewatch.org/news/2009/jun/uk-ireland-analysis-no-4-lisbon-opt-outs.pdf>
- Trauner, F. and Kruse, I. (23 April 2008). 'EC Visa Facilitation and Readmission Agreements: Implementing a New EU Security Approach in the Neighbourhood' CEPS Working Document No. 290

European Union documents

- AENEAS Regulation (EC) No 491/2004 of the European Parliament and of the Council of 10 March 2004 establishing a programme for financial and technical assistance to third countries in the areas of migration and asylum, OJ L 80, 18 March 2004
- Brussels European Council of 25 November 2002, Doc. 14673/02, available at <http://register.consilium.europa.eu/pdf/en/02/st14/14673en2.pdf>
- Council Decision 2004/191/EC of 23 February 2004 setting out the criteria and practical arrangements for the compensation of the financial im-

- balances resulting from the application of Directive 2001/40/EC, OJ L 060, 27 February 2004
- Council Decision 2004/573/EC of 29 April 2004 on the organization of joint flights for removals from the territory of two or more member states, of third country nationals who are subject of individual removal orders, OJ L 261
- 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 , 31 December 2004
- Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals, OJ L 149, 2 June 2001
- Council Directive 2003/110/EC of 25 November 2003 on assistance in case of transit for the purposes of removal by air, OJ L 321, 6 December 2003
- Council of Europe: Parliamentary Assembly, Readmission Agreements: a Mechanism for Returning Irregular Migrants, 16 March 2010, Doc. 12168, available at: <http://www.unhcr.org/refworld/docid/4bdadc1c3.html>
- Council of the EU, 7 October 2010, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/116918.pdf
- Council Recommendation of 30 November 1994 concerning a specimen bilateral readmission agreement between a Member State and a third country, OJ C 274 of 19/09/1996
- Draft Council Conclusions on the priorities for the successful development of a common readmission policy, (Doc. 13578/04) (2 November 2004) available at <http://www.consilium.europa.eu/uedocs/NewsWord/en/gena/82621.doc>
- Explanations relating to the Charter of Fundamental Rights, [2007] OJ C303/17
- Green Paper on a Community Return Policy on Illegal Residents COM(2002) 175 final, presented by the Commission on 10 April 2002.
- JHA Council meeting of 27-28 May 1999, Conclusion on "Readmission Agreements – consequences of the entry into force of the Amsterdam Treaty", available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/08654.en9.htm
- Laeken European Council of 14 and 15 December 2001, available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/68827.pdf
- Letter dated 23 March 2009 from the European Commission, DG Justice, Freedom and Security to the President of Migreurope.
- Presidency Conclusions, Tampere European Council of 15 and 16 October 1999, available at http://www.europarl.europa.eu/summits/tam_en.htm#c
- Proposal for a Comprehensive Plan to combat illegal immigration and trafficking of human being in the EU, OJ C 142, 14 June 2002
- Seville European Council of 21-22 June 2002, Doc. 13463/02, available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/en/ec/72638.pdf
- The Hague Programme for strengthening freedom, security and justice, adopted by the Brussels European Council of 4 and 5 November 2004, Doc. 14292/1/04, available at <http://www.consilium.europa.eu/uedocs/cmsUpload/14292-r1.en04.pdf>
- The Stockholm Programme – An open and secure Europe serving and protecting the citizens, adopted by the Brussels European Council of 2 December 2009, Doc. 17024/09, available at <http://register.consilium.europa.eu/pdf/en/09/st17/st17024.en09.pdf>
- The Treaty of Rome, establishing the European Economic Community (EEC), signed in Rome on 25 March 1957, and entered into force on 1 January 1958
- The Treaty on European Union, signed in Maastricht on 7 February 1992, entered into force on 1 November 1993
- Treaty establishing a Constitution for Europe, signed at Rome on 29 October 2004, OJ C 310.

Case-law

- Case 22/70 Commission v Council [1971] ECR 263 (E.R.T.A.– European Road Transport Agreement).
- Case C-266/03, Commission v. Luxembourg [2005]
- Opinion 1/76 (Re Rhine Navigation Agreement) [1977] ECR 741 (Rhine Navigation).