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THE EC READMISSION POLICY. ITS CONSEQUENCES ON THE RIGHT TO ASYLUM AND THE PRINCIPLE OF NON-REFOULEMENT.

Case Study: Spain/Africa: the so-called new Spanish Approach to Readmission of irregular migrants: the Agreements on Migratory Cooperation with Sub-Saharan countries

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The European Return Policy and more specifically the readmission agreements between EC and third countries form part of the wider strategy to combat "illegal migration" agreed upon by the Summit held in Tampere (15-16 October 1999), Laeken (14-15 December 2001), Seville (21-22 June 2002) and Thessaloniki (19-20 June 2003) and set out in the Council's action plan of 28 February 2002. The removal of illegally-staying third country nationals from EU territory remains at the top of the political agenda. During the last few years the EU has sought to strengthen co-operation with countries of origin and transit of illegal migrants and readmission agreements feature as prime instrument. All MS face the same obstacles to return irregular residents, such as the person's unknown identity, missing travel documents or difficulties in cooperation with some countries (denying that the individual actually possesses their nationality, not issuing the necessary travel documents or objecting modalities of return). The problems can be more with the readmission of third country nationals with transit countries when the itinerary but not their identity can be established. Taking into account that readmission agreements constitute a legally binding instrument imposing an obligation to take back third country nationals which cannot be deduced from International Law, it does not come as a surprise that EC readmission agreements with countries of origin and transit have become one of the external relations priorities. They are an important starting point to overcome some of the difficulties with regard to the State's obligations to readmit their own and foreign nationals. In sum and according to the European authorities, EC readmission agreements are supposed to play a prominent role as a key tool for a more efficient management –in partnership with the third countries concerned- of migration flows into the Union.

However, EC Readmission agreements not only provide for the return of irregular migrants but also for that of rejected asylum seekers and those whose claim was not examined as to the substance because they have allegedly passed through a "safe third country". For those who arguably have a protection need, the link between readmission agreements and human rights law is essential.

Nevertheless, neither the instrument nor the concern about its consequences regarding refugee protection is new. Despite recent political and media attention, this is not a brand new policy but a long-standing instrument of states to facilitate the return of irregular migrants and rejected asylum seekers of particular importance during the 1990s when more and more Western European countries introduced the so-called "safe third country" notion. No rule

exists stating that asylum seekers are obliged to file a claim in the first country possible, but sending an asylum seeker to another state where no persecution is feared is also not explicitly forbidden by international law and that is exactly what readmission agreements are about. At that moment, the use of readmission agreements combined with the safe third country principle was strongly criticized by UNHCR because of the detrimental impact of this policy on bona fide refugees.

But now, it is necessary to analyse this instrument in a different legal framework. The entry into force of the Amsterdam Treaty raises a new prospect regarding the harmonization in the field of Justice and Home Affairs. In particular, Article 63.3.b confers jurisdiction to the EC as regards repatriation of third country nationals. The Community's new power under this article includes external competence to conclude readmission agreements with relevant third countries in order to accelerate and facilitate the return of such persons. But it is not only a question of a "competence" (treaty making power), also the degree of harmonization on asylum matters is completely different. The first phase of the Common European Asylum System has concluded with a set of standards and measures –four main legal instruments: Reception Condition Directive, Qualification Directive, Dublin Regulation and Procedure Directive- based on the full and inclusive application of the Geneva Convention, thus ensuring that nobody is sent back to persecution, maintaining the principle of *non refoulement*. Unfortunately, as Costello has pointed out, the Procedure Directive embodies the lowest common denominator of lawmaking at its worst, and the exclusionary procedural practices as "safe third country", "safe country of origin" and "European safe third country" have come to be incorporated for the first time in a legally binding instrument. The presentation aims to discuss the interplay between the obligations deduced by EC Readmission agreements and those derived from Procedure Directive in the broader framework of International Refugee Law. The issue that is examined in this presentation is whether any lesson has been drawn from the experience of the second generation of readmission agreements regarding asylum seekers.

Thus, some questions to be examined are:

- Do the eleven readmission partners comply with the Procedure Directive requirements on safe country of origin, safe third country and European safe country?
- Taking into account that the EC Readmission agreements apply to those who are failed protection-seekers and to removal to supposedly safe third countries and safe countries of origin, do EC Readmission agreements contain adequate safeguards to ensure that people in need of international protection are not returned to persecution?
- Do the EC Readmission agreements provide for the responsibility on the part of the safe third country to assure asylum seekers' access to a fair refugee determination procedure?
- Taking into account that EC Readmission agreements include an accelerated procedure with extremely short deadlines for those who have illegally entered European territory, how could it be compatible with the obligation to ensure effective access to the procedure?

According to the Commission on the Green Paper of a Community Return Policy, "the return policy for rejected asylum seekers is necessary in order to safeguard the integrity of an EU asylum system". We will see if the readmission policy can be a safeguard or a detrimental of the European asylum system.

The presentation is based on "ongoing research" and does not aim to carry out an exhaustive analysis of the safe third country principle, but gives a broad outline of the content and state of play of the EC readmission agreements in order to stress the dangers of that policy for the asylum applicants whose application has been rejected by applying the safe third country principle and those who are generally illegally entering the territory of the European Union and are subjected to an accelerated procedure.

The first Part of the presentation will offer an overview of the state of play and content of the eleven EC Readmission agreements signed by now (definition, origins and development of readmission policy, state of play, key elements of readmission agreements) with a final assessment about human rights problems with readmission in practice, in particular, as regards the right to asylum and the principle of *non refoulment*.
The second part is a case study: Spain/Africa: the so-called new Spanish approach to readmission of irregular migrants: the Agreements on Migratory Cooperation with Sub-Saharan countries. I am going to pay attention to the context and content of the Spanish readmission agreement in order to assess whether the problems at communitarian level are the same at bilateral level.

To date the EU has concluded eleven readmission agreements:

Hong Kong: OJ 2004 L 17/23, 21.1.2004. See Commission proposal to Council for Decisions on signature and conclusion of the agreement (SEC (2002) 412, 18 Apr. 2002; Council doc. 8518, 2 May 2002).

Macao: OJ 2004 L 143/97, 30.4.2004. See Commission proposal to Council for Decisions on signature and conclusion of the agreement (COM (2003) 151, 31 May 2003).

Sri Lanka: OJ 2005 L 124/41, 17.5.2005. For the proposal to sign and conclude the agreement, see SEC (2003) 255, 21 Mar. 2003 (Council doc. 7831/1/03, 9 Apr. 2003).

Albania: OJ 2005 L 304/14, 23.11.2005. Visas: OJ 2007, L 334/85, 19 December 2007.

Russia, OJ 2007 L 129, 17.5.2007. COM (2006) 191-2.

Ukraine, OJ 2007 L 332/46, 18.12.2007. COM (2007) 197-2.

Bosnia-Herzegovina, OJ 2007 L 334/66, 19.12.2007. COM (2007) 425-2.

Montenegro, OJ 2007 L 334/25, 19.12.2007. COM (2007) 431-2.

Macedonia, OJ 2007 L 334/1, 19.12.2007. COM (2007), 432-2.

Serbia, OJ 2007 L 334/46, 19.12.2007. COM (2007) 438-2.

Moldova, OJ 2007, L 334/148, 19.12.2007. COM (2007) 504-2.