

EC Readmission Agreements: A Re-evaluation of the Political Impasse

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Abstract

The article reviews EU policy on readmission agreements and the state of negotiations, with a specific focus on the issue of the inclusion of non-nationals. It traces how their inclusion has hindered successful negotiations. A review of the limited incentives in the EC's 'package approach' demonstrates that third-country interest is largely dependent on two well-proven incentives: visa facilitation regimes and the attraction of EU membership. Neither of these incentives are available in negotiations with most third countries, particularly with so-called 'immigration problem countries'. As a result, readmission negotiations with these countries are likely to remain stalled. Moreover, the article argues that the inclusion of third country nationals goes against the EU's stated objectives of promoting sustainable return and a comprehensive approach to migration management.

Keywords

Readmission policy; European Neighbourhood Policy; Visa Facilitation; Return policy; non-EU nationals; countries of transit; irregular migration; negotiation packages

1. Introduction

The removal of illegally-staying third country nationals from European Union (EU) territory remains at the top of the political agenda. As a result, the conclusion of readmission agreements continues to be a pressing political priority. Bilateral or multilateral readmission agreements generally impose reciprocal obligations on the contracting parties to readmit their nationals, and set out technical and operational criteria for this process. Readmission negotiations become more complex when agreements are extended to cover persons who are not nationals of the contracting parties, but who transited through the territory of one of the parties en route to the other.

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The European Union has included both categories in its readmission policy: nationals of the contracting parties and non-nationals (encompassing stateless persons as well as persons who are not citizens of the EU or the other contracting party). Inclusion of the first category does not give rise to any dispute. The obligation for states to readmit their citizens is clear in international law. Article 13 of the 1948 UN Universal Declaration of Human Rights enshrines the right to return to one's own country, the corollary of which must be the obligation of the state to allow one to do so. Readmission agreements do not establish the state's obligation to readmit its citizens, but merely facilitate this process.

However, there is no corresponding international law obligation for states to admit non-nationals, even persons who transited through the territory of the state en route to another destination, even though some argue that the general international legal notion of 'good neighbourly relations' would establish such an obligation.¹ According to this argument, countries of transit would become responsible for readmission of non-nationals if they "supported or tolerated the illegal migration of nationals of third States in a reproachable manner."

To date the European Union has concluded five readmission agreements² and nine others are under negotiation. The five readmission agreements concluded thus far encompass both nationals and non-nationals of the contracting parties. Since 2001, the Council has justified Community competence in matters of readmission agreements as a "more cost-effective",³ "extremely useful and efficient instrument in the EU's fight against illegal immigration".⁴ The added value of the economic, diplomatic and political pressure that EU Member States can exert collectively should, in theory, make the conclusion of Community readmission agreements more rapid, efficient and productive. Along these lines, the Council reiterated in 2004 its determination "to make further use of this tool [readmission agreements] and to intensify all efforts to pursue such agreements".⁵

Despite this declaration, the Commission has only received eleven negotiating mandates from 1999 to July 2006,⁶ of which five are stalled. The reason behind these stalled negotiations merits investigation, given that the Council decided on

¹ "Annex 2: Extract from Professor Hailbronner's study on 'Obligations of States under International Law to readmit their own or alien nationals', in Inter-Governmental Consultations for Asylum, Refugee and Migration Policies in Europe, North America and Australia, *Report on Readmission Agreements*, Geneva, Switzerland, January 2002.

² Albania, The Hong Kong Special Administrative Region (SAR), Macao, Russia and Sri Lanka.

³ Statewatch, *EU seeking readmission (repatriation) agreements with 11 countries*, October 2002 <http://www.statewatch.org/news/2002/oct/06readm.htm>.

⁴ JHA Council Press Release, 15.10.2002.

⁵ European Council Conclusions on the priorities for the successful development of a common readmission policy. 13704/04 draft, 27.10.05, p. 4.

⁶ Albania, Algeria, China, The Hong Kong Special Administrative Region (SAR), Macao, Morocco, Pakistan, Russia, Sri Lanka, Turkey and Ukraine.

21 July 2006 to expand the Commission's negotiating mandate to three new countries: Bosnia and Herzegovina, Montenegro and Serbia.

This article will review EU policy on readmission agreements and the state of negotiations, with a specific focus on the issue of the inclusion of non-nationals. It will trace how their inclusion has hindered successful negotiations. A review of the limited incentives in the EC's 'package approach' will demonstrate that third-country interest is largely dependent on two well-proven incentives: visa facilitation regimes and the attraction of EU membership. Neither of these incentives are available in negotiations with most third countries, particularly with so-called 'immigration problem countries'. As a result, readmission negotiations with these countries are likely to remain stalled. Moreover, it will be argued that the inclusion of third country nationals goes against the EU's stated objectives of promoting sustainable return and a comprehensive approach to migration management. The article will conclude that the EU should exclude non-nationals of the contracting parties from the scope of EC readmission agreements, and that this approach would be in the interest of efficient, cost-effective and conclusive readmission negotiations. The EU could, in parallel, devote more attention to its efforts to promote human development, including good governance and respect for human rights standards, in major migrant-producing countries. EU readmission policy would thus be mainstreamed into the EU's broader migration, human rights and development policies.

2. The Scope of Readmission Agreements

In its attempt to develop return mechanisms for all categories of irregular migrants, the 2002 Commission Green Paper on a Community Return Policy on Illegal Residents sought "*solutions when a direct return to the country of origin is not possible or appropriate*".⁷ EU as well as Member States' return policy is often hindered by the fact that persons to be returned are most of the time undocumented, having lost, either by design or circumstance, any proof of citizenship from their country of origin.

The Commission views readmission agreements with transit countries as an alternative to repatriation to countries of origin of irregular migrants, whose itinerary, but not their identity, can be established. With readmission agreements in place, nationality may no longer be the decisive factor for return, if transit through a country can be "*proved or may be validly assumed*".⁸ The Commission

⁷ European Commission Green Paper on a Community Return Policy on Illegal Residents, COM (2002) 175 final, Brussels, Belgium, 10.04.2002, Article 4.2.

⁸ European Council Decision authorising the Commission to negotiate with the People's Democratic Republic of Algeria a readmission agreement between the European Community and Algeria Article 5.

Communication on ‘Integrating Migration Issues in the European Union’s Relations with Third Countries’ reveals how instrumental the Commission believes the inclusion of non-nationals in readmission agreements could be in the EU’s fight against illegal immigration:

As one of the main problems with illegal residents is the lack of identification documents and the corresponding difficulty in establishing his/her nationality, it would often be appropriate to extend that [readmission] obligation to cover also third country nationals.⁹

The Council can give the Commission a readmission agreement negotiation mandate for a specific country based on both origin and transit criteria, such as “*the migration pressure exerted by flows of persons from or via third countries*”,¹⁰ the location of a country on the EU’s external frontier¹¹ or the ambiguous need for a “*geographical balance... between the various regions of origin and transit of illegal migration flows*”.¹² For the EC, concluding readmission agreements that engage third countries as both countries of origin and countries of transit to readmit non-nationals would resolve the return dilemma of countless numbers of stateless and undocumented irregular migrants present in the territories of EU Member States and consequently lessen this burden.

As the EU has placed greater emphasis in recent years on the EU’s fight against illegal immigration,¹³ the conclusion of EC readmission agreements has risen to the top external relations priorities.¹⁴ The Council has elaborated¹⁵ the EU’s commitment to systematically address migration issues through political dialogue, information sharing, and joint monitoring with countries of origin and transit, with the final aim of “*establishing a prevention policy*”.¹⁶ “*Strict obligations on the readmission of illegal immigrants*”¹⁷ reinforce this goal of the prevention of new

⁹ European Commission Communication, *Integrating Migration Issues in the European Union’s Relations with Third Countries*, IP/02/1793, 03.12.2002, Article 11.

¹⁰ European Council Conclusions on “criteria for the identification of third countries with which new readmission agreements need to be negotiated”, 7990/02, COR 1, LIMITE 16.04.2002, Article 2 (i).

¹¹ *Ibid.* Article 2 (iii).

¹² *Ibid.* Article 2 (v).

¹³ 14–15 December 2001 Laeken Summit, 28 February 2002, JHA Council Action Plan to Combat Illegal Migration and Trafficking in human beings, June 2003, Commission Communication on common policy on illegal immigration.

¹⁴ Council Conclusions on the priorities for the successful development of a common readmission policy, 13758/04, 27.10.2004, Paragraph 2, and JHA Council of 28 February 2002, Action Plan to Combat Illegal Migration and Trafficking in human beings.

¹⁵ 18 June 2002, *Conclusions on Cooperation with third countries of origin and transit to jointly combat illegal immigration* and its 27 October 2004 *Conclusions on the priorities for the successful development of a common readmission policy*.

¹⁶ Council Conclusions on Cooperation with third countries of origin and transit to jointly combat illegal immigration. 9917/3/02 final, 18.06.2002, p. 3.

¹⁷ *Ibid.*, p. 4.

illegal arrivals.¹⁸ With the EU's effort to integrate migration issues into its relations with third countries in mind,¹⁹ the conclusion of readmission agreements with “*all the main transit and origin countries*”²⁰ would fulfil the Council's aim for a global reach for its return policy. The Council has reiterated its call to pursue readmission agreements and the inclusion of readmission clauses covering both nationals and third country nationals in all future Association, Cooperation or equivalent agreements²¹ in order to realize the widest possible range for readmission.²²

3. The History of EC Readmission Agreements and Readmission Clauses

The origins of EC readmission agreements shed light on current Commission aims for the inclusion of non-nationals. Dr. Daphné Bouteillet-Paquet highlights the fact that readmission agreements are actually one of the oldest instruments employed by Member States to control migratory flows.²³ The first generation of readmission agreements in the 1950s and 1960s addressed irregular movement of persons between EC States in the pre-Schengen era. This policy was externalized with the second generation of bilateral readmission agreements with the Central and Eastern European Countries (CEECs). In the early nineties²⁴ the Council aimed to counteract the potentially destabilizing effect of uncontrolled migratory and asylum seeker flows after the fall of the Berlin Wall and the breakup of the USSR and Yugoslavia. The Council and the then ad hoc Working Group on Immigration initiated negotiations with the CEECs, as the chief countries of origin and transit along the EU's eastern border. The main objective of the second generation of readmission agreements was to create a ‘cordon sanitaire’ along the EU's eastern border through bilateral readmission agreements covering nationals and non-nationals.²⁵

The inclusion of non-nationals was imported to the next set of readmission agreements with all third countries, known as the third-generation readmission agreements. At the policy level, the European Union developed a two-pronged approach to readmission: the adoption of a common specimen bilateral readmission agreement and the insertion of readmission clauses into EC cooperation

¹⁸ Council Conclusions on “Priorities for the successful development of a common readmission Policy”, 13758/04, 27.10.2004, Paragraph 1.

¹⁹ Council Press Release: Readmission Agreements, MEMO/05/351, 05.10.2005.

²⁰ Conclusions from the Council on Cooperation with third countries of origin and transit to jointly combat illegal immigration, 9917/3/02 final, 18.06.2002, 4.

²¹ *Ibid.* Declaratory Paragraph 3.

²² *Ibid.* Declaratory Paragraph 2.

²³ Bouteillet-Paquet, Daphné, ‘Passing the Buck: a critical analysis of the readmission policy implemented by the European Union and its Member States’, *European Journal of Migration and Law* 5, 2003, pp. 359–377.

²⁴ Edinburgh European Council, 13–14 December 1992, Conclusions of the Presidency, Europe, n 5878 bis.

²⁵ Crepeau, F., *Droit d'asile: de l'hospitalité aux contrôles migratoires*, (Brussels: Bruylant 1995), p. 285.

agreements. In November 1994, the Council adopted an EC specimen bilateral readmission agreement between an EC Member State and a third country that covered citizens and non-nationals.²⁶ Member States' were to use this document in conjunction with the Council Recommendation concerning the adoption of a standard travel document for the expulsion of third country nationals.²⁷ The EU harmonised Member States approaches to readmission agreements through the adoption of common texts. Yet Member States retained the competence to negotiate and conclude bilateral readmission agreements individually with third countries.

In 1996, the EC proposed a specimen readmission clause to be inserted in Community Agreements (EC and a third country) and "mixed agreements" (the then EC + 15 Member States and a third country) aimed at compelling contracting parties to readmit their own nationals, provide them appropriate travel documents and cooperate on the prevention and control of illegal immigration. The scope of the proposed readmission clause covered nationals of contracting parties only. However, the specimen also included Article Y, known as the 'enabling clause.' The enabling clause requested the third country to negotiate, at a later stage, bilateral agreements with Member States regarding non-nationals. In this case, Member States could ask for and negotiate further obligations regarding non-nationals who passed through the contracting party on their way to an EU Member state.²⁸

In 1999, the European Community received the competence to negotiate and conclude on behalf of its Member States readmission agreements with third countries. The entry into force of the Amsterdam Treaty on 1 May 1999 conferred competence on the Community to take "*measures on immigration policy... in the area of illegal immigration and illegal residence, including repatriation of illegal residents*".²⁹ With the new competence in mind, the 13–14 October 1999 Tampere Summit Conclusions called on the Council to integrate either readmission clauses covering nationals into cooperation agreements or conclude readmission agreements with third countries or a group of third countries.³⁰

The 2 December 1999 Justice and Home Affairs (JHA) Council meeting stipulated a new standard Community readmission clause, which mirrored the 1996 bilat-

²⁶ Council Recommendation concerning a specimen bilateral readmission agreement between a Member State and a third country, OJ C 274, 19 September 1996. pp. 0020–0024.

²⁷ Council Recommendation of 30 November 1994 concerning the adoption of a standard travel document for the expulsion of third-country nationals, OJ C 274, 19/09/1996, pp. 0018–0019.

²⁸ 1996 EU Council Conclusions on readmission clauses, Article Y <http://www.statewatch.org/news/2003/may/12a1995ccs.html>.

²⁹ Amsterdam Treaty Article 63&3d in conjunction with article 300: "(1) Where this Treaty provides for the conclusion of agreements between the Community and one or more States or international organisations [...], (2) The European Parliament shall be immediately and fully informed on any decision under this paragraph concerning the provisional application or the suspension of agreements [...], (3). The Council shall conclude agreements after consulting the European Parliament, [...]."

³⁰ Tampere Summit Council Conclusions, paragraphs 26 and 27.

eral specimen. The 1999 specimen clause re-inserted the 1996 enabling clause for the future negotiation of an agreement with the Community on behalf of its Member States regarding the readmission of non-nationals.³¹ The standard readmission clauses would be inserted into all future cooperation agreements with third countries or groups of countries, according to the 2002 Seville Council Conclusions.³²

The Council established a mandate and approval procedure for the negotiation of readmission agreements with third countries. Based essentially on the case-by-case³³ recommendations of the cross-pillar High Level Working Group's country action plans issued in 1998/9, the Council gave the Commission a mandate to invite a country or group of countries for bilateral or multilateral negotiations on an EC readmission agreement. Pre-existing bilateral agreements between Member States and the contracting party could remain in force, provided they complemented readmission agreements concluded by the Community. Once the Commission receives its own negotiating mandate,³⁴ Member States must relinquish negotiating power with regard to that particular country. The Commission and some Member States disagreed over the meaning of this mandate. A few Member States, led by Germany, asserted that Member States retained the right to continue negotiations concurrently on particular categories of persons.³⁵ Germany tested this interpretation when it concluded re-entry clauses with China concerning tourist visa over-stayers in 2003, after the granting of an EU mandate concerning all categories of persons. Once the Commission initiated infringement proceedings, Germany acquiesced to the mandate's exclusive nature before formal procedures were undertaken.³⁶

Once the Council has authorized the Commission to sign the agreement on behalf of the Community, the Parliament must be consulted under Article 300 (3) of the EC Treaty. To date, the role of the European Parliament (EP) in EC readmission agreements has been minimal. In most cases, the Parliament was neither consulted nor kept informed during negotiations and found itself delivering a post-facto opinion. The EP simply approved readmission agreements with Macao and Sri Lanka without additional comment. The Parliament's Resolution on the signature of the Hong Kong agreement³⁷ did express serious concern over the respect of human rights during return procedures, the need for stronger reference to the 1951 Geneva Convention and other international human rights instruments, the

³¹ 1999 EU Council Decision on readmission clauses, Article B <http://www.statewatch.org/news/2003/may/12b1999dec.html>.

³² EU Council Presidency Conclusions, Seville, 21–22.06.2002, Paragraph 33.

³³ Conclusions from the Council on the priorities for the successful development of a common readmission policy, 13704/04 draft, 27.10.05, p. 5.

³⁴ ECJ, 5 November 2002, *United Kingdom v. Commission*, C-466/98.

³⁵ Schieffer, Martin, 'Community Readmission Agreements with Third Countries – Objectives, Substance and Current State of Negotiations', *European Journal of Migration and Law* 3, 2003, p. 350.

³⁶ Agence Europe, 15 October 2003.

³⁷ The Watson report of 7 November 2002 to the Committee on Citizen's Freedoms and Rights, Justice and Home Affairs (A5-0381/2002) approved on 19 December 2002.

monitoring of readmission practice, criteria for the determination of a country of readmission as safe and the potential role of UNHCR. The EP further elaborated these concerns in its Report on the signature of the Albania agreement.³⁸

4. The Negotiations of Readmission Clauses and Agreements: State of Play

4.1 *Readmission Clauses*

Readmission clauses differ from readmission agreements they set out the principle of the return of nationals and establish a framework for negotiating further implementing agreements. These later agreements detail the obligations to readmit nationals as well as possibly specify the obligation to readmit non-nationals who merely passed through the contracting state on their way to the EU. Because readmission clauses are not self-executive, these implementing agreements are essential to their entry into force. Readmission agreements, on the other hand, contain not only the principle of return but also the implementation agreements which make them self-executive.

The first readmission clauses emerged in Partnership and Cooperation Agreements with the countries of Central Asia and the Caucasus in the mid-nineties. Vague reference to “*taking into account the principle and practice of readmission*”³⁹ in the 1995 Partnership and Cooperation Agreements (PCAs) with Kazakhstan and Kyrgyzstan later gave way to the first full readmission clauses in the 1996 PCAs with Armenia,⁴⁰ Georgia⁴¹ and Uzbekistan.⁴² Since 1996, the EC has inserted the 1996 and 1999 standard readmission clauses for nationals into agreements with Algeria,⁴³ Azerbaijan,⁴⁴ Chile,⁴⁵ Croatia,⁴⁶ Egypt,⁴⁷ Lebanon,⁴⁸ Macedonia,⁴⁹ Syria⁵⁰ and Tajikistan.⁵¹ Multilateral Partnership and Cooperation Agreements with regional organisations allowed the EU to cast a wider net on

³⁸ *Report on the proposal for a Council decision concerning the conclusion of the Agreement between the European Community and the Republic of Albania on the readmission of persons residing without authorisation*, A6-0214/2005, 22.06.2005.

³⁹ Article 20 PCA Kyrgyzstan and Article 20 PCA Kazakhstan.

⁴⁰ OJ L 239 of 9.9.1999, p. 22.

⁴¹ OJ L 205 of 4.8.1999, p. 22.

⁴² OJ L 229 of 31.8.1999, p. 22.

⁴³ Signed on 19 December 2001.

⁴⁴ OJ L 246 of 17.9.1999, p. 23.

⁴⁵ IP/02/1696, 18.11.2002, p. 25.

⁴⁶ COM (2001) 371 final of 9 July 2001, p. 46.

⁴⁷ OJ C 204 E of 30.10.2001, p. 16.

⁴⁸ Signed on 10 January 2002.

⁴⁹ OJ C 213 E of 31.7.2001, p. 44.

⁵⁰ Council to decide on signature. Clauses not yet public.

⁵¹ Clauses not yet public.

readmission with all the countries of the Africa-Caribbean-Pacific (ACP) Countries,⁵² Andean Community⁵³ and the San Jose Group (the Central American countries).

The Cotonou agreement provides a noteworthy illustration of the design and implementation of readmission clauses. Article 13 of the Cotonou agreement, which covers seventy-nine Asian, Caribbean, and Pacific countries, provides for the readmission of nationals of both ACP and EU countries living in one of the countries of the other region. For such clause to become operational, it must be complemented by implementing arrangements concluded bilaterally with Member States or the Community. Regarding non-nationals and stateless persons, the Cotonou Agreement provides that the to-be-negotiated complementary agreements will also cover, *if deemed necessary* by any of the Parties, arrangements for their readmission. Such agreements will lay down the details about the categories of persons covered by these arrangements as well as the modalities of their readmission and return. The Cotonou Agreement also specifies that adequate assistance to implement these agreements will be provided to the ACP States (see annex I). On 1 April 2003, the Cotonou agreement entered into force but as of to date, the status of Article 13 remains unclear and disputed between both parties.

The EC has also concluded other type of non-committing readmission clauses with certain states, such as Belarus, Kazakhstan, Kyrgyzstan, Moldova, Tunisia, and Vietnam.⁵⁴ The contents of these clauses vary from agreeing to enter into dialogue or co-operation in readmission at a later stage (Vietnam), to a declaration on readmission of own nationals only (Morocco, Yemen, Laos, Cambodia and Pakistan) or negotiations of further agreements concerning third country nationals (the majority, see footnote on Syria⁵⁵).

Taken as a whole, the mandatory inclusion of readmission clauses in all EU external agreements has rapidly increased the number of countries of origin that fall under EU readmission clauses covering nationals from five in 1999 to 102 to date. Simultaneously, the number of bilateral readmission agreements between EU Member States and third countries soared from fifteen in 1990 to 2004 in 2000 with fifty-eight third countries.⁵⁶

⁵² At the signature of the Cotonou Agreement, the ACP counted seventy-seven countries, since which time two new countries, Eritrea and Timor Leste, have joined the group.

⁵³ Bolivia, Colombia, Ecuador, Peru and Venezuela. President Hugo Chavez withdrew Venezuela from the Andean Community on 20 April 2006.

⁵⁴ The EU has obtained only non-binding readmission clauses with Belarus, Cambodia, Israel, Jordan, Kazakhstan, Kyrgyzstan, Laos, Moldova, Morocco, Pakistan, Russia, Tunisia, Ukraine, Vietnam and Yemen.

⁵⁵ The EU–Syria Association Agreement, 10 December 2003, Article 49: “The Parties agree, upon request and as soon as possible, to conclude an agreement regulating specific obligation for Member States of the EU and Syria on readmission, including readmission of nationals of other countries and stateless persons.”

⁵⁶ Inter-Governmental Consultations for Asylum, Refugee and Migration Policies in Europe, North America and Australia, *Report on Readmission Agreements*, Geneva, Switzerland, January 2002, p. 10.

4.2 *EC Readmission Agreements*

To date, the Council has given the Commission a mandate to negotiate readmission agreements with fourteen third countries/entities: Morocco, Sri Lanka, Russia and Pakistan (in September 2000), Hong Kong and Macao (May 2001), Ukraine (June 2002), Albania, Algeria, China and Turkey (November 2002) and Bosnia and Herzegovina, Montenegro and Serbia (July 2006). So far, only five of these fourteen mandates have resulted in signed readmission agreements. With countries that do not exert major migration-pressures on the European Union, the EU swiftly completed its first round of readmission agreement negotiations. The readmission agreement with the Hong Kong Special Administrative Region (SAR) was concluded within six months in November 2001 and approved by the Council and the EP by November 2002. The Hong Kong readmission agreement, the EC's first such agreement, entered into force on 1 May 2004. Negotiations were concluded with Macao after two years on 13 October 2003, Sri Lanka after three years on 25 November 2003 and Albania after two years on 18 December 2004. Five years on, the EU and Russia finally concluded a readmission agreement on 12 October 2005 and signed it on 25 May 2006. The Finnish Presidency initialed a readmission agreement with Ukraine on 27 October 2006, four years after the issuance of its mandate. In addition to Hong Kong, the agreements with Macao (1 June 2004), Sri Lanka (1 May 2005), and Albania (1 May 2006) have entered into force, while that with Russia will do so in the coming year(s).

Most third countries have attempted to delay each step of the negotiation process from the launch to the signature and the entry into force. In most cases, an average of two years passed without even a formal response to the invitation to open negotiations. The launch of negotiations took two years with Turkey, three years with Morocco, and four years with Pakistan. The Commission describes negotiations with these countries as “*ongoing*”.⁵⁷ The Commission still awaits any response on the launch of formal negotiations with two countries, China and Algeria. The Commission pushed back the promised start-date from autumn 2005⁵⁸ to early 2006⁵⁹ to some undetermined date. The EU has little to show for its mandate for the four countries in negotiation, after waiting through an average of two years of diplomatic meetings.

Furthermore, the conclusion of a readmission agreement does not guarantee that the agreement will enter into force without further delay. Albania negotiated a two-year suspension clause⁶⁰ as regards the readmission of non-nationals, while

⁵⁷ ‘Readmission Agreements’, Commission Press Release, 05.10.2005.

⁵⁸ Council Press Release: Readmission Agreements, MEMO/05/351. 05.10.2005.

⁵⁹ Commission Communication: Priority actions for responding to the challenges of migration: First follow-up to Hampton Court COM(2005) 621 final, 20.11.2005, pp. 8–9.

⁶⁰ ‘Agreement between the Republic of Albania and the European Community on the Readmission of Persons Residing without Authorisation’, COM(2004) 92, 12.02.2004, Article 22 (3).

Russia secured a similar three-year transition period.⁶¹ These transition periods have been justified as capacity-building phases although improvements will likely be minimal. The EP Report on the Albania readmission agreement took note of the International Organization for Migration's assessment that Albania will continue to suffer considerable capacity and infrastructure difficulties after the transition period. These extensive shortcomings span from a shortage of human and material resources to weak reception and management mechanisms.⁶² Remarks by the Russian Foreign Minister suggest that this transition phase is intended as a strategy, however temporary, to circumvent Russia's obligation to readmit non-nationals.⁶³

5. The Conclusion of EC Readmission Agreements: An Objective Out of Reach?

Few concrete results from the June 2002 Seville European Council's call for speeding up the negotiation process motivated the Commission in November 2005 to nominate a Special Representative for readmission policies. With little progress on current ones and few recommendations to bring many of them forward,⁶⁴ the criticism of a 2002 Report on Readmission Agreements endures; EC readmission agreement policy has yet to prove "effective".⁶⁵ French Interior Minister Nicolas Sarkozy, along with many of his colleagues in the Council of Ministers, the Council and the Commission, have publicly voiced this regret over the protracted state of negotiations.⁶⁶

Community readmission agreement negotiations are inconclusive for the simple reason that readmission agreements work solely in what French commentator Claire Rodier calls the EU's 'Eurocentric'⁶⁷ interest. In other migration management negotiations such as the joint border management and migration and development, third countries have demonstrated stronger initiative in comprehensive dialogues with their EU partners. In contrast, readmission negotiations appear as

⁶¹ Readmission Agreement between the European Community and the Russian Federation, 31.03.2006, Article 23 (3).

⁶² "Moscow hopes for abolition of visas by 2008 – Goodwill for progress on visa facilitation and readmission of illegal immigrants", Brussels, 01.03.2005.

⁶³ *Report on the proposal for a Council decision concerning the conclusion of the Agreement between the European Community and the Republic of Albania on the readmission of persons residing without authorisation*, AG-0214/2005, 22.06.2005, p. 6.

⁶⁴ Communication from the Commission on the monitoring and evaluation mechanism of the third countries in the field of the fight against illegal immigration, COM(2005) 352 final, 28.07.2005, p. 6.

⁶⁵ Inter-Governmental Consultations for Asylum, Refugee and Migration Policies in Europe, North America and Australia, *Report on Readmission Agreements*, Geneva, January 2002, p. 22.

⁶⁶ Agence Europe, *Commission prepares to initiate infringement proceedings against Germany for bilateral agreement on re-entry signed with China*, Brussels, 15.09.2003.

⁶⁷ Rodier, Claire, *Analyse de la dimension externe des politiques d'asile et d'immigration de l'UE – synthèse et recommandations: Etude pour le Parlement européen*, June 2006, p. 19.

EU monologues where little interest exists on the other side. Sri-Lankan, Moroccan and Ukrainians officials have reportedly lamented that readmission agreement meetings are prepared and directed unilaterally by the EU delegation.⁶⁸ In response to the Commission's suggestion to Morocco that speeding up readmission agreement negotiations was one solution to the tragedies at Ceuta and Melilla, Moroccan officials replied that readmission agreements, as they stood, offer "little added value".⁶⁹ The Pakistani government has expressed its fear that a readmission agreement would magnify the country's problems as a hub for South Asian asylum seekers and irregular migrants.⁷⁰ Likewise, The Centre for European Policy Studies has reported that the Turkish government refuses to transform the country into an irregular migrant 'dumping ground' for the rest of Europe.⁷¹

The unbalanced terms of readmission agreement negotiations stem in large part from the inclusion of non-nationals. Since 1999, the EU has negotiated and signed agreements including readmission clauses covering only nationals, with 102 countries. Readmission agreements covering nationals and non-nationals have been concluded with only five. In negotiations, the EU has encountered scant resistance to readmission of nationals. The Commission acknowledges that the greatest sticking point in readmission agreement negotiations has been the readmission of non-nationals. In the relatively straightforward negotiations with countries such as Hong Kong, Macao and Sri Lanka, the negotiations were bogged down over this question.⁷² The readmission of non-nationals has also frustrated otherwise constructive negotiations with Morocco.⁷³ The inclusion of non-nationals is the stumbling block that has hindered readmission agreement negotiations with Turkey.

Both parties doubt the Commission can formulate a negotiating strategy to satisfy third countries, which find these agreements Eurocentric and "discriminative in nature", according to an official statement by the Ukrainian government. The statement continues: "It's possible to assume that the European side has exhausted its arguments at the negotiation table for justifying its completely unacceptable propositions for Ukraine."⁷⁴ The Commission itself has recognized

⁶⁸ OXFAM, *Territoire inexploré : l'internationalisation de la politique d'asile de l'UE*, Londres 2005.

⁶⁹ Commission Mission Report, *Visit to Ceuta and Melilla – Mission Report: Technical mission to Morocco on illegal immigration*, Brussels, 11.10.2005, Article 5.1.2.

⁷⁰ Shahid, Zia Iqbal, 'EU wants early readmission pact with Islamabad', *The News International*, Pakistan/Brussels 26.05.2004.

⁷¹ Apap, Joanna, Carrera, Sergio and Kirişci, Kemal, *Turkey in the European Area of Freedom, Security and Justice*, Centre for European Policy Studies, EU-Turkey Working Papers, No. 3, August 2004, available on www.ceps.be in part. 23–26.

⁷² Schieffer, Martin, 'Community Readmission Agreements with Third Countries – Objectives, Substance and Current State of Negotiations', *European Journal of Migration and Law* 3, 2003, p. 355.

⁷³ Communication from the Commission on the monitoring and evaluation mechanism of the third countries in the field of the fight against illegal immigration, COM(2005) 352 final, 28.07.2005, p. 6.

⁷⁴ EC 'accusation of delaying readmission agreement', *Ukrainian News Agency*, 10.05.2006.

that the EU's interest has made bringing third countries to the negotiating table, an arduous and often unproductive process.⁷⁵

6. The Commission's 'Package Approach'

The Commission has requested a greater "*level of political and diplomatic support*"⁷⁶ from Member States in order to achieve more tangible results in its negotiation process regarding the conclusion of readmission agreements. This support has taken the form of negotiating tools and incentives that could be collected into a 'package approach'. The Commission's current toolbox for the negotiation of readmission agreements varies from visa facilitation regimes to open or enhanced channels for legal migration for nationals, development and migration aid, financial and technical support and WTO-compatible trade concessions. The Commission attempts to tailor the final negotiation incentive packages to meet the specific interests of each third country. This assortment of compensatory measures should in principle offer the Commission the leverage to secure third country cooperation on the return of non-nationals to their territories.

6.1 The Lure of EU Membership

Bouteillet-Paquet cites visa waiver regimes and the lure of membership as the two key components in the packages for the second-generation readmission agreements with the CEEC countries. Member States secured CEEC compliance by progressively lifting visa obligations for their nationals in exchange for greater CEEC responsibility for migratory flows.⁷⁷ Other incentives also contributed to CEEC agreement, such as the partnership policy of Germany with neighboring Poland and the Czech Republic, which offered substantial technical and financial assistance for capacity-building.⁷⁸ The enlargement framework was thus instrumental in the EC's first readmission agreements with third countries. As one process within the greater relationship of enlargement negotiations, Member States could use the various enlargement carrots and sticks to demand more of candidate countries than of other third countries. Indeed, adaptation to the EU

⁷⁵ Commission Communication, 'Integrating Migration Issues in the European Union's Relations with Third Countries', IP/02/1793, 03.12.2002.

⁷⁶ Commission Communication on a Community Return Policy on Illegal Residents, COM (2002) 564 final, Brussels, 14.10.2002, 2.5.2.

⁷⁷ Agreement between the Republic of Poland and the governments of Belgium, Germany, France, Italy, Luxembourg and the Netherlands on Readmission of Illegal Aliens, 29 March 1991.

⁷⁸ Agreement between Germany and Poland on Cooperation Regarding the Effects of Migratory Movements, 7 May 1993; Agreement between Germany and the Czech Republic on Cooperation Regarding the Effects of Migratory Movements, 3 November 1994.

migration regime is a compulsory and integral condition for membership.⁷⁹ It is argued that the EU framed this burden-shifting onto CEECs as part and parcel of conditionality; “*the exportation of the EU migration policy was also very much seen as an implicit condition to speed up the enlargement process*”.⁸⁰ Lavenex and Uçarer concur that CEECs had “*no choice but to accept*”⁸¹ this comprehensive transfer of migration-related responsibilities to them.

6.2 *Visa Facilitation Agreements*

The most successful compensation in the package approach is by far the visa facilitation regime. Visa facilitation agreements offer faster decision processes, simplified documents and reduced visa fees for short-stay visas, as well as simplified criteria for multiple-entry visas for certain categories of persons. Cross-border mobility and people-to-people contacts are priorities for third countries, particularly those along the EU’s external borders. Coupling visa facilitation agreements with readmission agreements permits the EU to negotiate returns of non-nationals to a country of transit in exchange for eased travel and short-stay residence for certain categories of nationals of that country. Macao and Hong Kong expressed marked interest in the conclusion of visa facilitation agreements before reaching a decision on readmission agreements. Both countries offered their cooperation on readmission as “*compensation*”⁸² for the lifting of visas. After three years of Russian resistance, readmission agreement negotiations were launched in January 2003, negotiations remained at a standstill for another ten months until the EU initiated a parallel visa facilitation negotiation. Coupling has also been credited for the breakthrough in negotiations with Ukraine. Countries already engaged in negotiations and future priority countries such as Moldova, have also requested that the readmission of non-nationals be made conditional upon a coupling proposal.

Nevertheless, the Commission has great difficulties in negotiating a visa facilitation regime, since this domain remains within the Member States’ national competences. In fact, Member States cannot afford to allow the Commission to give exorbitant packages like visa facilitation agreements in exchange for readmission agreements with most third countries. The Commission observed that coupling hinges on the “*substantial cooperation and coordination from and between the*

⁷⁹) Lavenex, Sandra and Uçarer, Emek M. ‘Modes and Consequences of Migration Policy Transfer’, in Lavenex and Uçarer, *Migration and the Externalities of European Integration*, (Oxford: Lexington Books, 2002), p. 213; and Grabbe, Heather, ‘Stabilizing the East While Keeping Out the Easterners: Internal and External Security Logics in Conflict’, pp. 91–104.

⁸⁰) Bouteillet-Paquet, Daphné, ‘Passing the Buck: a critical analysis of the readmission policy implemented by the European Union and its Member States’, *European Journal of Migration and Law* 5, 2003, p. 364.

⁸¹) *Ibid.* 214.

⁸²) Agence Europe, *Signing of readmission agreement with Macao – signature with Sri Lanka expected in November, launch of infringement proceedings against Germany for agreement with China*, Brussels, 15.10.2003.

Member States”.⁸³ Some Member States hesitate to close a door on irregular immigration only to open a window on new potential irregular flows of visa overstayers, already the largest category of irregular migrants in the EU. Moreover, the majority of these incentives touch on the most sensitive national sovereignty policy realms, such as visas and legal migration. Given the cost for Member States, it is not surprising that the Commission finds many unwilling to hand over substantial incentives for readmission agreements. The Commission admits that it generally received the cooperation of Member States on visa facilitation with negligible countries of transit or origin like Hong Kong and Macao,⁸⁴ or potential West Balkan candidate countries like Albania. Major ‘problem countries’ for irregular migration are another matter. Frattini confessed that coupling was essentially a feasible policy instrument for certain countries with a “*European perspective*”,⁸⁵ that is, candidate status.

In other words, coupling is a limited policy tool that Member States will allow the Commission to employ in ‘exceptional cases.’ The Commission will use readmission as a precondition for visa facilitation agreement, but not vice versa.⁸⁶ Member State political concerns will keep visa facilitation off the readmission agreement table with even EU candidate countries like Turkey, or with third countries such as Algeria, China, Morocco or Pakistan, whose large migratory pressures on EU Member States make the conclusion of EC readmission agreements most urgent. If anything, the already meagre visa facilitation packages will appear with an extremely narrow range, such as only “*certain categories of personnel*” for China.⁸⁷

6.3 *Exhausting All Other Positive Incentives*

With visa facilitation agreements never on the table in most cases, other incentives are considered unacceptable by one or both parties. Pakistani as well as Moroccan officials have repeated the request for open or facilitated channels for the legal migration of their citizens.⁸⁸ As an example, the Italian government successfully

⁸³ European Commission Communication, *Integrating Migration Issues in the European Union's Relations with Third Countries*, IP/02/1793, 03.12.2002, Article 11.

⁸⁴ European Commission Green Paper on a Community Return Policy on Illegal Residents, COM (2002) 175 final, Brussels, 10.04.2002, Article 4.1.1, p. 23.

⁸⁵ Frattini, Franco. *The role of internal security in relations between the EU and its neighbours*, SPEECH/06/275 Ministerial Conference, Vienna, 4.05.2006.

⁸⁶ Eurasyllum Interview with Karel Kovanda, EC Special Representative for Readmission Policies on ‘The foundations, benefits and challenges of the EU Readmission Policy’, April 2006.

⁸⁷ European Commission Communication on the monitoring and evaluation mechanism of the third countries in the field of the fight against illegal immigration, COM(2005) 352 final, 28.07.2005, p. 4.

⁸⁸ Shahid, Zia Iqbal, ‘EU wants early readmission pact with Islamabad’, *The News International*, Pakistan/Brussels, 26.05.2004.

concluded a bilateral readmission agreement with Albania by opening up a legal migration quota for Albanian citizens. During its Presidency in 2003 the Italian government attempted to transfer this positive bilateral experience to the European level through the introduction of a Commission-backed proposal for the pooling of legal immigration quotas from each Member States.⁸⁹ Minimal support has come from other Member States, for whom legal immigration channels carry more controversial costs than visa facilitation agreements. Such opportunities also do not address the underlying problematic costs of the management of readmitting non-nationals. The Senegalese government recognized this fact when it refused to sign a bilateral readmission agreement agreed with Spain covering non-nationals.⁹⁰ The agreement would be accompanied by a substantial offer of cooperation aid (15m euros over five years) and moreover greater open legal migrant channels for Senegalese. The Spanish government asserted that legal migration would stem the irregular migration flux.⁹¹ Yet in the estimation of the Senegalese, the migration benefits for nationals would not offset the significant return costs for non-nationals.

The Commission may also take advantage of the AENEAS programme, for financial and technical assistance in the migration and asylum field, earmarked *inter alia* for third countries with which the Community is negotiating a readmission agreement. Nevertheless, the AENEAS five-year instrument for 2004–2008 consists of a rather modest budget of 250 million euros or an average of fifty million per year. The EP has pointed out the unfortunately limited capacities of the AENEAS's programme's budget.⁹²

Third countries demonstrate little interest in other incentive options, such as funds for repatriation costs, technical assistance through the AENEAS programme and migration/asylum capacity-building, closer economic and trade cooperation and better market access or WTO-compatible tariff preferences. With Sri Lanka, Schieffer attributes the Commission's success to its openness to the government's request for closer law enforcement cooperation on measures against the financing of terrorist activities.⁹³ In all other cases, Schieffer and the Commission Special Representative for Readmission Policies admit that "*carrots have not always been easy to find*".⁹⁴ In fact, it is highly doubtful that the Commission can devise a

⁸⁹) Agence Europe, *Commission prepares to initiate infringement proceedings against Germany for bilateral agreement on re-entry signed with China*, Brussels, 15.09.2003.

⁹⁰) Deutsche Press Agentur, 12.10.2006.

⁹¹) 'Spain in Senegal migration deal', BBC.com 11.10.2006 <http://news.bbc.co.uk/2/hi/africa/6039624.stm>.

⁹²) *Report on the proposal for a Council decision concerning the conclusion of the Agreement between the European Community and the Republic of Albania on the readmission of persons residing without authorisation*, A6-0214/2005, 22.06.2005, p. 7.

⁹³) Schieffer, p. 356.

⁹⁴) Eurasyllum Interview with Karel Kovanda, EC Special Representative for Readmission Policies on 'The foundations, benefits and challenges of the EU Readmission Policy', April 2006.

package of carrots that satisfies the palate of third countries and whose costs Member States are also willing to swallow.

6.4 *The Temptation of Negative Incentives*

The Council has been tempted to adopt sanctions for non-cooperation. The Council introduced the conditionality concept to readmission agreements, whereby “*insufficient cooperation by a [third] country [to manage migration] could hamper the establishment of closer relations between that country and the Union*”.⁹⁵ Sanctioning tools included the threat to withdraw or cut assistance or suspend previously-granted allocations.⁹⁶ In the June 2002 Seville Conclusions, the European Council stated that “*retaliation measures could be taken under Common Security and Foreign Policy and other EU Policies in case of persistent and unjustified denial of such cooperation*”.⁹⁷ This policy was generally assessed as harmful not only to third countries, but also to the EU’s comprehensive approach to external relations. Lower assistance levels for trade, development, human rights programs and democracy-strengthening would only exacerbate the root causes of irregular migration and diminish a third country’s capacity to prevent and control it. Although the Council eventually dropped the approach, it should not be disregarded. The Commission and some Member States may in their desperation return to sanctions in their search for alternate ways around the current impasse. In fact, Malta has recently revived calls for the EU to apply conditionality on development aid to countries of origin for irregular migration.⁹⁸

7. Readmission of Non-nationals in Countries of Transit: The Revolving Door Effect

EU policymakers should take a step back and question whether the inclusion of non-nationals in readmission agreements is in the interest of the Union and its comprehensive migration management approach. Their inclusion rests on the assumption that the return of these groups to countries of transit will reduce the number of irregular migrants and rejected asylum seekers on European territory. But the return of irregular migrants and rejected asylum seekers to countries of transit could challenge the principle of sustainable return that the Commission

⁹⁵ Conclusions from the Council on Cooperation with third countries of origin and transit to jointly combat illegal immigration, 15292/03, 25.11.2003, Background Article 1.

⁹⁶ Conclusions from the Council on Cooperation with third countries of origin and transit to jointly combat illegal immigration, 9917/3/02 final, 18.06.2002, Articles 10–12.

⁹⁷ 18 June 2002, *Conclusions on Cooperation with third countries of origin and transit to jointly combat illegal immigration* and its 27 October 2004 *Conclusions on the priorities for the successful development of a common readmission policy*, Articles 8–12.

⁹⁸ Embassy of Malta, Tripoli, Press Release, 30.09.2006.

laid out in its Green Paper on a Community Return Policy on Illegal Residents. Again, their inclusion would undermine the EU's search for durable solutions to the management of migration flows. From a comprehensive approach, this burden-shifting policy to countries of transit is likely to overstretch the capacities of third-country governments to respond, of their labour markets to absorb⁹⁹ and of their societies to tolerate.

Return to countries of transit, particularly along the EU's external border, could exacerbate the already desperate situation of irregular migrants, where the only way out seems to be back across the EU border. Circular movements through more desperate channels would produce an unsustainable return policy that runs counter to EU objectives in its fight against illegal immigration.

Countries of transit would be even less likely than EU Member States to achieve a humane, lawful and durable return of irregular migrants to their countries of origin. The Commission's Green Paper on a Community Return Policy on Illegal Residents suggested that countries of transit could assist in the return of undocumented irregular migrants or stateless persons, whose identity or complete itinerary could not be determined by migration officials in EU Member States. The conclusion of EC readmission agreements would allow third countries to assist the EU in the "*transit of persons to the country of origin [through] suitable, transit arrangements*".¹⁰⁰ Given the weak asylum and migration regimes in these countries, it seems difficult to envisage that third countries could better determine the identity of returned irregular migrants or develop a more effective return policy than EU Member States.

Even if the returned migrants' full itinerary could be determined, most transit countries lack the political leverage to persuade other countries of transit or origin to readmit them. The 27 October 2004 Council Conclusions encouraged third countries to conclude readmission agreements with countries in their respective regions.¹⁰¹ These agreements would piece together 'a chain of readmission agreements' to bring irregular migrants back to their countries of origin. Unlike the EU, most third countries have no diplomatic incentives to entice other countries to readmit non-nationals or even their own nationals. Moroccan and Pakistani authorities doubt their capacity to unload the burden of returned irregular migrants onto their uncooperative neighbours, which refuse to readmit their own nationals.

The conclusion of EC readmission agreements and attempts to conclude similar bilateral agreements may aggravate the tenuous relationships of these countries with their neighbours. In the end, readmission cooperation with the EU

⁹⁹) Cassarino, Jean-Pierre, 'The EU Return Policy: Premises and Implications', <http://www.mirem.eu/politics/eu-return-policy>, 28.05.2006.

¹⁰⁰) Commission Green Paper on a Community Return Policy on Illegal Residents, COM (2002) 175 final, Brussels, 10.04.2002 Article 4.2, p. 24.

¹⁰¹) Council Conclusions on the priorities for the successful development of a common readmission policy, 13758/04, 27.10.2004, Paragraph 1.

could obstruct their own efforts to build partnerships in their own regions.¹⁰² One Moroccan official used the platform of the Euro-Mediterranean Human Rights Network to denounce the impact of EC readmission agreements on the management of migration between Morocco and its neighbours in the realm of border and visa policies.¹⁰³

In addition to facilitating repatriation, the Commission recommended that third countries could assist the EU by readmitting non-nationals “*for a limited time or as a sustainable solution*”,¹⁰⁴ that is, for temporary stay or permanent residence. The tolerance of irregular migrants and rejected asylum seekers in countries, with which they have no connection other than mere transit, is unlikely to lead to any form of integration, even temporary. These countries are most likely to express indifference towards returned migrants who are vulnerable to labour and sexual exploitation, police brutality and the constant threat of impoverishment. Where neither the third country nor the irregular migrant wants him or her to remain, temporary to long to long term stay is not a viable option. Given the interests of both parties and the conditions of stay, the Commission cannot qualify temporary or permanent residence in countries of transit as “*adequate for the returnee concerned*”.¹⁰⁵

The non-integration of irregular migrants living on the margins of a society would undercut EU development goals.¹⁰⁶ It would contradict the stated goals of the EU’s Migration and Development policy to capitalize on the returned migrant as investors and entrepreneurs in order to return human, financial, economic and social capital to their home communities in their country of origin.¹⁰⁷ Despite the European Parliament’s call for readmission policy to advance development,¹⁰⁸ the returned non-nationals will be hard pressed to become agents of development in a foreign country which they have not chosen as their country of destination. They would instead represent lost potential for the country of origin and a potential drain on development for the country of transit.

The EU cannot ignore the potentially destabilizing effect of obligations imposed on third countries where respect for human rights and the rule of law may be

¹⁰² Cassarino, Jean-Pierre, ‘The EU Return Policy: Premises and Implications’, <http://www.mirem.eu/politics/eu-return-policy>, 28.05.2006.

¹⁰³ Rodier, p. 16.

¹⁰⁴ Commission Green Paper on a Community Return Policy on Illegal Residents, COM (2002) 175 final, Brussels, 10.04.2002, Article 4.2, p. 24.

¹⁰⁵ *Ibid.*

¹⁰⁶ 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 (AENEAS)’, Article 4.

¹⁰⁷ Commission Communication on ‘Migration and Development: Some concrete orientations’, Brussels, COM(2005) 390 final, 1.09.2005, Annex 1, Article 2 and 3, pp. 12–13.

¹⁰⁸ *Report on the proposal for a Council decision concerning the conclusion of the Agreement between the European Community and the Republic of Albania on the readmission of persons residing without authorisation*, A6-0214/2005, 22.06.2005, p. 7.

tenuous. The questionable practices of Moroccan border and police officials towards intimidated returns to Mauritania and Algeria have generated strident criticism from human rights and civil society actors including UNHCR. They express alarm that the implementation of readmission agreements does not contain the necessary safeguards to respect the human rights of migrants and ensure non-refoulement and efficient access to asylum procedures for persons in need of international protection. Exclusion of non-nationals from the scope of readmission agreements would thus also appease human rights and international protection concerns. Indeed, the EU itself has affirmed that “*insufficient management of migratory flows* [between the EU and third countries] *can result in humanitarian disasters*”.¹⁰⁹ The transfer of responsibility to countries of transit with fragile capacities and spotty human rights records could result in rendering the EU as an accomplice in forced returns, human rights violations and human tragedies.

All these probable conditions would leave returned irregular migrants little choice but to irregularly re-enter the EU through even more desperate and fatal channels. As seven of the fourteen EC readmission agreement countries border the EU, an EU return policy that leaves returned irregular migrants right outside its front door seems imprudent. With the only connection to these countries being transit on the way to the EU, returned irregular migrants would continue to congregate on the other side of the EU border. Unlike the CEEC countries of the second generation of readmission agreements, the countries of the third generation would act less as a *cordon sanitaire* and more as the doormen at the EU’s revolving door. What the European Parliament’s Albania report dubbed the “*readmission trap*”¹¹⁰ would transform the EU’s fight against illegal immigration into a vicious cycle of a fight against secondary movements and circular return.

Given the Tampere objective, reiterated in the Hague Programme of November 2004, of an integrated, comprehensive and balanced approach to EU migration policy, the European Union should re-examine its readmission policy covering non-nationals, which undermines “*the complementarity and coherence*”¹¹¹ of its migration goals with third countries. The inclusion of non-nationals in EC readmission agreements comes at the cost of EU objectives for sustainable return policy and sound management of migratory flows. In this re-evaluation, the EU should likewise consider the costs to its reputation if seen as an accomplice to the deterioration of respect for human rights, the rule of law, societal tolerance and

¹⁰⁹ Multi-annual Programme, ‘The Hague Programme; strengthening freedom, security and justice in the European Union’, 13302/1/04 REV 1 JAI 370, 15.10.2004, Article 1.6.1.

¹¹⁰ *Report on the proposal for a Council decision concerning the conclusion of the Agreement between the European Community and the Republic of Albania on the readmission of persons residing without authorisation*, A6-0214/2005, 22.06.2005, p. 7.

¹¹¹ Commission Green Paper on a Community Return Policy on Illegal Residents, COM (2002) 175 final, Brussels, 10.04.2002, p. 23.

development in third countries as well as, above all, to the desperation of returned irregular migrants in transit countries.

8. Conclusions

The European Union should shift to a different two-pronged readmission policy. Readmission agreements covering nationals and non-nationals should be reserved for only EU acceding and certain advanced candidate countries. With the first generation of readmission agreements among EC Member States, the EC put into place a de facto transfer of responsibilities system for the return of non-nationals. The second-generation of readmission agreements enlarged this mechanism to cover the CEEC countries. EU officials rightly assumed that the lure of membership would bring a rising tide of human rights standards and border and migration management practices in the candidate countries that are required for accession and eventual integration into the Schengen Zone and a common immigration and asylum policy. The enlargement basket, brimming with carrots and sticks, also secured CEEC countries' interest in the second-generation of readmission agreements covering non-nationals.

Following this logic, the EU can only justify any responsibility sharing arrangement for the return of non-nationals with candidate countries well on the road to accession. In that case, coupled readmission and visa facilitation agreements should be integrated into the greater enlargement negotiation framework. Given the current state of enlargement negotiations, new readmission agreement negotiations should therefore be limited to Croatia and the Former Yugoslav Republic of Macedonia for the moment. Scepticism over the outcome of Turkish enlargement talks may make the inclusion of Turkey in this allocation of responsibility for return mechanism problematic. In addition to Turkey, question marks loom over the distant future for Bosnia and Herzegovina, Montenegro and Serbia.

With all other countries, the EU should pursue effective readmission clauses covering only nationals of the contracting parties, based on the logic of shared responsibility, joint ownership and common interests.¹¹² The European Union should drop stateless persons and most categories of non-nationals from its current readmission policy with third countries such as Algeria, China, Morocco and Pakistan. On a policy level, the EU cannot assure that cooperation outside of the enlargement process will raise the living and human rights standards of non-candidate countries to such a point of convergence that these countries could be considered viable destinations for the return of non-nationals. The Commission

¹¹² Cassarino, Jean-Pierre, 'The EU Return Policy: Premises and Implications', <http://www.mirem.eu/politics/eu-return-policy>, 28.05.2006.

could attempt to make the case to third countries for the inclusion of non-nationals holding a valid visa or a residence authorisation issued by that country. Any severely limited inclusion of non-nationals with non-candidate countries ought to be founded on evidence of strong and current links to the country of transit. The EU could revive earlier discussions to consider the legality and duration of residence or immediate family ties as grounds for such third-country national returns.¹¹³

If the European Union would omit non-nationals from the scope of these readmission agreement negotiations, it could put its readmission policy back on track and conclude more readmission clauses covering nationals with a wider range of countries of origin. IOM also encourages the insertion of standard readmission clauses in all future Association or Cooperation agreements. These would provide the “enabling” anchorage for operational arrangements in separate agreements on return. The EU possesses its strongest diplomatic leverage and international legal foundation for readmission clauses covering nationals, especially when negotiating Association, Cooperation and other forms of bilateral or regional Agreements. In most cases, concentrated efforts on readmission clauses could bear faster and greater fruit with a greater number of countries. The EU could launch readmission clause negotiations with countries that, at present, are not covered under any EU readmission policy. This list includes such migrant-producing countries as Bangladesh, Brazil, China, India and Mexico.¹¹⁴ The EU should re-engage the fifteen countries, such as Belarus, Kazakhstan, Moldova, Morocco, Tunisia and Vietnam with whom earlier bilateral negotiations settled for non-binding declarations on readmission. Binding commitments with these fifteen would target irregular migration at its source with significant countries of origin. This new policy shift would expand the number of countries covered by readmission clauses from 102 to nearly 120, counting ten major countries of origin. This shift would produce the cost-effective, useful and efficient instrument envisioned by a European readmission policy.

The EU should complement new readmission clauses negotiations with the development of efficient and humane guidelines for the implementation of readmission in full respect of the human rights and dignity of the returnee. The negotiation of safe return¹¹⁵ and readmission conditions, which satisfy both parties, will assure a functioning readmission system. With the necessary safeguards, read-

¹¹³ Danish Delegation to the Council Migration Working Party (Expulsion), *Readmission Agreements concerning third-country nationals*, Brussels, 7669/99, 26.04.99, pp. 6–8, <http://register.consilium.eu.int/pdf/en/99/st07/07669en9.pdf>.

¹¹⁴ ‘Unsafe’ countries of origin to which the EU could hardly return irregular migrants in the near or distant future, such as Afghanistan, Iraq, Iran, Libya, Syria or Turkmenistan, were not included.

¹¹⁵ See the Draft Proposal for a Directive on common standards and procedures in Member States for returning illegally staying third-country nationals, COM(2005) 391 final, 1.09.2005, http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0391en01.pdf.

mission clauses would not be subject to the diplomatic obstructionism from third countries that arise from complaints of returnee mistreatment, as occurred in Summer 2006 between Spain and Senegal.¹¹⁶ The EU should focus financial and technical assistance packages to raise human rights and living standards in as many countries of origin as possible. In return, these countries should commit to accepting the return of their own citizens and above all facilitating their re-integration. These efforts will cover all the countries in stalled readmission negotiations and expand the global reach for the safe and humane readmission of returnees and their sustainable reintegration into their home communities.

Investment in this return objective would further contribute to the EU's broader objective to address the root causes of illegal migration, ensure sustainable returns and develop a comprehensive migration management approach. A sustainable reintegration policy in home communities leads in turn to their sustainable development. Such new opportunities will diminish the push factors not only for the returnee contemplating a secondary movement, but also for his or her neighbors who may no longer be forced to turn in desperation to irregular migration.

Annex: Article 13 of the Cotonou Agreement

Migration

1. The issue of migration shall be the subject of in-depth dialogue in the framework of the ACP-EU Partnership.
The Parties reaffirm their existing obligations and commitments in international law to ensure respect for human rights and to eliminate all forms of discrimination based particularly on origin, sex, race, language and religion.
2. The Parties agree to consider that a partnership implies, with relation to migration, fair treatment of third country nationals who reside legally on their territories, integration policy aiming at granting them rights and obligations comparable to those of their citizens, enhancing non-discrimination in economic, social and cultural life and developing measures against racism and xenophobia.
3. The treatment accorded by each Member State to workers of ACP countries legally employed in its territory, shall be free from any discrimination based on nationality, as regards working conditions, remuneration and dismissal, relative to its own nationals. Further in this regard, each ACP State shall accord comparable non-discriminatory treatment to workers who are nationals of a Member State.

¹¹⁶ "Spain halts Senegal deportations," BBC News, 1 June 2006 <http://news.bbc.co.uk/1/hi/world/africa/5037808.stm>.

4. The Parties consider that strategies aiming at reducing poverty, improving living and working conditions, creating employment and developing training contribute in the long term to normalising migratory flows.

The Parties will take account, in the framework of development strategies and national and regional programming, of structural constraints associated with migratory flows with the purpose of supporting the economic and social development of the regions from which migrants originate and of reducing poverty.

The Community shall support, through national and regional Cooperation programmes, the training of ACP nationals in their country of origin, in another ACP country or in a Member State of the European Union. As regards training in a Member State, the Parties shall ensure that such action is geared towards the vocational integration of ACP nationals in their countries of origin.

The Parties shall develop cooperation programmes to facilitate the access of students from ACP States to education, in particular through the use of new communication technologies.

5. a. In the framework of the political dialogue the Council of Ministers shall examine issues arising from illegal immigration with a view to establishing, where appropriate, the means for a prevention policy.
- b. In this context the Parties agree in particular to ensure that the rights and dignity of individuals are respected in any procedure initiated to return illegal immigrants to their countries of origin. In this connection the authorities concerned shall extend to them the administrative facilities necessary for their return.
- c. The Parties further agree that:
- i. each Member State of the European Union shall accept the return of and readmission of any of its nationals who are illegally present on the territory of an ACP State, at that State's request and without further formalities; each of the ACP States shall accept the return of and readmission of any of its nationals who are illegally present on the territory of a Member State of the European Union, at that Member State's request and without further formalities.
- The Member States and the ACP States will provide their nationals with appropriate identity documents for such purposes.
- In respect of the Member States of the European Union, the obligations in this paragraph apply only in respect of those persons who are to be considered their nationals for the Community purposes in accordance with Declaration No 2 to the Treaty establishing the European Community. In respect of ACP States, the obligations in this paragraph apply only in respect of those persons who are considered as their nationals in accordance with their respective legal system.

- ii. at the request of a Party, negotiations shall be initiated with ACP States aiming at concluding in good faith and with due regard for the relevant rules of international law, bilateral agreements governing specific obligations for the readmission and return of their nationals. These agreements shall also cover, if deemed necessary by any of the Parties, arrangements for the readmission of third country nationals and stateless persons. Such agreements will lay down the details about the categories of persons covered by these arrangements as well as the modalities of their readmission and return.
Adequate assistance to implement these agreements will be provided to the ACP States.
- iii. for the purposes of this point (c), the term “Parties” shall refer to the Community, any of its Member States and any ACP State.