

Statewatch analysis

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Readmission Agreements and EC External Migration Law

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Summary

The EU's approach to readmission agreements involves insisting that more and more non-EU countries sign up to broad readmission obligations to the EU with little or nothing in return. EU policy has been backed up by harsher and harsher rhetoric and threats against third countries as the EU becomes more and more unilateralist and focused solely on migration control. These policies are unbalanced, inhumane, and internally contradictory.

Readmission agreements: the policy

Readmission agreements are the standard method of ensuring that persons are expelled from Member States individually, or from the EU as a whole. There are two ways in which the EU has become involved with such agreements. First of all, since the entry into force of the Treaty of Amsterdam in 1999, the European Community has had the power in its own name to enter into such agreements. This means, if such treaties are agreed, that it is easier to expel people from the whole of the Union.

Secondly, even before the Treaty of Amsterdam, the EC inserted clauses into a number of its association and cooperation agreements since 1995 insisting that the other country readmit its own citizens when any EU Member State asked, and also agree to negotiate a further readmission treaty with any Member State that wishes dealing with two further issues. These issues were the details of the obligation to readmit citizens (or example, because readmission is often delayed because of disputes as to whether a person is a citizen of the State asked to readmit them) and a further obligation to readmit persons who are not citizens of the requested State but who have merely passed through that State on their way to the EU (1).

After 1999, the latter policy was updated. First, there is now an obligation to negotiate a supplementary treaty with the entire Community, not just individual Member States, although there is still an obligation to negotiate with individual Member States in the meantime pending an agreement with the EC as a whole. Secondly, the EU policy is now that such clauses are mandatory: it will no longer sign any association or cooperation agreement unless the other side agrees to the standard obligations (2).

EC Readmission agreements: the practice

The European Commission has negotiated three readmission agreements on behalf of the European Community. These are treaties with:

- a) Hong Kong, November 2001 (3)
- b) Sri Lanka, May 2002 (4)
- c) Macao, October 2002 (5)

Of these, the treaty with Hong Kong was signed by the Council in November 2002, and the Commission has recently proposed that the Council sign and conclude the other two agreements. All three treaties will therefore be in force shortly.

The core part of each agreement provides that:

- the contracting parties have to take back their own nationals (or, in the case of Hong Kong and Macao, permanent residents) who have entered or stayed illegally in the other party.
- the parties must also readmit nationals of non-contracting parties or stateless persons who have illegally entered or stayed on their territory, subject to certain conditions.
- the parties must permit transit of persons back to a non-contracting party if necessary.
- there are detailed rules on the procedure for handing back persons, including the types of documents which constitute proof or evidence that a person is a national or was on the territory.
- the parties must either issue their own travel documents or use of the EC's standard travel document.
- there are detailed provisions on data protection, although these do not require the non-EC parties to apply basic principles concerning the effective collective or individual enforcement of data protection rules (such as the obligation to set up an independent data protection supervisor or the right of data subjects to apply to the courts for correction, blocking or erasure of data).
- Article 16 of each agreement provides that the agreement is 'without prejudice to the rights, obligations and responsibilities' of the parties arising from 'International Law', but there is no specific reference to human rights or refugee law.

Member States can draw up special implementing protocols with the non-EC party, but each agreement takes precedence over any incompatible bilateral agreement between a Member State and the non-EC party.

All three treaties can be denounced, but there is no procedure for settling disputes that might arise.

Also, the Commission has mandates from the Council to negotiate readmission treaties with Morocco and Russia (dating from 2000), with Ukraine (dating from June 2002) and with Algeria, Turkey, China and Albania (dating from November 2002).

The mandate to negotiate with Algeria has been passed to Statewatch, and it is essentially identical to the basic provisions of the three treaties agreed to date. (6)

Usually when one State (or a body such as the EC) wishes to sign an agreement with another State, there are advance consultations to see if the other State is interested. But in this area, the EU has apparently never consulted the other parties. The result is that, according to a Commission report of October 2002, Morocco, Pakistan and Russia had not even agreed to begin negotiations, more than two years after the Council gave the Commission a mandate. (7)

Since then, the EU and Russia have agreed on the status of Kaliningrad after Lithuania's accession to the EU, and so Russia has agreed to begin talks.

EC Readmission clauses: the practice

It should be kept in mind that there is a second part of the EU readmission policy, as described above. By now a large number of EU association and cooperation agreements contain clauses on readmission, at the EU's insistence. These are usually similar or identical to the standard clauses described above, although in a few cases the EC has had to settle for a mere declaration instead of a binding obligation.

The following summary sets out the current state of play on this issue:

a) Level 1: unilateral statement by EC on readmission

- Vietnam

b) Level 2: agreement to dialogue or cooperation on readmission only

- Tunisia, Israel, Russia, Ukraine, Moldova, Kazakhstan, Kyrgyzstan, Belarus, Slovenia, three Baltic republics

c) Level 3: declaration on readmission of own nationals

- Morocco (also with binding obligation to enter into dialogue), Yemen, Laos, Cambodia, Pakistan

d) Level 4: declaration on readmission of own nationals and negotiation of further treaties concerning third-country nationals

- Jordan (also with binding obligation to enter into dialogue)

e) Level 5: treaty obligation to readmit own nationals and negotiate further treaties concerning third-country nationals (1995 and 1999 standard EU clauses)

- Egypt, Lebanon, Algeria, Armenia, Georgia, Azerbaijan, Uzbekistan, Croatia, former Yugoslav Republic of Macedonia, African, Caribbean and Pacific (ACP) states (including South Africa), Chile

f) Level 6: application of internal EC rules

- Norway, Iceland; planned with Switzerland, Liechtenstein

The 'ACP' states consist of all sub-Saharan African States plus all independent States in the Caribbean (not Cuba) and developing Commonwealth countries in the Pacific (such as Tonga).

The treaties with Egypt, Lebanon, Algeria, Croatia, the former Yugoslav Republic of Macedonia and Chile are still being ratified, but all the others have entered into force. However, over seventy countries, including most of the poorest countries in the world, now have obligations in treaties with the EC to readmit their own nationals and to negotiate further treaties on readmission issues (on the subject-matter of such treaties, see above) if the EC or a Member State requests it. It seems likely that the EC will make such demands to some of the ACP countries soon.

EU external migration policy

The first major development in this area was the creation in 1998 of the 'High-Level Working Group' on asylum and immigration, in which civil servants from interior, development, trade and foreign ministries had to develop an external immigration policy. It did this by identifying a list of third States which should be subjected unilaterally to migration 'Action Plans' by the EU to reduce migration flows. (8)

By 2001, the profile of the issue was higher, and the Laeken European Council in December 2001 called for the Council to adopt an action plan on illegal migration, including the identification of more countries to be targeted for readmission agreements. (9)

The Council adopted an Action Plan on illegal migration in February 2002 and then agreed criteria for negotiation of readmission agreements and selected four new 'targets' for such agreements in April 2002. (10)

In connection with this, the mandate of the High-Level Working Group was expanded beyond the development and implementation of Action Plans, to cover among other things broader issues of migration control. (11)

Next, the Seville European Council (summit) of June 2002 adopted conclusions on a number of immigration and asylum issues, including particularly the external relations aspects of migration law. The final conclusions provided that:

- each future EU association or cooperation agreement should include a clause on 'joint management of migration flows and compulsory readmission in the event of illegal immigration';
- the EU declared its willingness to offer financial assistance to third States to assist with readmission of their own and other countries' nationals and with broader joint migration management;
- inadequate cooperation by a third State could hamper further development of relations with the EU, following a systematic assessment of relations with that country;
- if a non-EU state has demonstrated 'an unjustified lack of cooperation in joint management of migration flows', according to the Council (made up of delegates from EU Member States) following a unanimous vote, then the Council, after 'full use of existing Community mechanisms', could take 'measures or positions' as part of the EU's foreign policy or other policies, 'while honouring the Union's contractual commitments and not jeopardising development cooperation objectives'. (12)

The last part of the policy sets out a clear threat to reduce the existing level of EU relations with a third state in the event of 'non-cooperation', but the summit did not spell out what measures might be taken or the grounds for concluding that there has been a failure to cooperate.

It fell to the General Affairs Council to implement these conclusions in more detail in November 2002. It agreed criteria for deciding which States to target were the extent of migration flows towards the EU (geography, the need to build capacity, the framework for cooperation and the attitude of that State regarding cooperation on migration issues). Applying these criteria, the Council decided that the EU should intensify relations on migration issues with Albania, China, Yugoslavia, Morocco,

Russia, Tunisia, Ukraine and Turkey, and to start cooperation with Libya as regards cooperation on migration issues. The precise nature of this cooperation was not specified in detail. Also, the Council agreed on the future 'migration cooperation' clause which will have to be included in all cooperation and association agreements with the Community. (13)

Next, the Commission released a paper in December 2002, as requested by the Seville summit, on two issues: the link between migration and development and the EC financial resources available for implementing internal and external migration policies. Among other things, the Commission announced its intention to suggest a huge increase in the funds available for migration projects in non-EU countries. (14)

The Council is due to adopt conclusions on the Commission's paper in May 2003. The Council has been very tardy in making drafts of these conclusions available to the public, even following requests under its access to documents rules, but the most recent draft available does not suggest that the Council will be examining alternative approaches such as assisting developing countries with debt relief, allowing further imports from developing countries or reforming the EU's Common Agricultural Policy, which has a disastrous effect upon the rural economy in many developing countries. (15)

Problems with EU policy

The EU's external migration policy is increasingly incoherent, unbalanced and unrealistic as regards both external relations and migration objectives.

First of all, it might damage human rights, because the EU is encouraging third States to violate human rights law or to participate in its own breaches of that law, in particular by sending rejected asylum-seekers to 'safe' countries of origin which are not really safe for those persons, or to 'safe' transit countries which might then breach human rights obligations in the same way. In the absence of any procedure in the EU for examining the human rights record of a country, particularly relating to these issues, before agreeing a readmission agreement and during the operation of that agreement, these risks are hugely increased.

Secondly, the EU is not giving sufficient attention to a more realistic 'root causes' approach to migration. People usually decide to leave a country due to limited economic opportunities (poverty) or the threat posed by conflict or human rights abuses. To address these issues, the EU needs to ensure a fairer trade policy, including a radical reform of the Common Agricultural Policy; further development assistance; and major debt relief. There has been limited liberalisation of trade from the poorest countries into the EU but this has not been enough.

Thirdly, the focus on migration control in the EU's external relations is just as unbalanced as the focus on control in the EU's internal migration law. In the absence of a fuller commitment by the EU in most cases to allow easier travel to the EU, fairer rules on migration of further workers and family members or effective rules on equal treatment of migrants living in the EC in return for migration control commitments, the EU is simply reproducing the profound flaws in its current internal policy in its external relations.

Finally, a 'punishment' policy is inherently contradictory, even in its own terms. If the EU cuts off or reduces trade, aid, investment or diplomatic relations with a developing country, that country will have fewer resources to control migration toward the EU

and no reason to do so. Also if that country becomes poorer and/or more troubled as a result of the EU's actions, more of its population is likely to migrate to the EU.

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Notes

(1) See 1995 EU Council Conclusions on readmission clauses:
<http://www.statewatch.org/news/2003/may/12a1995ccs.html>.

(2) See 1999 EU Council Decision on readmission clauses:
<http://www.statewatch.org/news/2003/may/12b1999dec.html>

(3) See Council doc. 8518/02, 2.5.02:
<http://www.statewatch.org/news/2003/may/12d8518-02.pdf>

(4) See Council doc. 7831/1/03, 9.4.03:
<http://www.statewatch.org/news/2003/may/12c7831-r1-03.pdf>

(5) See Commission doc. COM (2003) 151, 31.3.03:
<http://www.statewatch.org/news/2003/may/12dcom03-151.pdf>

(6) See Council doc. 14101/02, 25.11.02:
<http://www.statewatch.org/news/2003/may/12falgeriamdte.html>

(7) See Commission report in Council doc. 12625/02, 10.2.02:
<http://www.statewatch.org/news/2003/may/12e12625-02.pdf>

(8) See mandate of High-Level Working Group,
<http://www.statewatch.org/news/2003/may/12gHLWG.html>

(9) See Laeken European Council conclusions on immigration (p.12):
<http://www.statewatch.org/news/2003/may/12hLaeken.pdf>

(10) See criteria for readmission and new readmission list, Council doc. 7990/02 COR 1, 16.4.02, approved by JHA Council 25/26 April 2002:
<http://www.statewatch.org/news/2003/may/12i7990-02-c1.pdf>

(11) See new mandate of HLWG, Council doc. 9433/02, 30.5.02:
<http://www.statewatch.org/news/2003/may/12j9433-02.pdf>

(12) See Seville summit conclusions on immigration and asylum:
<http://www.statewatch.org/news/2002/jun/14seville.htm>

(13) See Council conclusions of November 2002, Council doc. 13894/02, 14.11.02:
<http://www.statewatch.org/news/2003/may/12k13894-02.pdf>

(14) See Commission Communication, COM (2002) 703, 3.12.02:
<http://www.statewatch.org/news/2002/dec/MIGR.DOC>

(15) See draft Council conclusions, Council doc. 8472/03, 15.4.03:
<http://www.statewatch.org/news/2003/may/12l8473-03-pa.pdf>