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Readmission agreements: a mechanism for returning irregular migrants

Report
Committee on Migration, Refugees and Population
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Summary

Readmission agreements reiterate and define the obligation for a country to readmit its citizens. Some readmission agreements also set out the conditions under which the state parties are obliged to readmit citizens of third countries who have passed through their territory. Advocates of readmission agreements claim that they are neutral in terms of human rights and merely a tool for the removal of irregular migrants. Skeptics claim that there is a risk that readmission agreements pose a threat to the human rights of irregular migrants and to the right of those in need of international protection not to be subjected to *refoulement*.

The main cause for concern relates to the readmission of third-country nationals. Irregular migrants who are returned to a country which is not their country of origin might risk ending up in an unsustainable situation, notably in terms of social rights. There is also a risk that third country returnees are shuttled back to their country of origin without having had the possibility to submit an asylum application in any of the countries through which they pass. Until now, there has hardly been any experience with the readmission of third-country nationals, as the European Union readmission agreements have only applied to this group since 2007. As the number of returns to transit countries may be expected to rise, it is important to pay close attention to this development. Statistics on the implementation of readmission agreements are lacking.

The Parliamentary Assembly recommends that member states and the European Union only negotiate and apply readmission agreements with regard to countries that respect human rights and those that have a functioning asylum system in place. They should ensure that readmission agreements contain appropriate legal safeguards in terms of human rights. Member states are also urged to compile statistics on the implementation of readmission agreements and to study their impact, as well as to consider setting up a mechanism to monitor their use.

A. Draft resolution

1. Readmission agreements reiterate and define the obligation to readmit a country's own citizens and set out the conditions under which state parties to such agreements are obliged to readmit citizens of third countries who have passed through their territory. They facilitate and expedite the enforcement of return decisions in respect of irregular migrants and may also function as an incentive for countries of origin or transit to enhance their migration control. Depending on one's viewpoint, readmission agreements can either be considered an important element in the migration management strategies of Council of Europe member states, or as facilitators of questionable return decisions and part of the criticised "externalising of migration control" of European countries.

2. It can be argued that readmission agreements provide transparency, since they clearly state the procedural conditions for readmission prior to the enforcement of a return decision. If implemented with care, the agreements may contribute to reducing the migrant's period of uncertainty or detention by facilitating and speeding up the enforcement of return decisions. Advocates of readmission agreements claim that these are neutral in terms of human rights and merely a tool for the removal of irregular migrants. The stage at which a human rights concern may arise is usually when the decision to expel the person concerned, the return decision, is taken and not when that decision is enforced by way of the readmission agreement, unless the situation in the readmitting country has changed in the meantime.

3. There is, however, a risk that readmission agreements pose a threat, directly or indirectly, to the human rights of irregular migrants or asylum seekers. This concerns, in particular, the risk that the sending or the readmitting country fails to honour their obligations under the Geneva Convention Relating to the Status of Refugees (the 1951 Geneva Convention) and its 1967 Protocol and the European Convention on Human Rights and then uses a readmission agreement to enforce a flawed decision. The return process should be seen as a whole, in which readmission agreements are one important element.

4. The main cause for concern relates to the readmission of third-country nationals. Irregular migrants who are returned to a country which is not their country of origin might risk ending up in an unsustainable situation. There is a risk that third country returnees are subject to so-called chain-refoulement, which means being shuttled back to their country of origin without having had the possibility to submit an asylum application or having had the asylum claim reviewed in any of the countries through which they pass. Some readmission agreements provide for accelerated procedures at borders, which might in effect hinder migrants from submitting an asylum application or give rise to an assessment of poor quality.

5. Statistics on the number of returns enforced with the help of readmission agreements are hard to obtain. States have not assembled statistics or are reluctant to publish them. The situation of returnees is rarely evaluated. This lack of information prevents a thorough evaluation of these instruments.

6. It is essential to negotiate and apply readmission agreements which take fully into account the human rights of the irregular migrants concerned. Furthermore, it is crucial, in order to better understand and evaluate these instruments, to collect data on their effects and implementation. The Parliamentary Assembly therefore calls upon Council of Europe member states to:

6.1. conclude readmission agreements only with countries that comply with relevant human rights standards and with the 1951 Geneva Convention, that have functioning asylum systems in place and that protect their citizens' right to free movement, neither criminalising unauthorised entry into, nor departure from, the country in question;

6.2. comply fully with their obligations under the European Convention on Human Rights and in particular its Article 3, the 1951 Geneva Convention and other relevant human rights instruments and to follow the Council of Europe Twenty Guidelines on Forced Returns when readmitting an irregular migrant under a readmission agreement, or when requesting the enforcement of a decision to return an irregular migrant under such an agreement;

6.3. ratify and abide fully and effectively by Protocol No. 4 to the European Convention on Human Rights which, inter alia, prohibits collective expulsion of aliens;

6.4. abide by the Council of Europe Guidelines on human rights protection in the context of accelerated asylum procedures;

- 6.5. ensure that, before a readmission agreement is put to use, asylum seekers have had the possibility to submit an asylum application, and the right to an effective remedy with suspensive effect, which implies a review on facts and law by an independent national authority;
 - 6.6. verify that, if the member state applies the concept of "safe third country" with regard to asylum seekers whose claims are not assessed substantially, the country of destination is safe for that particular asylum seeker, implying that it will respect the human rights of the person concerned, provide access to a proper asylum procedure and comply with the 1951 Geneva Convention;
 - 6.7. include a provision into readmission agreements which requires that a sending country always first tries to return a person concerned to his or her country of origin before requesting readmission by a country through which that person has merely transited;
 - 6.8. include a provision into readmission agreements which requires that the requesting country, prior to requesting readmission by a third country, verifies that the readmitting third country will grant the person concerned access to minimum social rights. If this cannot be verified, readmission must not take place and the requesting country shall instead give the person concerned access to such rights as long as he or she stays in that country;
 - 6.9. ensure that a readmitted third-country national does not become stranded in a readmitting transit country without the possibility to go back to his or her country of origin;
 - 6.10. study the impact of provisions in readmission agreements that provide for accelerated procedures with regard to migrants apprehended close to the border between the parties, with a view to ascertaining whether or not there are questionable practices at borders;
 - 6.11. take care that readmission agreements contain appropriate legal safeguards to protect the migrants against any abuse of their human rights and that the agreements are specific about their rights, in particular as concerns vulnerable categories;
 - 6.12. ensure that the country of origin of the person concerned will not receive any evidence or information on an asylum claim lodged in the sending country;
 - 6.13. ensure that readmission agreements provide for a system under which the implementation of the agreement may be properly monitored and evaluated, and that they provide for a public annual report to be drawn up by the authorities of the readmitting country including, as a minimum, statistical data on the fate of readmitted persons (on issues such as detention, release, expulsion, access to asylum system, etc.);
 - 6.14. phase out older bilateral readmission agreements, replacing them with more modern ones which fully respect the Council of Europe's human rights standards;
 - 6.15. carry out quantitative and qualitative studies on the functioning and impact of readmission agreements to which they are parties, in readmitting as well as sending countries, in order to ascertain whether they might result in human rights abuses;
 - 6.16. ensure that readmission agreements are always made public;
 - 6.17. avoid using informal readmission arrangements, or at least ensure that the recommendations set out in this resolution are applied also with regard to such arrangements;
 - 6.18. seek co-operation with the European Commission in order to set up adequate monitoring bodies and to coordinate the collection and analysis of statistics in respect of readmission agreements;
 - 6.19. set up training schemes for border guards, civil servants and others involved in the implementation of readmission agreements, in both sending and readmitting countries;
 - 6.20. consider regularisation programmes as an alternative to the return of irregular migrants, where appropriate.
7. The Assembly invites the European Union to take into account the recommendations made in this Resolution in negotiating and promoting its readmission agreements, ensuring that these are consistent with relevant human rights standards, in particular Article 3 of the European Convention on Human Rights and

Article 19 of the European Union Charter of Fundamental Rights, and that they do not induce members states to operate return policies which are contrary to these standards, to make all statistics in respect of readmissions public and to set up a monitoring mechanism with regard to readmission agreements. In particular, the European Union is invited to:

- 7.1. properly consider the human rights situation and the availability of a well-functioning asylum system in a country prior to entering into negotiations on readmission agreements with that country;
- 7.2. use its strong bargaining position to negotiate provisions in readmission agreements that safeguard the human rights of the persons to whom they are to be applied;
- 7.3. include in its readmission agreements as a condition for their application, that an asylum seeker to whom the agreement is applied shall first have had access in the European Union member state to an effective remedy in the sense of Article 13 of the European Convention on Human Rights, and that the agreements shall not be applied until the competent authority has ruled on the asylum seeker's appeal;
- 7.4. include in its readmission agreements as a condition for their application, that third-country nationals are not sent to transit countries where they might risk facing a situation threatening their human dignity in terms of social rights;
- 7.5. instruct an appropriate body to monitor the implementation by member states of European Union-brokered readmission agreements and to provide relevant training to the European Union member states;
- 7.6. co-operate closely with its member states in the collection and evaluation of statistics with regard to the implementation of readmission agreements and ensure that these statistics are made public;
- 7.7. examine the interaction between the rules of the "safe third country" concept and the implementation of readmission agreements and whether there are any flaws in the system;
- 7.8. study the impact of the signing of readmission agreements in respect of third-country nationals as a condition for visa liberalisation and co-operation, with regard to the goals of the European Neighbourhood Policy and the international development policy of the European Union.

B. Draft recommendation

1. Referring to its Resolution ... (2010) on readmission agreements: a mechanism for returning irregular migrants, the Parliamentary Assembly draws attention to the role of readmission agreements in the policy on return of irregular migrants of the member states of the Council of Europe and the fact that these raise concerns with regard to human rights.
2. The Committee of Ministers is invited to take note of the Assembly's recommendations to member states set out in its above-mentioned resolution and to urge member states to comply with them.
3. The Assembly considers that much greater efforts should be made to examine the impact of readmission agreements on irregular migrants and asylum seekers, beginning with the collection and evaluation of related statistics. The Assembly therefore invites the Committee of Ministers to:
 - 3.1. define criteria with regard to human rights for the selection of countries with which the negotiations on a readmission agreement can be opened;
 - 3.2. prepare guidelines on how to negotiate and implement readmission agreements in ways which ensure that human rights are respected and protected, taking into account identified best practices, in particular by examining:
 - 3.2.1. if the readmission process implemented by members states offer sufficient capacity building and assistance programmes for the reintegration of returnees, in particular with regard to the return of members of minorities;
 - 3.2.2. the effect of readmission agreements that provide for the return of third-country nationals to countries in which they are not guaranteed access to an asylum system;
 - 3.2.3. ways to avoid situations in which returnees lack access to minimum social rights and are deprived of sustainable life projects;
 - 3.2.4. the implementation of the readmission agreements negotiated by the European Union and human rights implications arising from the use of accelerated readmission procedures provided for in some of these agreements (with Russia, Ukraine and other countries).

C. Explanatory memorandum by Ms Strik, rapporteur

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I. Introduction

1. Readmission agreements are an important element in migration management strategies of Council of Europe member states and in the common return policy of the European Union. They facilitate and expedite the enforcement of return decisions in respect of irregular migrants and presumably also function as an incentive for countries of origin or transit, that are parties to readmission agreements, to improve their border control. The main question discussed in this report is whether the existence or implementation of readmission agreements poses a threat, directly or indirectly, to the human rights of irregular migrants. This concerns in particular the risk that the sending or the readmitting country fails to honour their obligations under the 1951 Geneva Convention Relating to the Status of Refugees and its 1967 Protocol (the 1951 Geneva Convention) and the European Convention on Human Rights.

2. Readmission agreements set out the conditions under which the states parties to them are obliged to readmit their own citizens and sometimes also third-country citizens who have passed through their territory. The human rights concerns arise in particular with regard to the latter. It has been argued that irregular migrants who are returned to a country which is not their country of origin might risk being deprived of the possibility to submit an asylum application or to have it examined in substance, thus becoming subject to so-called “*chain-refoulement*”, or placed in an unsustainable situation in terms of social rights.

3. Unsurprisingly, representatives of national governments and the European Union claim that readmission agreements are safe and neutral in terms of human rights. They argue that a readmission agreement is merely a tool for the effective removal of irregular migrants and that all human rights issues must be raised when the decision to expel the person concerned, the return decision, is taken.

4. Representatives of NGOs, for example, do not agree with this view, but maintain that it is in fact relevant to question the neutrality of readmission agreements as regards human rights. Their argument is that one cannot isolate the different links in the chain which lead to the return of a person, but have to see the process as a whole. Readmission agreements are a very important part of this whole, it is claimed, and should not be detached from it. Moreover, the existence of a readmission agreement may serve as a catalyst for questionable return decisions. The impact of readmission agreements must therefore also be evaluated. A particular problem arises if there has been no examination of the claim on the merits of the individual protection needs (for example persons whose applications have been rejected on “safe third country” grounds) before readmission is requested or if the situation in the readmitting country has deteriorated between the taking of the return decision and the request for readmission.

5. The European Union is a driving force in the promotion of readmission agreements. It negotiates readmission agreements which are then put at the disposal of and implemented by its member states. Also many purely bilateral readmission agreements are in force between countries. States members of the Council of Europe but not of the European Union are also parties to bilateral readmission agreements with third countries. These states are, however, first and foremost at the receiving end of readmission agreements with European Union member states. In 2007, for example, “The former Yugoslav Republic of Macedonia” readmitted 528 persons, all from either Austria, Germany, Hungary or Switzerland.

6. The European Union has concluded readmission agreements with the following countries: Hong Kong, Macao, Sri Lanka, Albania, Russia, Bosnia and Herzegovina, “the former Yugoslav Republic of Macedonia”, Georgia, Moldova, Montenegro, Pakistan, Serbia and Ukraine. Negotiations are on-going with Morocco and Turkey, whereas mandates for the European Commission to negotiate readmission agreements exist also in respect of China, Algeria and Cape Verde. The Council of the European Union has invited the Commission to prepare a mandate with a view to initiate negotiations concerning a readmission agreement with Belarus.

7. Over and above the European Union readmission agreements, hundreds of bilateral readmission agreements have been concluded. Germany, for example, has 29 agreements; Italy has 30; Poland is party to 19 agreements and Hungary to 25. Many of these bilateral agreements are between European Union member states. 13 of Germany’s agreements are with other European Union member states, as are 15 of

Italy's. "The former Yugoslav Republic of Macedonia" has 21 readmission agreements and Moldova is party to three agreements.

8. Statistics on the number of returns enforced with the help of readmission agreements are sometimes difficult to obtain. States have not assembled statistics or are reluctant to publish them. When statistics do exist, they can be on returns in general and not broken down with regard to the number enforced through the application of readmission agreements. The situation of returnees is rarely evaluated, and even less so with regard to the effect the implementation of readmission agreements has on their situation. This lack of information prevents a thorough evaluation of the advantages and disadvantages of these instruments.

9. In the light of the above the rapporteur has prepared this report on the human rights implications of readmission agreements. As part of the preparations, on 15-16 February 2009, the rapporteur conducted a study visit to Brussels where she met with representatives of the United Nations High Commissioner for Refugees (UNHCR), the European Commission, Amnesty International and the Centre for European Political Studies as well as with independent experts, all of whom provided a great deal of valuable information. Furthermore, on 27 May 2009 a hearing was organised in Paris on the topic of the report. The meeting benefited from an exchange of views with, *inter alia*, civil servants from the European Commission staff, UNHCR and the International Organization for Migration (IOM), and with representatives from civil society. In the course of the preparations, questionnaires were sent to and replied to by members of the European Committee on Migration (CDMG). The rapporteur was also greatly assisted by a consultant, Ms Joanne van Selm, who prepared a paper on this topic from which the rapporteur has derived input for the report. The rapporteur would like to warmly thank all those mentioned for their valuable contributions.

II. What are readmission agreements?

10. Countries have an obligation under international law to readmit their own citizens.¹ When a country in which a person resides wishes to return him or her to his or her country of origin, it might, however, sometimes occur that the latter country does not honour this obligation. The formal reason can, for example, be that the individual lacks the necessary documents, whereas the real reason might be that he or she is simply undesirable or that there are political or economic reasons why the government does not want to readmit some of its own citizens. In order to facilitate and expedite returns, countries have concluded readmission agreements. Such agreements set out a number of conditions that, if fulfilled, imposes upon the country of origin a contractual obligation to readmit the person in question onto its territory, in addition to the obligation already flowing from international law. The agreement sets out the precise conditions that are to be fulfilled in order for the requested readmission to be granted.

11. Countries that wish to expel individuals who for some reason are no longer allowed to stay on their territory might sometimes have an interest in sending that person, not to his or her country of origin, but to a third country, usually one through which the person has passed on his or her way to the country that wishes to expel him or her. The reason can be that the transit country is easier to co-operate with. However, countries have the prerogative to decide upon the entry of foreign citizens on their territory, and are thus not obliged under international law to admit individuals who are not their citizens. Readmission agreements therefore sometimes contain clauses obliging the receiving country to readmit returnees who are not citizens of that country. These persons are referred to here as "third-country nationals".

12. Readmission agreements concern the readmission of irregular migrants, individuals who for one reason or another have no right to reside on the territory of a certain state. A migrant can be considered irregular for several different reasons.² He or she can be an asylum seeker whose asylum application has been rejected or not even considered or might have entered the country without the necessary documents. Countries have the right to expel irregular migrants, provided the expulsion is not in violation of the 1951 Geneva Convention,³ or other international human rights instruments including the European Convention on Human Rights, the International Covenant on Civil and Political Rights or the United Nations Convention against Torture. This does not necessarily mean that it can always be considered humane to expel an individual, but the right to do so is still there with the proviso mentioned above. In this context, it is particularly important to focus on the rights of third-country nationals. Such returnees are at even greater risk of ending up in a situation where they lack access to an asylum system.

¹ See Article 12.4 of the UN International Covenant on Civil and Political Rights and Protocol No. 4 to the ECHR, Article 3.2.

² The European Union refers to "illegal migrants". The Parliamentary Assembly has, however, opted for the expression "irregular migrants".

³ Article 33 of the 1951 Geneva Conventions provides: "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

13. The European Commission defines European Union readmission agreements in the following way: “A Community Readmission Agreement is an international agreement between the European Community and a third country which sets out reciprocal obligations, as well as detailed administrative and operational procedures, to facilitate the return of illegally residing persons to their country of origin or country of transit”.⁴ The same definition normally applies for bilateral readmission agreements, except that they do not involve the European Union.

14. Readmission agreements set out that, upon application by the requesting state, without any further formalities than those specified in the agreement, the requested state must readmit any person who does not, or who no longer, fulfils the entry or residence conditions applicable in the territory of the requesting state, on the condition that it can be proved or indicated by *prima facie* evidence that the person concerned is a national of the requested state. The various documents serving as proof or evidence of nationality are listed in the annexes to each readmission agreement. If the conditions are fulfilled, the requested state must issue the person to be readmitted with the travel document required for his or her return, with a period of validity of at least six months.

15. Readmission agreements normally also provide that the requested state must readmit to its territory, upon application by the requesting state, any third-country national or stateless person who does not fulfill, or who no longer fulfils, the conditions for entry to or residence in the territory of the requesting state, where it can be proved that such a person:

- has unlawfully entered the territory of the requesting state directly from the territory of the requested party;
- held, at the time of entry, a valid residence authorisation issued by the requested state;
- held, at the time of entry, a valid visa issued by the requested state.

If the conditions are fulfilled, the requested state must issue the person to be readmitted with the travel document required for his return, with a period of validity of at least six months.⁵

16. The “detailed and operational procedures” mentioned in the definition above refers to the way in which an irregular migrant is returned in application of the agreement. The provisions setting out these procedures concern, inter alia, the means of evidence regarding the nationality of the returnee that must be accepted by the readmitting country, transit operations, protection of personal data, implementation and territorial application of the agreement and rules on costs and data protection. The agreements also contain a “non-affection clause”, which commits the parties to respect the human rights of the migrants concerned, or refers to “obligations and responsibilities arising from International Law and from any applicable International Convention or agreement...”.

17. Readmission agreements have occurred in different forms for many years. Three main waves can be identified: the 19th century, the 1950s and a third one which started in the early 1990s.⁶ During the 1990s most European Union member states pursued bilateral readmission agreements with the countries most important to them with respect to migration policy. With national return policies facing increasing difficulties in implementation, European Union member states turned to collective action to create a climate for co-operation with non-member states.

18. As mentioned earlier, hundreds of bilateral readmission agreements have been concluded. Bulgaria, France, Germany, Italy, Latvia, Lithuania, Romania, and Spain are the European Union member states most involved in bilateral readmission co-operation. Bosnia and Herzegovina, Croatia, “the former Yugoslav Republic of Macedonia”, Switzerland and Ukraine are the non-European Union Council of Europe member states which co-operate most at a bilateral level with European Union member states. The European Union encourages states with which it has readmission agreements to conclude readmission agreements in their turn with other habitual countries of origin.

⁴ Information provided by an official at the European Commission's Directorate-General of Justice, Freedom and Security, May 2009.

⁵ The readmission obligation for the third-country national or stateless person does not apply in some cases, such as if the person concerned has only been in air transit via an international airport of the requested party.

⁶ See more about the history of readmission agreements in Coleman, Nils; “European Readmission Policy, Third Country Interests and Refugee Rights”; Chapter 1.

19. In some cases countries have agreed to co-operate on readmission issues without necessarily formalising the co-operation in a readmission agreement. They may have opted for alternative ways of dealing with the issue of readmission by placing it in a broader framework of co-operation including additional forms of mutual assistance or by choosing to confirm their co-operation via other types of deals. These can include exchanges of letters and memoranda of understanding.⁷

20. In 1999, through the Amsterdam Treaty, the European Community was given the competence by member states to start negotiating readmission agreements, which have then, once concluded, been put to the disposal of member states.⁸ The competence with regard to readmission agreements is a matter of discussion. It is not clear whether the European Union enjoys sole competence in this area. European Union member states contest that this would be the case. The customary practice between the Commission and member states is one of shared competence governed by certain rules. Previous state-negotiated bilateral readmission agreements of European Union member states are still in force and used. European Union readmission agreements, however, take precedence over state-negotiated ones. Member states can also enter into readmission agreements with countries that are not encompassed by the Council of the European Union mandate referred to below. Although the European Commission is responsible for the negotiation of readmission agreements, it does not take part in their implementation. The actual decision to return an individual and request readmission rests entirely with the individual country.⁹

21. European Union readmission agreements are, as already stated, negotiated by the European Commission, which is authorised to do so by the European Union Council. Since 2000, partnership and co-operation agreements between the European Union and third countries, notably the Cotonou Agreement and its Article 13, contain clauses which demand that the parties readmit their own citizens.¹⁰

22. The European Pact on Migration and Asylum, which was adopted by European Union heads of state and government at the European Summit of October 2008, endorses and recommends the conclusion of readmission agreements by the European Union. It states that the effectiveness of European Union readmission agreements will be evaluated and that member states and the Commission will consult closely when future readmission agreements are negotiated. The "Stockholm Programme – an open and secure Europe serving and protecting the citizens", adopted in December 2009, mentions readmission agreements as an important element in European Union migration management. It considers that the Council of the European Union should put its focus on "the presentation by the Commission of an evaluation, also of ongoing negotiations, during 2010 of the EC readmission agreements and propose a mechanism to monitor their implementation. The Council should define a renewed, coherent strategy on readmission on that basis, taking into account the overall relations with the country concerned, including a common approach towards third countries that do not co-operate in readmitting their own nationals" (Section 6.1.6).

23. Bilateral readmission agreements are international treaties and must therefore, in a vast majority of countries, be signed by the government of the parties and ratified by their parliaments and in some cases incorporated into domestic law before entering into force in respect of that country. In the case of European Union-negotiated readmission agreements, under the Nice Treaty, the European Parliament was consulted and gave a non-binding opinion. This has changed with the Lisbon Treaty under which the agreements will have to be ratified by the European Parliament (Article 216). Readmission agreements concluded by the European Union are not so-called "mixed agreements", and consequently do not require separate ratification by member states' governments or parliaments.

24. Statistics on the number of returns enforced with the help of readmission agreements are hard to obtain. States have not assembled statistics or are reluctant to publish them. When statistics are published they most often show returns in general and are not broken down by the number enforced under readmission agreements.

⁷ See the "Collective Action to Support the Reintegration of Return Migrants in their Country of Origin" (the MI.RE.M.-project).

⁸ Article 63(3)(b) of the Treaty of the European Union.

⁹ Letter dated 23 March 2009 from the European Commission, DG Justice, Freedom and Security to the President of Migreurop.

¹⁰ The Cotonou Agreement between the European Union and the ACP (African, Caribbean and Pacific) countries was signed in 2000. Its Article 13 contains a standard readmission clause, which provides that every State Party "shall accept the return of and readmission of any of its nationals who are illegally present on the territory" of another State Party "at that State's request and without further formalities". This text also makes provision for the possibility of adopting "if deemed necessary by any of the Parties, arrangements for the readmission of third-country nationals and stateless persons".

25. Some figures have, however, been provided by states responding to the rapporteur's questionnaire. The European Union readmission agreement with Russia entered into force on 1 June 2007 (the provision in respect of third-country nationals will enter into force only on 1 June 2010). Despite having signed bilateral agreements with a few states only, in order to implement the European Union readmission agreement Russia had been applying it in practice in respect of Russian citizens illegally present on the territory of European Union member states. As at May 2009, Russia had received 2 025 readmission requests from 16 European Union member states. Of the 820 requests granted, 211 Russian nationals had returned. Almost a third of the people readmitted by Russia attempted to go back to the countries from which they had been returned.

26. Italy states in its reply to the questionnaire sent out by the rapporteur that in 2008, 8 651 readmission requests were made by Italy, of which 8 340 were accepted. The total number of returned foreign citizens in 2008 in Italy was 9 606. A great majority were thus returned under readmission agreements. It should be noted that in 2008 in Italy, an additional 46 391 expulsion or rejection decisions were taken in respect of irregular migrants, but which could *not* be enforced. The non-enforcement was due to the fact that the migrants in questions lacked passports or other valid travel documents. Serbia replied to the rapporteur's questionnaire that, under its 17 bilateral readmission agreements, in 2007, the country received 2 577 readmission requests of which 2 465 were accepted. The corresponding figures for 2008 were 1 572, all of which were accepted. Spain has replied that it is party to 24 readmission agreements. In 2007, a total of 55 938 persons were expelled or refused entry into Spain. Of these returns, 6 248 took place under readmission agreements. The corresponding figures for 2008 were 46 426 and 6 178.

III. Human rights concerns associated with readmission agreements

i. Introduction

27. The removal of a migrant from a country against his or her will is normally the result of a return decision taken under national law. If the country in question is a member state of the European Union, the legislation under which the decision is taken should be based on the European Union Returns Directive.¹¹ Readmission agreements are an instrument used to enforce such a decision. Consequently, the agreements are implemented only once the competent authorities of the sending country have finally established that a person does not have a right to stay in that country.

28. Although countries have the prerogative to decide who shall be allowed to enter and reside in their territory, a decision to expel an individual might still be in violation of that person's human rights as guaranteed by the European Convention on Human Rights and other human rights instruments. This is the case if, for example, upon arrival in the country to which he or she is returned there is a risk that the individual will be subjected to torture or inhuman or degrading treatment as defined in the case-law of the European Court of Human Rights, or will be deprived of basic social rights, particularly if sent to a country which is not his or her country of origin, thus being put in an unsustainable situation. Furthermore, an expulsion can be a violation of the country's obligations under the 1951 Geneva Convention, if an individual is faces persecution on return. Also the process leading up to the enforcement of an expulsion, including the removal of the individual, may give rise to human rights concerns.

29. Those who advocate the utility and harmlessness of readmission agreements claim that it is not relevant to ask whether readmission agreements are in conformity with human rights or not. If a human rights issue arises – and it might very well do so – this happens when taking the return decision, not when enforcing that decision through the application of a readmission agreement. This is because the human rights concern should *already* have been taken into account when making the decision. Readmission agreements provide a legal framework and are merely an instrument facilitating return. Readmission agreements even provide transparency in the sense that the procedural conditions for readmission are clearly stated prior to the enforcement of a return decision. If implemented with care, the agreements may contribute to reducing the migrant's period of uncertainty or detention. Amnesty International, for example, is not in principle opposed to readmission agreements.¹²

¹¹ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

¹² Amnesty International Report, July 2008: "Mauritania: «Nobody wants to have anything to do with us» : Arrests and collective expulsions of migrants denied entry into Europe": "Amnesty International is not opposed in principle to readmission agreements, which are not illegal in themselves. However, the organization stresses that any readmission agreement has to be fully compliant with the human rights obligations with the states parties to the agreement. They must contain clear provisions protecting the rights of migrants and asylum-seekers."

30. The critics of readmission agreements claim that it is in fact relevant to question the human rights neutrality of readmission agreements. The argument is that one cannot isolate the different links in the chain that lead to the return of a person – a return that may be questionable in terms of human rights – but have to see the process as a whole. Readmission agreements are part of this whole, it is claimed, and should not be detached from it. The existence of a readmission agreements may also encourage the taking of bad return decisions, and consequently serve as a catalyst for the enforcement of such questionable decisions. Here it is particularly important to focus on the rights of third-country nationals, who are at greater risk of finding themselves in a situation of vulnerability and might lack access to an asylum system.

31. Furthermore, certain readmission agreements contain provisions on accelerated procedures at borders, which require examination from a human rights point of view. Moreover, the speed with which a return is enforced under readmission agreements might prevent the returnee from properly accessing all legal remedies that would or should be at his or her disposal. Important questions also remain the monitoring and collection of information on readmission agreements.

32. Besides the formal readmission agreements in place between countries, there is also strong increase in other kinds of informal readmission arrangements, such as memoranda of understanding, exchanges of letters, informal co-operation and concerted practice between border authorities or between diplomatic personnel. Agreements on voluntary returns also include readmission elements. These kinds of less transparent practices constitute a particular threat to the human rights of irregular migrants and should be carefully monitored.

33. A particular problem can arise in situations where a readmission request is made to a state, which has succeeded another state during the period which the returnee has spent in the requesting country, or to a breakaway region, whose status under international law has not yet been finally decided. This issue should be considered by states when signing and implementing readmission agreements.

34. In 2007, the Assembly adopted its Recommendation 1807 (2007) on regularisation programmes for irregular migrants (rapporteur: Mr John Greenway, United Kingdom, EGD). Today in Europe, there are millions of irregular migrants who cannot be expected to go back to their countries of origin. Considering this, the recommendation urges member states to examine the option of regularisation programmes as part of an overall strategy for tackling irregular migration. This option should also be kept in mind when discussing the issue of return under readmission agreements. The rapporteur encourages member states to consider regularisation as an option to return.

ii. *Human rights clauses*

35. The first three readmission agreements concluded by the European Union include a summary “non-affectation clause”. The clause provides that the agreement shall be “without prejudice to the rights, obligations and responsibilities of the Community, the member states and [the third country], arising from international law and, in particular, from any applicable international convention or agreement to which they are parties”. Subsequently, starting with the 2004 agreement with Albania, explicit references to human rights instruments, such as the European Convention on Human Rights, the 1951 Geneva Convention and the 1984 United Nations Torture Convention, were introduced into some readmission agreements. Bilateral agreements can include similar clauses, which might, however, not always be implemented. This is the case in countries where the readmission procedure often takes on an informal character.

36. Readmission agreements normally do not include safeguards with regard to the non-application of the agreement in individual cases. The reason for this is presumably, that if concerns with regard to human rights existed, the return decision should not have been taken in the first place, and the readmission agreement thus never been applied.

37. Another problem might arise. Considering that countries normally wish to readmit as few migrants as possible, setting out as a *prerequisite* for readmission, that the *readmitting* country respects human rights, would not serve as a positive incentive for achieving that objective, but rather encourage the readmitting country *not* to respect human rights (in order thus to prevent unwanted returns). This is however more of a theoretical observation, and there should be nothing preventing enhancing protection by inserting safeguards also into the readmission agreements, which the rapporteur in fact encourages. This way migrants would be provided enhanced safeguards and the human rights commitments of the parties clearly manifested. A starting point should be that sending countries make sure, when negotiating readmission agreements, that the relevant international instruments are ratified by receiving countries, but also that they are correctly implemented.

38. In the present discussion, it should be remembered that the contracting parties are of course already under the obligation to respect human rights as a result of their being parties to international human rights treaties. The need to include human rights in negotiations, however, arises from the fact that these obligations are not always respected. Forced returns from Council of Europe member states to states with long-standing, proven records of torture has been an issue of particular concern for the Council of Europe Commissioner for Human Rights, who has highlighted them.

iii. Might readmission agreements be a catalyst for return decisions which breach human rights?

39. Might the existence of a readmission agreement be a necessary condition for, or even encourage, authorities to take questionable return decisions – decisions which would thus not have been taken, had the agreement not been in place?

40. An example of such a situation could be the return from western and central European countries to Serbia of asylum seekers originating from Kosovo and Serbia proper, many of whom are Roma.¹³ These returns have been questioned and criticised in view of the UNHCR 2006 and 2009 recommendations on the return of Roma and related groups to Kosovo or Serbia proper.¹⁴ The position of the UNCHR was, and still remains, that the social conditions in Kosovo and in Serbia proper, and as far as Kosovo is concerned also the security situation, is such that Roma and related groups should not be returned there.

41. As of October 2009, Kosovo has negotiated readmission agreements with several member states and signed with some, including Germany and France. In the opinion of the Council of Europe Commissioner for Human Rights, Kosovo is under political pressure to accept these agreements without having the budget or the capacity to receive the returnees in dignity and security.¹⁵ According to the Director of the Kosovo Department for Border Management, Asylum and Migration (DBAM), Germany is prepared to request readmission for 18 500 Kosovars. Of these, 15 000 are minority members and amongst them, some 11 500 Roma. It may be assumed that the entry into force of a readmission agreements will be a precondition for, or at least greatly facilitate, return of these individuals.¹⁶ Since 1999, 92 000 Kosovars have returned voluntarily from Germany, whereas 22 000 have been returned forcibly, according to the German Minister of the Interior.

42. In 2002, Germany and the then Federal Republic of Yugoslavia signed a readmission agreement that regulated the return of individuals who did not have a legal basis to remain in Germany, many of whom were Roma. It may be assumed that the entry into force of this readmission agreements was a precondition for, or at least greatly facilitated, return of these individuals to conditions that might have been unsustainable in social and economic terms, albeit not directly in terms of physical security. At the time of writing, no statistic was available to the rapporteur with regard to the number of readmissions effected from Germany to Serbia under this readmission agreement.

43. In view of the position of UNHCR and the Human Rights Commissioner described above, it is thus legitimate to question these readmission agreements as such, in terms of human rights. The rapporteur is of the opinion that the return of irregular migrants to Kosovo and Serbia proper, and the impact of the apparently crucial readmission agreements in this process, should be examined further.

iv. Third-country nationals, access to asylum in transit countries and the problem of chain-refoulement

44. The most sensitive issue in the context of readmission agreements is their role in the return of irregular migrants to countries of which they are not citizens. Third-country nationals risk becoming victims of “chain-refoulement” to their country of origin. This means that a migrant eventually has to return to his or her country of origin, without having had the chance to submit an asylum application or to have it reviewed either in the returning country or in the transit country to which he or she has been readmitted. Third-country nationals should be protected from chain-refoulement.

45. It should, however, also be understood that it might be difficult to implement a readmission agreement with regard to third-country nationals. The reason is that it is very difficult for the sending country to meet the

¹³ All reference to Kosovo, whether to the territory, institutions or people, in this text, shall be understood in full compliance with the United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.

¹⁴ “UNHCR’s Position on the Continued International Protection Needs of Individuals from Kosovo”, June 2006 and “UNHCR’s eligibility guidelines for assessing the international protection needs of individuals from Kosovo”, November 2009.

¹⁵ Report of the Council of Europe Commissioner’s for Human Rights Special Mission to Kosovo, 23 – 27 March 2009, para. 156.

¹⁶ See also *Süddeutsche Zeitung*, 14 October 2009, “Tausende Kosovo-Flüchtlinge offenbar vor Abschiebung”.

criteria and provide the evidence as required by the agreements. Essentially, it will only be possible to seek readmission of a third-country national if he or she is caught in the act of illegally crossing the border or is in possession of a visa or residence permit from the transit country. An official working for the European Commission has informed the rapporteur that the readmission of third-country nationals under European Union readmission agreements has indeed been very limited. Nonetheless, as the number of returns to transit countries might be expected to rise, it is important to pay close attention to this development.

46. States which request readmission sometimes claim not to be responsible for the fate of the person to be readmitted, as regards the possibility of accessing an asylum system. However, it follows from the judgment of the European Court of Human Rights in the case of *T.I. v. The United Kingdom*, that the sending state has the responsibility to ensure that procedural safeguards are in place in the receiving state and that these are effective in the individual case.¹⁷ There is a need to look at the transfer of responsibility of examination of asylum claims in general, such as safe third country policies. Although these policies are not included in readmission agreements, the two systems work together. Another important concern, pointed to by the European Council on Refugees and Exiles (ECRE), is that readmission agreements can act as effective barriers at the second stage of access to the asylum procedure as they may facilitate a return in a very short time span, thus preventing access to legal remedies.¹⁸

47. Although the taking of the return decision might be seen as the moment at which the human rights assessment should be made, one should be aware that the situation in the readmitting country might change between the taking of the return decision and its enforcement through a readmission agreement.

48. Moreover, there might be cases in which an asylum seeker's application has not been examined on the merits, but has been rejected on "safe third country" grounds. Readmission of an asylum seeker will in such cases be sought without him or her having benefited from an assessment of his or her individual risk situation. The rapporteur strongly advises against this procedure and urges member states always to assess the individual claims of asylum seekers. The rapporteur also emphasises that asylum seekers whose claims have not been examined on the merits should never be sent to a country which is not their country of origin and in which they will not be able to submit an asylum claim or have it examined. The person concerned should of course also not be sent to the country of origin without a prior negative decision on the asylum application, which must first have been properly examined. Below are a few examples in which the application of readmission agreements give rise to concerns for third-country nationals.

49. Libya is a country to which many non-Libyan irregular migrants are returned every year under bilateral readmission agreements. Libya has not signed the 1951 Geneva Convention and lacks an asylum system. Asylum seekers returned to Libya will thus face a situation in which they cannot submit an asylum application. Recently, the eyes of migration and asylum experts and the general public turned to a situation in which Italy returned to Libya hundreds of irregular migrants and possibly asylum seekers that were heading for the Italian shores. The migrants were intercepted at sea and were not allowed to set foot on Italian soil.¹⁹ It appears that this course of action was based on a bilateral readmission agreement or a readmission clause between the two countries.

50. The Italian authorities have claimed that the vessels which intercepted the boat people at sea carried mobile asylum determination units. None of the applications were found to prompt the Italian authorities to grant refugee status or complementary protection and all the boat people were immediately returned to Libya. It is likely that among those on board were people in need of international protection. In 2008, an estimated 75% of sea arrivals in Italy applied for asylum and 50% of them were granted some form of protection.²⁰

51. While recognising the particular pressure put on countries at the borders of Europe in terms of migration, the rapporteur strongly condemns any action taken by the member states of the Council of Europe

¹⁷ *T.I. v. UK* (App. No. 43844/98), decision of 7 March 2000 and *K.R.S. v. UK* (Appl No. 32733/08), decision of 2 December 2008.

¹⁸ European Council on Refugees and Exiles (ECRE), "Defending Refugees' Access to Protection in Europe", December 2007.

¹⁹ For additional information on the plight of migrants arriving in Europe by sea, please see the Resolution 1637 (2008) "Europe's "boat-people": mixed migration flows by sea into southern Europe" (Rapporteur: Mr Østergaard, Denmark, ALDE) and the associated report (Doc. 11688). Please also see the forthcoming report of the Committee on Migration, Refugees and Population on "The interception and rescue at sea of asylum seekers, refugees and irregular migrants" (Rapporteur: Mr Díaz Tejera, Spain, SOC).

²⁰ "UNHCR deeply concerned over returns from Italy to Libya", Press Release published on 7 May 2009. As concerns the fate of the returnees upon arrival in Libya, see "UNHCR interviews asylum seekers pushed back to Libya", Press Release published on 14 July 2009.

where migrants are turned away without having had the possibility to pursue their right to submit an asylum application and to do so effectively. In order for that right to be effective, for the asylum seeker to be able to present his or her case properly, there has to be sufficient time to prepare, to consult with experts and legal counsel and to collect evidence. Being arrested in a boat in the middle of the sea following a long and very hazardous journey is not conducive to the formulation of a coherent asylum application, even a preliminary one. The rapporteur doubts strongly that Italy honoured its obligations under the 1951 Geneva Convention in the case of the migrants pushed back to Libya.

52. Consequently, the rapporteur demands that similar operations are stopped, hereinafter, that the relevant readmission agreements between Italy and Libya be made public in their entirety and that the situation is properly examined, also from the point of view of the application of the readmission agreements. If readmission agreements are a precondition for the said returns, albeit neutral in themselves, they also have to be closely scrutinised and appropriately refashioned or cancelled.

53. The application of the 2001 bilateral readmission agreement between Greece and Turkey has given rise to concern. Under this agreement, Iraqi and Iranian citizens have been returned from Greece to Turkey. From Turkey some of the migrants were allegedly returned to Iran or Iraq, having not had the opportunity to apply for asylum in Greece or in Turkey. Turkey maintains limitations on the application of the 1951 Geneva Convention to non-Europeans. Most of the returns in question appear to have taken place, however, without application of the readmission agreement.

54. A further country to which many irregular migrants are returned under readmission agreements is Mauritania. In a 2008 report, Amnesty International described the plight of these returnees.²¹ In 2003, Mauritania agreed to sign an agreement with Spain which obliges it to readmit onto its territory not only Mauritanian citizens but also third-country nationals where it has been “ascertained” or “presumed” that they have attempted to travel to Spain from the Mauritanian coast. Several thousand third-country nationals have been readmitted by Mauritania from Spain. This has created problems for those returnees who wished to submit an asylum application, since Mauritania practically lacks a functioning asylum system. Mauritania also claims that the readmission of third country citizens who have subsequently been expelled from Mauritania, has caused tensions with its neighbouring countries.

55. Ukraine, which is party to several bilateral readmission agreements, as well as one with the European Union, has had problems with its asylum system. Human Rights Watch has advocated that a “transition clause” be inserted into the readmission agreement between the European Union and Ukraine. Such a clause would have delayed any returns of third-country nationals from the European Union to Ukraine until Ukraine provided effective protection and guaranteed the human rights of asylum seekers. However, no such clause was inserted into the agreement.

56. The European Union is negotiating a framework agreement with Libya which includes a readmission clause. The human rights record and the presence of a well-functioning asylum system of countries such as Algeria, China and Morocco, with which the European Union wants to negotiate readmission agreements, also suffer from serious flaws. With the exception of Libya, all North African countries have ratified the 1951 Geneva Convention and they all have UNHCR offices. However, none of these countries has its own asylum system or a framework for the legal protection of refugees. Egypt is the only country offering residence permits. In December 2008, Egypt expelled 1,200 Eritreans without even allowing them into the detention centre to which the UNHCR has access, where their refugee status could have been assessed.²² Member states have also been willing to negotiate bilateral readmission agreements with countries lacking a proper asylum system.

57. The rapporteur notes that the “Dublin system” implies that every asylum seeker entering the European Union will have his or her request assessed on substance at least once. The rapporteur calls upon the member states of the European Union not to violate this principle by returning persons to countries outside the European Union without an examination of the asylum claim, and to comply with the European Union qualification and procedures directives.

58. Furthermore, the rapporteur emphasises the importance of ensuring that, before requesting readmission of an asylum seeker whose asylum application has been rejected, the person in question has had access to an effective remedy. An effective remedy according to the European Court of Human Rights implies a review by an independent authority, which has a suspensive effect. Readmission agreements

²¹ Amnesty Report, July 2008: “Mauritania: «Nobody wants to have anything to do with us» : Arrests and collective expulsions of migrants denied entry into Europe”.

²² This information was provided orally by Migreurop.

should include this requirement. Returning an asylum seeker whilst a court has not yet decided on his appeal violates the principle of non-*refoulement* and article 13 of the European Convention on Human Rights.²³ In fact, European Union countries are obliged under Article 13 of the returns directive to provide an effective remedy for irregular migrants about to be returned.

v. *Conditions upon return either to country of origin or country of transit*

59. The example of migrants returned to Kosovo or Serbia proper outlined above illustrates a situation in which the returnee faces difficult economic or social conditions upon return. It can be suspected that the return will not be sustainable and that consequently, the returnee might feel obliged to quickly leave the country again. If the returnee is a third-country national or stateless, he or she will have even greater problems than a national of the receiving country. Vulnerable persons such as parents with young children, elderly persons or single women are at greater risk. The same is true for members of minorities such as Roma who suffer from systemic discrimination in a number of Council of Europe member states. The rapporteur is of the opinion that readmission agreements should contain additional safeguards preventing the enforcement of returns which are likely to be unsustainable.

60. The sending country should always assure access to minimum economic, social and cultural rights for irregular migrants as long as they are still in the sending country.²⁴ If the irregular migrant cannot be sent to his or her country of origin and the transit country to which he or she could be sent is not likely to fulfill these rights, the sending country should refrain from requesting readmission. The rapporteur is of the opinion that it is contrary to the human dignity of irregular migrants to have them removed to a country which is not their country of origin and in which they are likely to be denied access to basic rights such as the right to housing, health care, primary education, work and social welfare, in particular if they can be supposed to become stranded in that third country.

61. The International Organisation for Migration (IOM) has informed the rapporteur that almost a third of the people taken back by the Russian Federation under readmission agreements attempt to return to the countries from which they were readmitted. It would thus seem essential to provide readmission-related assistance. Such assistance should be outlined in readmission agreements. The Russian Government has begun a six-month evaluation programme for returnees under the readmission agreements. It is designed to help identify their needs, especially in terms of employment and housing. So far, as of May 2009, IOM reports, none of the persons readmitted had found employment.

62. Human Rights Watch has found that Libyan security officials typically arrest refugees and other migrants who are entering or departing from the country at or near the borders. In both cases the migrants reported physical abuse by Libyan police and prison guards, sometimes allegedly resulting in deaths. There have been complaints of overcrowding in detention facilities, poor sanitation and food, absence of justification given for their detention and refusal of access to a lawyer or legal review. Libya is a country that readmits many migrants under readmission agreements.

63. In some countries, for example Morocco or Tunisia, leaving the country irregularly is criminalised, with the result that, upon return, the readmitted person risks imprisonment or heavy fines. This constitutes a breach of the human right to leave any country, including one's own.²⁵ In some countries irregular entry by an alien is also criminalised. If the person concerned is returned to that country after having moved on, thus as a third-country national, he or she risks being punished upon return to the transit country. The rapporteur is of the opinion that returns should not be enforced to countries in which these scenarios are likely to occur and that therefore, readmission agreements should not be used for such returns.²⁶

64. A problem for irregular migrants who are returned to their country of origin has been pointed out by the UNHCR. It has been noted that governments in countries under pressure to readmit individuals might take a different approach to recognising citizenship. In some cases the authorities in a country asked to readmit citizens have denied that these people are actually nationals of their state. The UNHCR has stated: "Denial of readmission could, in some instances, amount to de facto expulsion of a national or a stateless person by his or her own country, which is prohibited under international law. Measures designed to evade these

²³ See the case of Gebremedhin [Gebremedhian] v. France, judgment of 26 April 2007, Appl. No. nr. 25389/05.

²⁴ The European Committee of Social Rights in a recommendation issued on 8 September 2004 (No14/2003) has interpreted Article 17 of the Revised European Social Charter to contain an obligation for the signatory states to provide irregular migrant children with medical care.

²⁵ The right to leave one's country is set out in the United Nations International Covenant on Civil and Political Rights, Article 12.2 and in Article 2.2 and 3.2 of Protocol 4 to the European Convention on Human Rights.

²⁶ Please also see the forthcoming report of the Committee on Migration, Refugees and Population on "Detention of Asylum Seekers and Irregular Migrants in Europe" (Rapporteur: Ms Mendonça, Portugal, SOC).

international obligations, including administrative and bureaucratic obstacles and unwarranted delays, are contrary to the general principles of international co-operation and good faith. They may also have adverse effects on the individuals concerned who, often detained, would benefit from expeditious return.”²⁷

vi. *Stranded third-country nationals*

65. As described above, third-country nationals risk becoming victims of chain-refoulement. But they also run the risk of being stranded in the country of transit. Not having the means to return independently, regardless of whether the countries of origin and transit are favourable to their return, they might find themselves unable to make use of the right to return to their country of origin. On the other hand, it must also be remembered that third-country nationals might be stranded in a country, precisely because of the *lack* of a readmission agreement between that country and their country of origin.²⁸

66. Although this might already be established practice, and already provided for in the readmission agreements concluded by the European Union, readmission agreements should contain a provision requiring states to first make an attempt to return a person to his or her country of origin. Respect of this obligation should also be verified in every individual decision to transfer a person. Only when this fails should he or she be returned to a transit country under a readmission agreement. Even if states do follow this principle, the question arises: How will the requested transit country be able to identify and return the individual concerned to his or her country of origin, if the requesting state, which has often far greater resources at its disposal, has failed to do so? The readmitted third-country national may thus risk either becoming stuck with very limited rights and possibilities in the transit country, or returned to his or her country of origin without having had the chance to put forward an asylum application or having had a fair assessment of such an application.

vii. *Externalised migration control, border procedures and accelerated asylum procedures*

67. The objective of readmission agreements is to facilitate the return of irregular migrants. As such they have become an important tool in the project of European countries to clamp down hard on irregular migration. Readmission agreements can also be seen as an element in the much criticised “externalising of migration control” policy of European countries.²⁹ The fact that a country outside Europe is obliged under readmission agreements to take back third-country nationals which have passed over their territory works as an incentive for it to intensify its border controls. Added to this is pressure exerted by the European Union and individual member states (in terms of trade, aid, visa requirements, political support) vis-à-vis the countries in question. There is serious ground for fearing that this shifting of responsibility can indeed lead to a better border control, but without the necessary safeguards for asylum seekers. This potential consequence should be of concern for the European Union. Transit countries should thus be assisted in organising access to a proper asylum procedure.

68. European Union neighbouring countries are experiencing increasing numbers of asylum seekers and other migrants in transit trying to reach the European Union. The European Union is pursuing partnerships with countries that do not have systems for handling migrants and asylum seekers. Although they are not necessarily “safe countries,” it is expedient for the European Union to characterise them as such. Irregular migrants are returned to these countries under readmission agreements. In addition to the risk thus faced by individual asylum seekers and other migrants as a result, a heavy responsibility is put on these states for the identification, apprehension, detention, and return of migrants, as well as the responsibility for identifying asylum seekers and providing them with a full and fair asylum determination procedure.

69. The IOM has provided the rapporteur with a study on Albania, illustrating the problems faced by a country which is obliged to implement readmission agreements with regard to third-country nationals. The main problem identified in Albania in the course of implementing readmission agreements was a serious lack of exchange of information between, on the one hand, the requesting state, and, on the other hand, Albania and neighbouring countries. Furthermore, the Albanian authorities were faced with a massive number of returnees at border points, and were unprepared to respond to the needs of such returnees.³⁰

70. The readmission agreements between the European Union, on the one hand, and Russia and Ukraine, respectively, on the other, entered into force on 1 January 2008 and its provision with regard to third-country nationals entered into force on 1 January 2010. These two agreements contain provisions

²⁷ UNHCR, “Return of Persons Not in Need of International Protection Standing Committee on International Protection”.

²⁸ Amnesty International, *Stranded: Refugees in Turkey denied protection*, April 2009, page 27.

²⁹ See for example Human Rights Watch Reports, No. 2, 2006, “Managing Migration Means Potential European Union Complicity in Neighbouring States’ Abuse of Migrants and Refugees”.

³⁰ Internal IOM working paper.

which allow for the request of readmission within two working days following the apprehension, within 30 kilometers from the border between the two countries in question, of a migrant having illegally crossed the border. A reply is required within two days of the reception of the request and the person concerned must then be returned within two working days from the date of the reply. It can be assumed that apprehension will take place predominantly on the territory of the state party to the agreement which is not Russia or Ukraine.

71. This arrangement is a cause for concern, since the very short time during which the person concerned is allowed to physically stay in the country of destination might be too short for him or her to lodge an asylum application. If the asylum seeker actually manages to submit such a claim, it is of course of utmost importance that the readmission procedure be halted until the application has been properly evaluated. Nevertheless, with the very narrow time-frame, there is a greater risk that an application is ignored, in particular if submitted to border guards that might not have the right education to deal with such applications or that a claim is dealt with without a proper examination or an effective remedy.

72. A study carried out by Human Rights Watch has indicated that upon entry into force of the readmission agreements between Ukraine, and Poland and Slovakia respectively, Polish and Slovak border police intercepting people arriving from Ukraine sent them back within 48 hours without having properly attempted to ascertain their legal status or whether they needed international protection.³¹ The rapporteur emphasises the importance of compliance with the relevant European Union directives and with the principle of non-refoulement. Furthermore, the readmission agreements in question should be interpreted in a broad way and implemented under close monitoring. All persons in need of international protection should immediately be provided with adequate information on the asylum procedure in a language they understand, be given sufficient time to state whether they wish to submit an asylum application and to do so.

viii. The need for monitoring and training

73. It is the rapporteur's understanding that there is currently no particular monitoring process in place as far as the implementation of returns under readmission agreements are concerned. In order to ensure that readmission agreements do not contribute to the abuse of the human rights of irregular migrants, their implementation should be closely monitored, including the situation following return of an irregular migrant. As far as European Union member states are concerned, the rapporteur therefore welcomes Article 8.6 of the European Union Returns Directive, which provides that "member states shall provide for an effective forced-return monitoring system".

74. All readmission agreements should contain clear provisions protecting the rights of irregular migrants and asylum seekers. These must include their rights to liberty and freedom from arbitrary detention, protection against torture or other ill-treatment, their rights to access to a fair and satisfactory asylum procedure, and protection from *refoulement* and return to a country or territory where they would be at risk of serious human rights violations. Monitoring should be aimed at the respect of these provisions.

75. It is, however, difficult to put monitoring in place, since it has proven to be very costly. Monitoring must be independent and NGOs could be entrusted with the task. Also parliamentary delegations from international organisations could carry out monitoring in countries that readmit migrants under readmission agreements. The rapporteur has been informed by staff at the European Commission, that a monitoring committee – a "Joint Readmission Committee" – meets on a regular basis to consider readmission agreements and the relation between European Union readmission agreements and bilateral ones. These committees, however, examine technical issues with regard to these agreements and not their implementation. The rapporteur is of the opinion that the mandate of this committee could be extended to encompass issues concerning human rights protection.

76. It is important to ensure that all civil servants and others involved in the handling of asylum applications are well trained in their tasks and in human rights and refugee law. This of course also applies to the implementation of readmission agreements. Some initiatives and co-operation programs already exist, with a view to training personnel from readmitting countries in the implementation of readmission agreements. For example, the "Budapest Process" organised two seminars in Warsaw in September 2007 and 2008 on the topic of returns and readmission, and a colloquy in August 2009 in Zagreb entitled "Practical implementation of readmission agreements in the South East European region". In March 2010 the "Söderköping Process" will organise its first conference, which will examine the return politics of the participating states and the practical application of European Union readmission agreements and readmission agreements with regard to Belarus, Moldova and Ukraine. The rapporteur is of the view that

³¹ Human Rights Watch, "On the Margins: Rights Violations against Migrants and Asylum Seekers at the New Eastern Border of the European Union", November 2005.

training of personnel handling readmission agreements should be institutionalised, made permanent and subject to high quality demands.

ix. *Statistics and transparency*

77. Statistics on the number of returns enforced with the help of readmission agreements are difficult to obtain. States have not assembled statistics or are reluctant to publish them. Many readmission agreements are not public at all. The situation of returnees is rarely evaluated and even less so with regard to the effect that the implementation of readmission agreements has had on their situation. This lack of information prevents a thorough evaluation of these instruments and steps should be taken to remedy this situation.

78. It would be important, as a starting point, to have statistics on the extent to which readmission agreements are being implemented and the degree to which they are effective, in the sense that readmission is being granted and enforced. Secondly, it would be useful to have statistics on the character of those returns: How long do they take? Are they preceded by detention? Are the returnees citizens or not of the country to which they are readmitted? What happens to them following return? To what extent do returnees make renewed attempts to migrate? The rapporteur encourages the governments of the member states of the Council of Europe and the European Commission to work together to set up a system for the collection of such statistics and information. This should be coordinated with the setting up of a monitoring mechanism.

x. *The negotiation process*

79. The negotiation of readmission agreements often involves two parties which have different bargaining positions. For European Union member states the added value of European Union-brokered readmission agreements as compared to those negotiated bilaterally is that the bargaining position of the European Union is stronger than that of individual countries. But what are the parties actually bargaining about? The starting point is that the typical returning country wants to return as many irregular migrants as possible, whereas the readmitting country wishes to readmit as few as possible. Since countries have an obligation to readmit their own citizens, the crucial issue will thus be the readmission of third-country nationals.

80. NGOs and others wish to highlight that the inequality in strength between the negotiating parties might lead to countries with a weaker bargaining position being "exploited" by the stronger, returning countries. Others, again, argue that this is not at all the case, or even that the situation is in fact the contrary, and that the "weaker" countries are in fact exploiting the stronger ones in order to obtain benefits of different sorts. The rapporteur is of the opinion that criteria on the respect and protection of human rights for the selection of countries with which negotiations could be opened should be defined beforehand.

81. An example of what is offered by a country which can be expected to return migrants under a readmission agreement is provided on the website of the French Ministry of Foreign Affairs. It is explained that France decided to grant Pakistan concessions for entry of goods onto the European market, and that there were agreements with it covering the fields of development, science and the environment. This agreement was signed in 2005, but its implementation depended on Pakistan's signing a readmission agreement. This shows the bargaining process in practice on a bilateral level. Pakistan has not ratified the 1951 Geneva Convention.

82. As far as human rights are concerned, representatives of the European Commission claim that in the European Union context the negotiation of a readmission agreement is not the right place for negotiating with third countries on human rights. The issue of human rights should rather be introduced in connection with negotiations on, for example, visa rules. The rapporteur can understand this argument. In the case of visa negotiations, it is the European Union that *offers* something (liberalised visa requirements) for which it can claim something in return (enhanced de facto respect for human rights). In the case of negotiations on readmission agreements, the situation is reversed. Here it is not the sending, but *the readmitting party that provides a service*, namely to readmit third-country nationals who have been deemed undesirable in the European Union. This is thus not the right place to demand an additional obligation.

83. This understanding is relevant to the comprehension of readmission agreements, but does not mean that human rights clauses should be excluded from them. Insisting on the insertion of such clauses could make it harder to achieve results, following the argument in the previous paragraph. However, the European Union must ensure these safeguards. The hesitation of the receiving country to insert these clauses can rightly be regarded as a negative indication. In some cases the readmission agreements are only one element of more extensive negotiations including many other topics, such as trade and visa arrangements, in which the human rights aspects may be easier to include. Transparency in all negotiations is vital.

84. The following facts stem from the replies to the questionnaire sent out by the rapporteur to governments of member states as part of the preparations for the report and illustrate the topic of negotiations on readmission agreements. Germany, Italy and Poland have been chosen as examples.

85. Germany noted that countries of origin and transit present problems in negotiating readmission agreements and their implementation primarily due to domestic political factors (for example frequent change of government) as well as economic instability (such as natural disasters or financial crises).

86. The Italian authorities indicated that problems arise mainly in the implementation of readmission agreements. These problems are usually caused by a lack of collaboration between the parties. The Italian authorities indicated that the other parties to readmission agreements did not respect the procedures and modalities for the application of the agreements (interviewing the person to be readmitted, answering the application of readmission, issuing travel documents within the established deadlines, providing written motivation in case of refusal of the readmission application).

87. Poland sees difficulties both in initiating negotiations, which sometimes requires political or economic incentives, and in the implementation of agreements. Implementation problems arise with respect to receiving answers to readmission requests, confirmation of citizenship and obtaining adequate travel documents for returnees on time. Poland notes, however, that the situation is improving.

88. The German authorities indicate that they do not make direct links between incentives and readmission agreements, as to do so would contradict the principle that countries of origin are obliged to readmit their own citizens without any precondition. Nonetheless, the German authorities state that experience has shown that in relations between countries of origin, transit countries and countries of destination, good co-operation, for example in the field of readmission, can contribute to favourable conditions in many areas.

89. Italy offers more open and direct incentives to foster co-operation on readmission, and has often offered countries reluctant to conclude readmission agreements due to their economic, social and political costs, preferred quotas for work entry visas and technical assistance programs, based on the supply of equipment. Looking at the high number of readmission requests lodged by Italy (see paragraph 26) and the high success rate, this policy seems to work quite well. Poland offers technical assistance and an exchange of good practices. For example, in 2008 the Polish Ministry of the Interior hosted experts from Sierra Leone within the framework of a project aimed at enhancing Sierra Leone's border services' capabilities and to facilitate dialogue between the migration services of both countries. Poland, Italy and Germany all seek to promote voluntary returns.³²

IV. Conclusion and proposals

90. It is important in the evaluation of readmission agreements not to confuse, on the one hand, one's standpoint as regards migration policy and, on the other hand, the mainly legal issue of the human rights compatibility of readmission agreements. The rapporteur sees the benefits of readmission agreements from the point of view of migration management and understands that, at least on the surface, they are neutral. Readmission agreements provide foreseeability, in the sense that the conditions for readmission are clearly stated prior to the enforcement of a return decision. If implemented with care, the readmission agreement may contribute to rendering the return process more humane by shortening the period of uncertainty of the person concerned, as well as the period in detention. The view that readmission agreements are a positive aspect of migration policy would necessarily be accompanied by the view that there would not be serious human rights concerns with the agreements.

91. Some points should be raised as concerns the human rights implication of these agreements. The existence of readmission agreements might accelerate the taking of bad readmission decisions, as has been the case with returns of, for example, Roma from western Europe to Serbia and other countries. Once again, the readmission agreement as such is neutral and the problem relates to the decision to expel the people concerned. Nevertheless, since readmission agreements have been a necessary condition for the implementation of these decisions, they should at the very least include clauses that reiterate the obligations of state parties in terms of human rights and asylum and make the honouring of these obligations a precondition for the use of the agreement.

³² See the forthcoming report by the Committee on Migration, Refugees and Population, "Human rights implications for voluntary return policies and programmes for irregular migrants" (Rapporteur, Ms Türköne, Turkey, EPP/CD)

92. The readmission agreement should thus reiterate the obligation of both the sending and the receiving countries to respect the human rights of a person readmitted to its territory, and not to request readmission if it can be suspected that the other party will not respect, or will be unable to protect, the human rights of these persons. Special attention should generally be paid in negotiating, drafting and implementing readmission agreements, to the situation of third-country nationals.

93. It should be ensured that a transit country to which a person is readmitted offers him or her effective access to a proper asylum procedure and is notified by the sending country if an application has not yet been examined in substance or if the asylum seeker has not been able to profit from an effective remedy. The rapporteur stresses that, even if the safe third country concept is applied, there should be an individual assessment and an effective remedy for the asylum seeker, before returning him or her. There is a need to look at the transfer of responsibility of the examination of asylum claims in general. This is linked to arrangements which are normally not included in readmission agreements, such as safe third country policies. However, the two systems work together. It is necessary to ensure that asylum applications and appeals against negative asylum decisions always have suspensive effect, which is currently not the case in many member states. It would be advisable to have special agreements in place on the determination of nationality.

94. The rapporteur strongly condemns any action taken by the member states of the Council of Europe which results in asylum seekers being turned away or “pushed back” to countries of origin or transit countries, without having had the possibility to effectively present asylum applications. This applies even more so in the case of receiving countries which lack an adequate asylum system.

95. Criteria on the respect and protection of human rights for the selection of countries with which negotiations could be opened should be defined beforehand. These criteria should include the presence in these countries of relevant human rights safeguards and the respect of the principle of non-refoulement.

96. Member states who request readmission should do so with regard to a third-country national only if it has not been possible to return him or her to their country of origin and, concerning asylum seekers whose claim has not been assessed substantially, the transit country must be a third safe country for that particular person.

97. When requesting a transit country to readmit an irregular migrant, it should first ensure that the requested country is able to offer the returnee a sustainable situation, or, as a minimum, ensure access to basic social rights. If these conditions are not fulfilled, the sending country should refrain from enforcing the readmission and, in any case, grant the migrant access to minimum social rights as long as he or she remains on its territory.

98. As readmission agreements with regard to third-country nationals have been applied only quite recently, only a small number of third-country nationals have been transferred to a transit country on the basis of such an agreement. However, this might rapidly change. As there is no legal obligation for a transit country to readmit a third-country national, the rapporteur would like to stress that there is a moral question to address, namely whether member states of the Council of Europe should shift their responsibility for irregular migrants to countries that are normally in a worse position economically and regarding the rule of law. Even if such countries have signed an agreement on the readmission of third-country nationals, it is not clear whether they can and will take due responsibility for these people.

99. If the member states use “carrots” such as trade benefits, assistance programs and visa liberalisation, the transit countries might well sign the agreements without taking the consequences for the human dignity of the migrants into account. Member states should therefore be aware of the impact of the arrival of huge numbers of third-country nationals on these sometimes fragile countries. Furthermore, they should be very careful to shift their own responsibility with regard to migrants to other countries as part of a deal.

100. Member states of the Council of Europe and the European Union would gain from working closely together with NGOs, who are often very committed and have extensive knowledge of the relevant facts, and with international organisations such as the UNHCR and IOM. An exercise that could be undertaken in co-operation with civil society is monitoring of the implementation of readmission agreements. The rapporteur considers monitoring crucial to safeguard the interest of the migrants and to gain a better understanding of the workings of readmission agreements. It is important that monitoring is carried out by independent powers.

101. The collection of statistics is also crucial. The rapporteur encourages member states of the Council of Europe and the European Commission to work together in order to compile national data with a view to

drawing up an annual report on the implementation of readmission agreements. Countries must improve transparency in order to facilitate the collection of statistics and the evaluation of readmission agreements. This applies all the more so with regard to the numerous informal readmission arrangements currently used by member states.

102. Since many countries, in particular readmitting ones, are not always fully up-to date with the procedure to follow in the implementation of readmission agreements, it is advisable to develop training programmes for readmitting countries and to follow up on those already in place.

103. The rapporteur is convinced of the need to carry out further investigation, both qualitative and quantitative, into readmission agreements and their consequences. This is the only way of ascertaining the human rights impact of these agreements.

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Reporting committee: Committee on Migration, Refugees and Population

Reference to Committee: Doc 11519, Reference 3429 of 14 April 2008

Draft resolution and draft recommendation unanimously adopted by the Committee on 28 January 2010

Members of the Committee: Mr John **Greenway** (Chairperson), Mr Giacomo Santini (1st Vice-Chairperson), Mr Tadeusz **Iwiński** (2nd Vice-Chairperson), Ms Tina **Acketoft** (3rd Vice-Chairperson), Mr Francis Agius, Mr Pedro Agramunt, Mr Francisco Assis (alternate: Ms Ana Catarina **Mendonça**, Mr Alexander **van der Bellen**, Mr Ryszard **Bender**, Mr Márton Braun, Mr André **Bugnon**, Mr Sergej Chelemendik, Mr Vannino Chiti, Mr Christopher Chope (alternate: Mr Michael **Hancock**), Mr Desislav Chukolov, Mr Boriss **Cilevičs**, Mr Titus Corlăţean, Ms Claire Curtis-Thomas (alternate: Lord Donald **Anderson**), Mr David Darchiashvili (alternate: Mr Guiorgui **Kandelaki**), Mr Nikolaos **Dendias**, Mr Arcadio Díaz Tejera, Mr Tuur Elzinga (alternate: Ms Tineke **Strik**), Mr Valeriy **Fedorov**, Mr Oleksandr Feldman, Mr Relu Fenechiu, Ms Doris **Fiala**, Mr Bernard Fournier, Mr Aristophanes Georgiou, Mr Paul Giacobbi, Ms Angelika Graf, Ms Anette Groth, Mr Michael Hagberg (alternate: Mr Göran **Lindblad**), Ms Gultakin Hajibayli, Mr Doug Henderson, Ms Anette **Hübinger**, Mr Jean **Huss**, Mr Denis Jacquat, Mr Zmago Jelinčič Plemeniti, Mr Mustafa Jemiliev, Mr Tomáš **Jirsa**, Ms Corien W.A. **Jonker**, Mr Reijo Kallio, Mr Ruslan Kondratov, Mr Franz Eduard **Kühnel**, Mr Geert **Lambert**, Mr Pavel **Lebeda**, Mr Arminas Lydeka, Mr Jean-Pierre Masseret, Mr Slavko Matić, Ms Nursuna Memecan, Mr Ronan Mullen (alternate: Mr Frank **Fahey**), Mr Gebhard Negele, Ms Korneliya Ninova, Ms Steinunn Valdís Óskarsdóttir, Mr Alexey Ostrovsky, Mr Evangelos **Papachristos**, Mr Jørgen **Poulsen**, Mr Cezar Florin Preda, Mr Gabino Puche, Mr Milorad **Pupovac**, Mr Volodymyr Pylypenko, Ms Mailis Reps, Mr Branko Ružić, Mr Džavid Šabović, Mr Samad Seyidov, Mr Joachim Spatz, Mr Florenzo Stolfi, Mr Giacomo **Stucchi**, Mr László Szakács, Ms Elke **Tindemans**, Mr Dragan Todorović, Ms Anette Trettebergstuen, Mr Tuğrul **Türkeş**, Ms Özlem **Türköne**, Mr Michał Wojtczak (alternate: Mr Bronisław **Korfanty**), Mr Marco Zacchera, Mr Yury Zelenskiy, Mr Andrej **Zernovski**, Ms Naira **Zohrabyan**

N.B.: The names of the members who took part in the meeting are printed in **bold**

Secretariat of the Committee: Mr Neville, Ms Odrats, Mr Ekström