9 Readmission Agreements: Function & Fundamental Rights Implications

Steffi Vella Laurenti

This chapter highlights the function and fundamental rights implications of readmission agreements. In doing so, it explores where and how these readmission agreements feature in the migration control efforts of the EU and its Member States and whether these instruments can be implicated in the fundamental rights violations that can, at times, be occasioned by such efforts. It also considers whether fundamental rights concerns linked directly to cooperation on readmission exist. The chapter concludes by suggesting that, if drafted and applied properly, readmission agreements can sometimes act as a fundamental rights safety net when all prior safeguards in the return process fail, and it calls on the EU to take the lead in this regard.[1]

9.1 Introduction

A readmission agreement is "establishing rapid and effective procedures for the identification and safe and orderly return of persons who do not, or no longer, fulfil the conditions for entry to, presence in, or residence"[2] in the territory of a contracting party. Besides standard readmission agreements, cooperation on readmission has taken other forms over the years. For various reasons, such as greater flexibility and rendering these otherwise unpopular arrangements less visible,[3] more informal methods have emerged, making cooperation on readmission a "highly diversified"[4] exercise.

At the national level, examples of such nonstandard means of readmission include exchanges of letters, memoranda of understanding, friendship treaties and police cooperation agreements.[5] Similarly, one finds so-called readmission arrangements

1 This is an edited and updated version of the author's dissertation "Readmission Agreements and the Rights of Asylum Seekers: A European Context", which was submitted in partial fulfilment of the LLD. degree from the University of Malta in 2012.
2 European Migration Network. (2023). 'Asylum and Migration Glossary.' https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary_en.
3 Ibid., 28.
4 Ibid., 26.
5 Ibid., 27.

alongside standard readmission agreements at the EU level.[6] All of these alternative instruments, while not readmission agreements "in the technical sense",[7] nonetheless establish cooperation on or result in the readmission of unauthorised migrants between the contracting parties.

Readmission agreements and these other more informal forms of cooperation on readmission are essential to the efforts of the EU and its Member States to control migration;[8] yet, they seldom evoke the same attention as the return decisions, border control practices and asylum policies they seek to implement. Thus, this chapter aims to shed more light on these seemingly elusive instruments, particularly their function and fundamental rights implications within the EU and Member State context.

To this end, section two explores where and how standard and nonstandard readmission agreements feature in the migration control efforts of the EU and its Member States. It does this through the lens of certain key pieces of legislation adopted under the EU policy framework known as the Area of Freedom, Security and Justice (AFSJ). On the other hand, section three considers whether formal or informal forms of cooperation on readmission are neutral or otherwise from a fundamental rights perspective.

The EU laws that will feature in section two are those in force as of February 2024. As a result, the chapter will not discuss how these laws or the issues they regulate will change with the New Pact on Migration and Asylum.[9] Suffice it to say that the need for readmission agreements (whether formal or informal) at the EU or Member State level will probably increase.[10] For this reason, it is assumed that the human rights implications of these agreements (if any) would, if left unaddressed, be exacerbated under the new Pact.

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6 European Court of Auditors. (2021). *EU Readmission Cooperation with Third Countries: Relevant Actions Yielded Limited Results* (Special Report 17), 11. https://op.europa.eu/webpub/eca/special-reports/readmission-cooperation-17-2021/en/.

7 European Migration Network. (2023). 'Asylum and Migration Glossary.' https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary_en., 28.

8 Council of the European Union. (2010). *Conclusions on the Follow Up of the European Pact on Immigration and Asylum* (3018th Justice and Home Affairs Council meeting) 4. www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/114881.pdf; European Migration Network. (2022). Bilateral Readmission Agreements – EMN Inform. European Migration Network, 1. https://home-affairs.ec.europa.eu/news/new-emn-inform-examines-and-updates-how-bilateral-readmission-agreements-influence-return-irregular-2022-09-16_en.

9 European Commission. (2020). *Communication from the Commission on a New Pact on Migration and Asylum* (COM(2020) 609 final). https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0609.

10 Ibid.

Before proceeding any further, it is also important to clarify at this stage that the readmission agreements covered by this chapter are those between the EU or a Member State and a non-EU country (also known as a 'third country'). Moreover, this chapter will refer to a readmission agreement between the EU and a third country as an EU Readmission Agreement or EURA. In contrast, a readmission agreement between a Member State and a third country will be referred to as a National Readmission Agreement or NRA. In addition, unless stated otherwise, reference to a readmission agreement, generally, or a EURA or NRA, specifically, includes both standard readmission agreements and nonstandard ones as described earlier.

9.2 Function

The principle of readmission can be found both in customary international law[11] and the *jus inter gentes*. Concerning the latter, the principle finds expression in the Universal Declaration of Human Rights,[12] which protects, among other things, everyone's right "to return to his country".[13] The inverse of this right is the obligation of the state to allow its nationals to return and, thus, to readmit.[14] This right can also be found in the International Covenant on Civil and Political Rights[15] and the International Convention on Eliminating all Forms of Racial Discrimination.[16]

Thus, readmission agreements do not obligate the contracting parties to readmit their citizens as such is already imposed by international law. Rather, these agreements facilitate the implementation of this obligation[17] and ensure that states live up to it in practice. Even though a state may identify and apprehend an undocumented migrant as well as issue a return decision in his or her regard, the actual return is uncertain if a readmission agreement with the country of origin has not been concluded. The country of origin "may be reluctant to readmit him on economic, demographic or

11 Jean-Pierre Cassarino. 'Readmission Policy in the EU' (Study prepared for the European Parliament's Committee on Civil Liberties, Justice and Home Affairs, 2010), 13. www.europarl.europa.eu/studies.
12 Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III).
13 Ibid., Art. 13(2).
14 Roig, A., & Huddleston, T. (2007). EC Readmission Agreements: A Re-evaluation of the Political Impasse. *European Journal of Migration and Law*, 9(3), 363-387, 364. https://doi.org/10.1163/138836407X190433.
15 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 Art. 12 (4).
16 International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 Art. 5 (d) (ii).
17 Roig & Huddleston, 363-387.

social grounds",[18] even though the person's nationality may be uncontested.[19] For this reason, a readmission agreement is crucial to ensure that the removal process can be completed.

A readmission agreement becomes even more indispensable in the case of removal of persons who are not nationals of the readmitting country but who have simply transited through the latter while travelling to the country of destination. The reason is that states are not required under international law to readmit non-nationals.[20] Thus, rather than simply facilitating or ensuring that readmission occurs in practice, readmission agreements that cover non-nationals establish an obligation between the contracting parties to readmit.

Concluding readmission agreements with transit countries has become a priority for both the EU and its Member States because they are seen as "an alternative to repatriation to countries of origin"[21] when such proves to be difficult due to, for instance, problems in determining the nationality of the returnee due to a lack of documentation.[22] Under these agreements, transit countries would accept responsibility for irregular non-nationals and stateless persons because they transited through its territory on their way to the EU. Thus, in such situations, the itinerary replaces nationality as a criterion for return and readmission.

To better understand the role of readmission agreements in the migration control efforts of the EU and its Member States, this section will turn to and consider the core idea/s behind certain key pieces of legislation adopted under the AFSJ. However, before undertaking such an exercise, the AFSJ will be briefly discussed as a more general EU policy area.

9.3 The Area of Freedom, Security & Justice

The AFSJ, the legal provisions of which are contained in Title V of the Treaty on the Functioning of the European Union (TFEU),[23] features prominently as part of the EU's

18 Billet, C. (2010). EC Readmission Agreements: A Prime Instrument of the External Dimension of the EU's Fight against Irregular Migration. An Assessment after Ten Years of Practice. *European Journal of Migration and Law*, 12(1), 45-79, 46. https://doi.org/10.1163/138836410X13476363652596.
19 Ibid.
20 Roig & Huddleston, 363-387.
21 Ibid., 365.
22 Ibid.
23 Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/01.

objectives.[24] It was officially developed in response to one of the fundamental freedoms underpinning the internal market – the right of free movement of persons.

To safeguard this right, Member States considered it necessary to develop common policies on immigration, asylum and border control and measures for cooperation among their national competent authorities in civil and criminal matters.[25] However, it is argued that the AFSJ is more than just a set of policies and measures.[26] Rather, it contributes to and defends a "wider European way of life".[27] Migration and asylum are seen as "affecting this way of life"[28] and, therefore, a joint effort in their management and regulation is considered necessary.[29]

The AFSJ is an area of shared competence.[30] In the context of this chapter, shared competence generally means that a Member State can negotiate and conclude an NRA unless the EU is in the process of or has concluded a EURA with the same third country. Nevertheless, a previous NRA is still valid, notwithstanding the entry into force of a subsequent EURA with the same third country. However, in case of incompatibility, the EURA takes precedence.[31]

9.4 The Role of Readmission Agreements in EU Immigration, Asylum and Border Control Policies

9.4.1 Common Policy on Immigration

Article 79 of the TFEU empowers the European Parliament and the Council of the EU to take certain measures in the field of immigration in pursuance of a common EU policy in this regard. The areas covered by such measures include "illegal immigration"[32] and the "removal and repatriation of persons residing without authorization"[33] in the EU territory.

In this regard, the central piece of EU secondary legislation is the Directive on common standards and procedures in Member States for illegally returning third country

24 Consolidated version of the Treaty on European Union [2012] OJ C326/01, Art. 3(2).
25 Craig, P., & De Búrca, G. (2020). *EU Law: Text, Cases, and Materials*. Oxford University Press, 998-1000.
26 Chalmers, D., Davies, G., & Monti, G. (2010). *European Union Law*. Cambridge University Press, 493.
27 Ibid.
28 Ibid.
29 Ibid.
30 TFEU, Art. 4(2).
31 European Migration Network (2022), 4.
32 TFEU, Art. 79(2)(c).
33 Ibid.

nationals (hereinafter the "Returns Directive").[34] Under this Directive, Member States are, with some exceptions, under an obligation[35] to issue a return decision concerning non-EU nationals who do not or no longer fulfil the "conditions for entry, stay or residence in that Member State".[36]

In the absence of a voluntary return, Member States are required to "take all necessary measures to enforce the return decision",[37] resulting in the physical removal from their territory of persons to whom a return decision is addressed. Such necessary measures generally require a readmission agreement with the country of return, including the returnee's country of origin or a transit country. In fact, the need for such agreements, whether at an EU or a national level, is explicitly mentioned in the Returns Directive when the return is to take place to a transit country.[38]

9.4.2 Common Policy on Asylum

A significant volume of EU secondary legislation has been adopted in pursuance of a Common Policy on Asylum as required by Article 78 TFEU. The most relevant for this article is the Directive on common procedures for granting and withdrawing international protection (hereinafter the "Asylum Procedures Directive").[39]

The reason is that in case of a negative decision on an asylum application pursuant to the common procedures established by the Directive, the failed asylum seeker is no longer considered to have cause to remain in the EU. Therefore, he or she should subsequently be subjected to the procedure established by the Returns Directive,[40] including readmission to a third country in terms of a readmission agreement, as discussed in Section 9.2.

Moreover, a provision in the Asylum Procedures Directive allows Member States not to examine an asylum application in certain circumstances, such as when a third country is deemed responsible for the asylum seeker.[41] Known as the Safe Third Country or First

34 Directive 2008/115/EC of the European Parliament and of the Council of 16th December 2008 on common standards and procedures in Member States for returning illegally staying third country nationals [2008] OJ L348/98.
35 Ibid., Art. 6(1).
36 Ibid., Art. 3(2).
37 Ibid., Art. 8.
38 Ibid., recital 7 & Art. 3(3).
39 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L180/60.
40 Returns Directive, recital 9.
41 Asylum Procedures Directive, Art. 33.

Country of Asylum policies,[42] these policies are based on the premise that the asylum seeker has no justification for seeking asylum in the EU because his or her international protection needs can be catered for in that other third country.

However, this transfer of responsibility is conditional on the third country readmitting the asylum seeker in question[43] While it is conceivable for a third country to readmit an applicant for asylum on a case-by-case basis without a readmission agreement in place, a readmission agreement would, no doubt, offer Member States a guarantee that this will, in fact, take place.

9.4.3 Common Policy on Border Checks

The development of a common policy on border checks required by Article 77 TFEU rests on two main interrelated objectives: removing checks on persons at internal border crossing points and strengthening the EU's external borders. The latter consists of performing checks on persons at external border crossing points and effectively monitoring those borders.[44]

The main EU instrument in this regard is the Regulation on a Union Code on the rules governing the movement of persons across borders (hereinafter the "Schengen Borders Code"),[45] according to which persons who do not fulfil the entry conditions stipulated therein are, with some exceptions, to be refused entry in the territory of the relevant Member State.[46] In such situations, Member States may choose to rely on applicable national legislation rather than the Returns Directive (Section 9.2) to regulate the return of such persons.[47] The same applies to persons who are apprehended after having irregularly crossed into that territory and "who have not subsequently obtained an authorization or a right to stay".[48] In any case, a readmission agreement with the country of origin or with a transit country should facilitate the orderly removal of such persons.[49]

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42 Ibid., Art. 33(2)(b) & (c).
43 Ibid., Art. 35 & 39(6).
44 Ibid., Art. 77(1)(b).
45 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders [2016] OJ L77/1.
46 Schengen Borders Code, Art. 14.
47 Returns Directive, Art. 2(2)(a).
48 Ibid.
49 By way of clarification, when a person who is refused entry at a border crossing point used a carrier to arrive at that crossing point, it is generally the responsibility of that carrier, pursuant to Part A of Annex V of the Schengen Borders Code, to effect the return of that person.

Furthermore, readmission agreements have proven to be indispensable in the context of border surveillance at or beyond the EU's external sea borders,[50] whereby vessels carrying undocumented migrants are intercepted and forcefully pushed or pulled back to the point of embarkation within a third country.[51] In fact, the EU's Sea Borders Regulation[52] – which regulates sea border surveillance operations when these involve the assistance of FRONTEX – provides, among other things, for the interception on the high seas of vessels suspected of being "engaged in the smuggling of migrants by sea"[53] where they would be ordered to head towards a third country[54] or be handed over, together with the persons travelling thereupon, "to the authorities of a third country".[55]

9.5 Fundamental Rights Implications

The relationship between readmission agreements and the fundamental rights of the persons readmitted thereunder is a contested one. Advocates of readmission agreements argue that these agreements "are neutral in terms of human rights".[56] This argument is based on the idea that readmission agreements are simply the instruments through which decisions made under immigration, asylum and border control legislation may be implemented or completed successfully.

For this reason, if there are any fundamental rights concerns, they are related to the stage at which the actual decisions are taken because it is at this stage that fundamental rights have to be taken into account.[57] Readmission agreements simply "provide a legal framework and are merely an instrument facilitating return".[58] Moreover, it can be argued that, with or without a readmission agreement in place, such decisions will be adopted nonetheless.

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50 Gammeltoft-Hansen, T. (2011). The Externalization of European Migration Control and the Reach of International Refugee Law, in E. Guild & P. Minderhoud (Eds.), *The First Decade of EU Migration and Asylum Law* (pp. 273-298, 273-277). Brill | Nijhoff.

51 As evidenced by the facts in the case of *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, ECHR 2012 and *S.S. and Others v. Italy*, no. 21660/18, ECHR [pending].

52 Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2014] OJ L189/93.

53 Ibid., Art. 7(1).

54 Ibid., Art. 7(2)(c).

55 Ibid.

56 Council of Europe Parliamentary Assembly. (2010). *Readmission Agreements: A Mechanism for Returning Irregular Migrants* (Resolution 1741), paras. 2, 1. https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17874&lang=en.

57 Ibid., para. 2.

58 Council of Europe Parliamentary Assembly. (2010). *Readmission Agreements: A Mechanism for Returning Irregular Migrants* (Report 12168), paras. 29, 11. https://pace.coe.int/en/files/12439/html.

However, even though readmission agreements represent only a part of the return process, critics argue that they are an important part that cannot be disconnected and considered independently.[59] For this reason, any fundamental rights violations arising at the pre-readmission stage will still bring about the responsibility of readmission agreements as they are an inseparable part of the whole process of return.[60] According to these critics, this occurs when a readmission agreement is utilised to implement "a flawed decision".[61] Alternatively, the existence of a readmission agreement could encourage states to make flawed decisions.[62] It is also possible that cooperation on readmission itself is a threat to fundamental rights.

This section will, therefore, seek to uncover whether readmission agreements are neutral from a fundamental rights perspective. For this to occur, however, some of the risks to fundamental rights posed by the pre-readmission stage must first be discussed.

9.6 Some Fundamental Rights Concerns Linked to the Pre-Readmission Stage

The pre-readmission stage in an EU context is largely dominated and dictated by the legal instruments that are featured in section two of this chapter. Additionally, many of them contain minimum harmonisation measures and/or grant Member States a wide margin of discretion as well as several opportunities to opt out or derogate from their provisions. Thus, most fundamental rights concerns linked to this stage can be traced back to these laws.

However, exceptions exist. Member States might fail to adhere to their minimal obligations under the said laws and interfere with fundamental rights in the process. Moreover, as held previously, the AFSJ is an area of shared competence. This means that Member States can act to the extent that the EU has not or has ceased to act. In doing so, they may undermine fundamental rights outside of the EU legislative framework.

9.6.1 The Returns Directive

Certain provisions in the Returns Directive can be criticised for their ability to expose the person concerned to forced removal in violation of his or her fundamental rights.

59 Ibid., paras. 30, 12.
60 Ibid.
61 Council of Europe Parliamentary Assembly (2010, Resolution 1741), paras. 3, 2.
62 Council of Europe Parliamentary Assembly (2010, Report 12168), paras. 30, 12.

This is particularly evident regarding certain provisions aimed at preventing "abuse"[63] by the returnee of the legal remedies provided by the Directive.

For instance, Member States are obliged to provide the person concerned with "an effective remedy to appeal against or seek review"[64] of a return decision. However, they are allowed to make free legal assistance subject to certain conditions and limitations.[65] Also, they are not obliged to grant automatic suspensive effect to the appeal or review, which means that the return decision can be enforced pending the outcome of the process.[66] Further, in leaving the time limits within which to file an appeal or review up to the Member States, the Commission openly suggests that "Member States provide for the shortest deadline",[67] even if this could somewhat compromise the right to an effective remedy.[68]

Fortunately, with regard to the lack of automatic suspensive effect of the appeal or review, both the European Court of Human Rights (ECtHR) and the Court of Justice of the EU have required Member States to give suspensive effect to appeals whenever the principle of non-refoulement risks being compromised[69] or whenever the health of the potential returnee is at "a serious risk of grave and irreversible deterioration".[70] Although it is not excluded that suspensive effect would be granted if other rights are at risk,[71] the Commission has recommended against this in order "to strike the right balance between the right to an effective remedy and the need to ensure the effectiveness of return procedures".[72]

To conclude, the fact that a third country national can be returned to a transit country under the Returns Directive is also a cause for worry from a fundamental rights perspective. The reason is that persons who are returned to a transit country, with which

63 European Commission. (2017). *Commission recommendation (EU) 2017/2338 of 16 November 2017 establishing a common 'Return Handbook' to be used by Member States' competent authorities when carrying out return-related tasks* (C/2017/6505) 135. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017H2338.

64 Returns Directive, Art. 13(1).

65 Ibid., Art. 13(4).

66 Ibid., Art. 13(2).

67 European Commission (2017, Return Handbook).

68 The Commission draws the line at "disproportionate interference with the right to an effective remedy", implying that an interference is acceptable (in the face of a hypothetical scenario that the returnee will abuse the system) as long as it is proportionate. See European Commission (2017, Return Handbook).

69 *Gebremedhin v. France* [Sect.2], no. 25389/05, ECHR 2007.

70 Case C-562/13 *Centre public d'action sociale d'Ottignies-Louvain-La-Neuve v. Moussa Abdida* [2014] EU:C:2014:2453.

71 When one considers Arts. 5 (Non-Refoulement, best interests of the child, family life and state of health) and 9 (Postponement of removal) of the Returns Directive.

72 European Commission (2017, Return Handbook).

they have few ties save for the fact that they had transited through its territory, are more likely to end up in an "unsustainable situation"[73] in that country as the governments in question may not have the capacity to sustain them and/or return them to their country of origin.[74] Moreover, third country nationals who are returned to a transit country also risk being locked up for an excessive amount of time while they await repatriation.[75]

9.6.2 The Asylum Procedures Directive

Like the Returns Directive, the Asylum Procedures Directive has shortcomings that can lead to questionable decisions on asylum applications, which can, in turn, trigger unlawful returns under the former Directive. For instance, Member States have the right to accelerate the procedure for examining an asylum application at first instance in no less than ten defined circumstances,[76] which includes that the "applicant has made clearly inconsistent and contradictory, clearly false or obviously improbable representations which contradict sufficiently verified country-of-origin information"[77] and that the applicant hails from a country which is considered to be a safe country of origin.[78]

The case of *S.H. v. Malta*[79] highlights the risks associated with using the accelerated procedure. In this case, the ECtHR held that "the asylum procedure undertaken by the applicant"[80] – a journalist from Bangladesh, which was designated as a safe country of origin by the Maltese authorities – "and examined under the accelerated procedure, *ab initio*, did not offer effective guarantees protecting him from arbitrary removal".[81] Consequently, the court found, inter alia, that Malta had violated the applicant's rights under Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[82] (ECHR) in conjunction with Article 3 thereof.[83]

Admittedly, the infringement of the applicant's fundamental rights in this case was not the result of the Maltese authorities' blind acceptance of the measures introduced by

73 Council of Europe Parliamentary Assembly (2010, Report 12168), paras. 28, 11.
74 Roig & Huddleston, 380-381.
75 European Commission (2011). *Evaluation of EU Readmission Agreements* (COM (2011) 76 final) 13.
76 Asylum Procedures Directive, Art. 31(8).
77 Ibid., Art. 31(8)I.
78 Ibid., Art. 31(8)(b).
79 *S.H. v. Malta* [Sect.2], no. 37241/21, ECHR 2022.
80 Ibid., para. 93.
81 Ibid.
82 Convention for the Protection of Human Rights and Fundamental Freedoms (signed on 4 November 1950, entered into force 3 September 1953) ETS No. 5.
83 *S.H. v. Malta* [Sect.2], no. 37241/21, ECHR 2022, para. 99.

the Directive. However, it is hard to ignore the fact that the Maltese government relied on the rights granted to Member States under the Directive "to introduce accelerated procedures"[84] as part of its defence strategy. Also, it appears that the European Commission did not take Malta to task for the systemic failures[85] identified by the ECtHR in the case, to both abide by the minimum obligations imposed by the Directive and guarantee the rights in the Charter of Fundamental Rights of the EU[86] "when they are implementing Union law".[87] Hence, the EU's complete lack of culpability in this regard is questionable at best.

Interestingly, a EURA with Bangladesh was and is currently in force,[88] meaning that if the Maltese authorities were allowed to have their way with the applicant in this case, the latter could have been readmitted to Bangladesh in violation of his fundamental rights on the strength of this form of EU-level cooperation.[89]

Aside from the asylum procedure itself, the application of the First Country of Asylum and Safe Third Country policies can be problematic in their own right. Although the Asylum Procedures Directive provides a list of requirements[90] that must be fulfilled in order for these concepts to be applied to an asylum application – such as that the applicant will not be subject to "refoulement"[91] in that country – "in reality, nominal adherence to these criteria has often been deemed sufficient even when there are evident gaps between formal acceptance of principles and their realization in practice".[92]

9.6.3 Border Control Practices

Suppose Member States decide to apply the Returns Directive to persons who have been refused entry at the external border or have crossed the EU irregularly. In that case, some fundamental rights concerns related to this particular pre-readmission stage.

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84 Ibid., para. 72.
85 Ibid., para. 91.
86 Charter of Fundamental Rights of the EU [2012] OJ C326/02.
87 Ibid., Art. 51(1).
88 European Commission. 'A Humane and Effective Return and Readmission Policy.' *Migration and Home Affairs*. https://home-affairs.ec.europa.eu/policies/migration-and-asylum/irregular-migration-and-return/humane-and-effective-return-and-readmission-policy_en.
89 The author is not aware of the current personal circumstances of the applicant in question and, hence, is not in a position to provide information as to what happened to him once the judgement was delivered and became final.
90 Asylum Procedures Directive, Arts. 35 and 38.
91 Ibid., Arts. 35(b) and 38(1)(c).
92 Frelick, B., Kysel, I.M., & Podkul, J. (2016). 'The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants.' *Human Rights Watch*. https://www.hrw.org/news/2016/12/06/impact-externalization-migration-controls-rights-asylum-seekers-and-other-migrants.

However, regardless of whether Member States apply the Returns Directive in such circumstances, the fact that border regions tend to be located far from any form of public scrutiny means that persons apprehended risk being subject to treatment in violation of their most basic rights, including the principle of non-refoulement. Indeed, the Border Violence Monitoring Network[93] noted how, between 2020 and 2022, migrants "along the EU's external border"[94] suffered "beatings at the hands of police",[95] "forced undressing",[96] "shaving of heads",[97] "sexual assault"[98] and were subject to "illegal expulsions".[99]

All this, notwithstanding that the Returns Directive obliges the Member States to adhere to the principle of non-refoulement even in respect of border cases that have been excluded from its scope[100] as well as a similar obligation under the Schengen Borders Code,[101] not to mention their obligation under the said Code to ensure that border guards "in the performance of their duties, fully respect human dignity, in particular in cases involving vulnerable persons".[102]

Moreover, border control practices performed at sea increase the risk of refoulement, as confirmed by the ECtHR in *Hirsi Jamaa and Others v. Italy*.[103] The origins of the case date back to 2009, when, based on a number of bilateral instruments[104] between Italy and Libya, including a newly signed treaty between the two nations (hereinafter the "Friendship Treaty"),[105] Italian authorities conducted a series of maritime interception and push-back operations involving vessels carrying migrants in the Central Mediterranean region. A group of migrants that had been intercepted and turned back to Libya during one such operation challenged Italy's actions before the ECtHR.

The applicants claimed that their return to Libya violated their right to be free from torture or inhuman or degrading treatment or punishment under Article 3 of the

93 Rankin, J. (2022). 'Migrants Face "Unprecedented Rise in Violence" in EU Borders, Report Finds.' *The Guardian*. https://www.theguardian.com/law/2022/dec/08/migrants-face-unprecedented-rise-in-violence-in-eu-borders-report-finds.
94 Ibid. In countries such as Poland, Greece, Croatia, Serbia, North Macedonia and Albania.
95 Ibid.
96 Ibid.
97 Ibid.
98 Ibid.
99 Ibid.
100 Returns Directive, Art.4(4)(b).
101 Schengen Borders Code, Art.4.
102 Ibid., Art.7.
103 *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, ECHR 2012.
104 Ibid., paras. 19-20.
105 Trattato di Amicizia, Parternariato e Cooperazione tra La Repubblica Italiana e La Grande Giamahiria Araba Libica Popolare Socialista (Italy-Libya) (signed 30 August 2008, entered into force 2 March 2009).

ECHR, their right not to be collectively expelled under Article 4 of Protocol No. 4 to the ECHR[106] and their right to an effective remedy under Article 13 of the ECHR.[107] Firstly, the ECtHR held that the return of the intercepted migrants to Libya brought about Italy's responsibility under the ECHR because, notwithstanding that these events occurred on the high seas, Italy had exercised "continuous and exclusive *de jure* and *de facto* control"[108] over the applicants.[109] Secondly, the ECtHR ruled in favour of the applicants on all three counts, finding that there had indeed been a violation of the rights complained of.[110]

Regrettably, it appears that this landmark ruling did not deter Italy from subsequently relaunching cooperation with post-Arab Spring Libya on irregular migration along similar lines. It did this primarily through a Memorandum of Understanding (hereinafter the "Memorandum") signed in 2017[111] to, inter alia, "implement the relevant agreements undersigned by the Parties".[112] Among these agreements, the Friendship Treaty[113] – the instrument on which the interception and push-back of the applicants in the aforementioned case largely rested – is specifically mentioned.

The apparent consequence of this is that Italy is once again being challenged before the ECtHR in the case of *S.S. and Others v. Italy*.[114] The applicants in this case, whose vessel was intercepted and pulled back to Libya by the Libyan Coast Guard (hereinafter "LCG") in November 2017, seem to be relying on the fact that, under the Memorandum, "the Italian government committed to providing technical and technologic support to the Libyan institutions in charge of the fight against illegal immigration."[115] Thus, Italy is allegedly responsible for the fundamental rights violations suffered by the applicants "insofar as it effectively made it possible for the LCG to conduct interception measures".[116]

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106 Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto. CETS, No. 046.

107 *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, ECHR 2012, para. 3.

108 Ibid., para. 81.

109 Ibid., paras. 81 & 82.

110 Ibid., paras. 137, 158, 186 & 207.

111 Memorandum d'intesa sulla cooperazione nel campo dello sviluppo, del contrasto all'immigrazione illegale, al traffico di esseri umani, al contrabbando e sul rafforzamento della sicurezza delle frontiere tra lo Stato della Libia e la Repubblica Italiana (Italy-Libya) (signed and entered into force on 2 February 2017).

112 Ibid., preamble.

113 Ibid.

114 *S.S. and Others v. Italy*, no. 21660/18, ECHR [pending].

115 De Leo, A. (2020). '*S.S and Others v. Italy*: Sharing Responsibility For Migrants Abuses in Libya.' *Public International Law and Policy Group (PILPG)*. https://www.publicinternationallawandpolicygroup.org/lawyering-justice-blog/2020/4/23/ss-and-others-v-italy-sharing-responsibility-for-migrants-abuses-in-libya.

116 Ibid.

While the judgement appears to be pending at the time of writing, the ECtHR might, notwithstanding the lack of effective control by Italy over the applicants' situation at the time the LCG intercepted them, rely on its judgment in *Ilascu and Others v. Moldova and Russia*[117] to establish Italy's connection with and, hence, responsibility for the alleged violations in this case.[118] The reason being that, in the latter case, the ECtHR found the Russian Federation responsible for the "unlawful acts committed by the Transdniestrian separatists, regarding the military and political support it gave them to help them set up the separatist regime"[119] as well as its subsequent continued "support for the regime and collaboration with it".[120]

9.6.4 The Neutrality or Otherwise of Readmission Agreements

The previous subsection attempted to illustrate how certain procedures at the pre-readmission stage can result in flawed return decisions. Nevertheless, a flawed return decision is nearly irrelevant if it cannot be implemented in practice. For this reason, the argument put forward by critics of readmission agreements – that any fundamental rights concerns arising at the pre-readmission stage will still bring about the responsibility of readmission agreements as they are an inseparable part of the whole return process – seems well-founded.

Advocates of readmission agreements, on the other hand, might counter this argument by stating that returnees have, prior to their return under these agreements, recourse to national constitutional courts (which might, in turn, make a preliminary reference to the CJEU) and/or the ECtHR for violations or potential violations of their fundamental rights as a result of a flawed decision. However, how satisfied should we be with this position considering that

1. potential returnees are known to experience logistical difficulties in accessing legal assistance to be able to file cases of this nature or to be able to file them in due course;[121]
2. the independence and impartiality of national constitutional courts are under threat in some Member States;[122] and/or
3. not all proceedings before such bodies have an automatic suspensive effect.[123]

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117 *Ilascu and Others v. Moldova and Russia* [GC], no. 48787/99, ECHR 2004.
118 De Leo.
119 *Ilascu and Others v. Moldova and Russia* [GC], no. 48787/99, ECHR 2004, para. 382.
120 Ibid., para. 393.
121 The ECtHR in *S.H. v. Malta* [Sect.2], no. 37241/21, ECHR 2022 confirmed this in para 82 at least in respect of Malta.
122 Examples: Poland and Hungary due to well-documented rule of law backsliding in recent years.
123 As was also acknowledged by the EctHR in *S.H. v. Malta* [Sect.2], no. 37241/21, ECHR 2022 in para. 98.

Furthermore, in the context of the sea border controls, maritime interception and push-back/pull-back operations depend upon a readmission agreement with the country of return, as evidenced by the Italo-Libyan case studies examined in the previous subsection. Moreover, the pressures on transit countries resulting from readmission agreements with the EU or its Member States may also induce such countries to adopt questionable methods of migration control even before the migrants reach EU territory. Often referred to as the externalisation of immigration and asylum policies, this is an aspect of readmission agreements that sees the intensification of immigration and border controls in transit countries as a consequence of these countries' obligations under these agreements.

Such intensification can also have negative repercussions on the rights of asylum seekers and irregular migrants trying to reach the EU.[124] It is perhaps not a coincidence that the non-EU states implicated in the report compiled by the Border Violence Monitoring Network all have a EURA in place.[125] From all this, it is possible to concur with the other view shared by the critics of readmission agreements, which is that the existence of such agreements leads states to adopt, rather than a flawed decision, a course of action which is flawed from a fundamental rights perspective.

In the author's view, however, there are also instances where readmission agreements may be held responsible on both counts simultaneously. This double responsibility is observable concerning persons caught crossing irregularly into the EU. The remote locations of border regions increase the likelihood that undocumented migrants are subject to treatment in violation of their most basic rights, including the principle of non-refoulement. Therefore, a readmission agreement in a border setting would go a long way to ensure removal in breach of this principle.

However, the existence of a readmission agreement in such a setting, especially an agreement with the country from which the person concerned attempted to cross into the EU irregularly, can also encourage Member States to conduct unlawful returns. The reason is that the mixture of geographical proximity and an established form of cooperation on readmission offers the Member State in question the opportunity to swiftly deal with such persons while potentially preventing them from accessing effective legal remedies[126] to challenge their return.

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124 Council of Europe Parliamentary Assembly (2010, Report 12168)), paras. 67, 17.

125 European Commission. 'Return and Readmission.' *Migration and Home Affairs*. https://home-affairs.ec.europa.eu/policies/migration-and-asylum/irregular-migration-and-return/return-and-readmission_en.

126 Council of Europe Parliamentary Assembly (2010, Report 12168), paras. 31, 12.

In fact, ten out of eighteen EURAs are with countries that share a land border with EU Member States.[127] Moreover, seven of these ten EURAs provide for an accelerated procedure that is contracted specifically to deal with persons apprehended while trying to cross the borders of the contracting parties irregularly. The accelerated procedure allows the contracting parties to accelerate the readmission process in such situations, usually by requiring them to request readmission and reply to a request for readmission within two days from the apprehension of the person and the receipt of the request, respectively.[128]

This double responsibility of readmission agreements is also evident in the case of a decision to return irregular migrants and failed asylum seekers to a transit country under the Returns Directive. Aside from implementing a potentially flawed decision the existence of a readmission agreement with a transit country rather than the country of origin could also be a factor that determines removal to the former rather than the latter. If a readmission agreement already exists with a transit country, Member States do not have to negotiate directly with the country of origin to secure a return. In addition, the costs and complexities of the actual return are less as transit countries are usually located closer to the EU.

In addition to the pre-readmission stage, the culpability of readmission agreements from a fundamental rights perspective may arise from how the EU and its Member States shape their cooperation on readmission. Aside from how the actual transfer of persons under a readmission agreement occurs, this aspect includes the choice of third countries with whom to cooperate on readmission, as well as the lack of sufficient guarantees in the text of the agreements to ensure that such countries will adhere to certain fundamental rights standards in relation to those who are readmitted.

There are several factors which the EU and its Member States take into account when determining the third country with which to cooperate on readmission. One of these factors is the migratory pressure coming from or through a third country.[129] In fact, it is possible to state that the greater the migratory pressure, the greater the urgency to establish some form of cooperation on readmission with that country. Unfortunately,

127 European Commission ("Return and Readmission.").
128 Ibid. EURAs with Russia, Ukraine, North Macedonia, Serbia, Moldova, Turkey and Belarus.
129 Billet, 52.

this urgency often seems to overlook the fact that many of these third world countries have a shady human rights record.[130]

Perhaps even more worrying is the fact that certain third countries that the EU has sanctioned for serious human rights violations are among the list of countries with which the EU has also concluded a readmission agreement. The EURA with Belarus is a case in point, having been concluded while EU restrictive measures had been in place since 2004.[131] In addition, following its entry into force in June 2020, the EU imposed further restrictive measures on Belarus as a result of "the fraudulent presidential elections that took place in August 2020 and the brutal crackdown by Belarusian security forces on the peaceful protesters, democratic opposition and journalists".[132] Sadly, it appears that Belarus (in response to the sanctions) and not the EU subsequently suspended the said agreement.[133] Furthermore, at the time of writing, the EURA with Russia, which entered into force on 1 June 2007, appears to be unaffected despite the ongoing war in Ukraine and resulting EU sanctions.

Suppose the EU and its Member States do not refrain from reaching or do not suspend agreements of this nature with certain third countries. In that case, the least they could do is infuse them with all sorts of fundamental rights safeguards, including monitoring mechanisms and corresponding sanctions as a compensatory measure. Since NRAs tend to be inaccessible to the general public,[134] it is hard to determine whether sufficient provision is made to respect and protect the fundamental rights of the persons to be readmitted. However, if the NRAs mentioned earlier in this section between Italy and Libya are anything to go by, it would seem that fundamental rights issues are not high on the agenda of the contracting parties.

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130 For instance, Italy currently has the Memorandum with Libya, while Belgium has/had an NRA with Somalia. Moreover, EURAs have been concluded with Pakistan, Afghanistan and Guinea. For an inventory of NRAs signed or in force between 2014 and 2021. https://home-affairs.ec.europa.eu/news/new-emn-inform-examines-and-updates-how-bilateral-readmission-agreements-influence-return-irregular-2022-09-16_en, while most EURAs currently in force are accessible at: https://home-affairs.ec.europa.eu/policies/migration-and-asylum/irregular-migration-and-return/return-and-readmission_en.

131 European Council/Council of the European Union. 'EU restrictive measures against Belarus.' https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-belarus/.

132 European Union. (2023). 'Restrictive Measures in View of the Situation in Belarus and the Involvement of Belarus in the Russian Aggression against Ukraine.' *EU Sanctions Map*. https://www.sanctionsmap.eu/#/main/details/2/?search=%7B%22value%22:%22%22,%22searchType%22:%7B%7D%7D.

133 European Commission. (2021). 'Commission Proposes Partial Suspension of EU–Belarus Visa Facilitation Agreement for Officials of the Belarus Regime.' *Press Release*. https://ec.europa.eu/commission/presscorner/detail/en/IP_21_4906.

134 Council of Europe Parliamentary Assembly 2010, (Report 12168), paras. 77, 19.

Indeed, Article 6 of the Friendship Treaty simply states that Italy and Libya shall act according to their respective laws, objectives and principles of the UN Charter[135] and the Universal Declaration of Human Rights. In addition, Article 5 of the Memorandum states that the "Parties commit to interpret and apply the present Memorandum in respect of the international obligations and the human rights agreements to which the two countries are parties".

The insufficiency of the provision was confirmed by the ECtHR in *Hirsi Jamaa and Others vs Italy*, when it stated that relying on that provision to argue that Libya was a safe place to return the applicants was not enough to absolve Italy of responsibility under the ECHR, given the well-documented and consistent failure on the part of Libya to abide by its international obligations in practice.[136] This also confirms that the insertion of a rudimentary fundamental rights provision in the text of an NRA is not enough to bring it in line with the contracting parties' international obligations in this respect.

Unfortunately, the same criticism can be levelled at the corresponding provision in all the EURAs currently in force. For instance, the relevant provision in certain EURAs is generic in its wording as it essentially states that the agreement in question will not affect the obligations of the contracting parties under international law. On the other hand, the relevant provision in other EURAs is only slightly more elaborate as it specifies the instruments to be adhered to by the contracting parties in their implementation of the agreement,[137] which, generally, include the Refugee Convention,[138] the ECHR and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[139] Moreover, it would appear that under most of the more informal EURAs (or readmission arrangements), the contents of which are not publicly accessible, "no references to international protection of refugees and human rights" are made.[140]

135 United Nations, Charter of the United Nations, 1945, 1 UNTS XVI.
136 *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, ECHR 2012, paras. 127 & 128.
137 European Commission ("Return and Readmission").
138 UN Convention Relating to the Status of Refugees (opened for accession 28 July 1951, entered into force 22 April 1954) 189 UNTS 137; Protocol Relating to the Status of Refugees (opened for accession 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.
139 The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.
140 European Court of Auditors (2021), paras. 36, 23 and paras. 37, 25.

9.7 Conclusion

This chapter aimed to shine a light on readmission agreements, particularly their function and fundamental rights implications. It first clarified how vital these agreements are in the migration control efforts of the EU and its Member States. Their importance is underscored by the fact that they do not simply complement some of the most prominent pieces of legislation adopted under the immigration, asylum and border control policies of the AFSJ. Instead, readmission agreements complete them.

The chapter then exposed how readmission agreements are far from neutral from a fundamental rights perspective. In implementing certain decisions under the policies mentioned, readmission agreements can potentially unleash the toxicity of those decisions. Moreover, they can, in certain circumstances, encourage states to flout their international law obligations, and they do very little to restrain the conduct of the contracting parties, particularly the country that is doing the readmitting. In fact, it can be argued that the perception that these instruments are, somehow, impartial when it comes to fundamental rights has served to mask and avoid a proper discussion by the powers that be of their actual accountability in this respect.

Nevertheless, it would be unrealistic to call for completely eradicating these instruments. Moreover, there may be some benefits associated with readmission agreements. They can, if drafted and applied properly, "contribute to reducing the migrant's period of uncertainty or detention by facilitating and speeding up the enforcement of return decisions".[141] However, among the improvements that should be considered is increased attention to fundamental rights by adopting a provision in the agreements that goes beyond a simple reaffirmation of the contracting parties' obligations under certain international instruments. In fact, such provisions should be more specific about the obligations expected from the contracting parties.[142]

For instance, if a third country is considered a safe third country under the Asylum Procedures Directive, the provision in question should specify that the state will provide readmitted asylum seekers access to an asylum procedure that contains effective guarantees against refoulement. Moreover, suppose the third country national is in transit under the Returns Directive. In that case, the relevant clause should specifically bind that state to guarantee that such returnees will live with dignity in that country, that it will provide them with the possibility of returning home and that it will not

141 Council of Europe Parliamentary Assembly (2010, Resolution 1741), paras. 2, 1.
142 Council of Europe Parliamentary Assembly 2010, (Report 12168), paras. 37, 12.

arbitrarily detain them for an indefinite period pending such return. In addition, these clauses should be beefed up by an appropriate monitoring and sanctioning mechanism to ensure that these obligations are observed in practice post-readmission.[143]

For the EU to truly become an area of freedom, security and justice, the right of the EU and its Member States to control migration must be reconciled with their obligations under fundamental rights law. Readmission agreements constitute just a part of the migration control process and, therefore, addressing their fundamental rights implications will not necessarily be enough to achieve this. They were turning readmission agreements into a fundamental rights safety net when all pre-readmission safeguards can constitute an important first step in this reconciliation process.

Given its prominent position in shaping the migration, asylum and border control policies of the Member States and the fact that respect for fundamental rights is one of its founding values,[144] the EU should lead the way in this regard and start setting the right example in the context of its readmission agreements, which, after all, have primacy over national ones.

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143 Council of Europe Parliamentary Assembly (2010, Resolution 1741), paras. 6, 2-3.
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