ASILE Global Asylum Governance and the European Union's Role

WORKING PAPER

EU´S READMISSION DEALS UNDER THE LIGHT OF GLOBAL COMPACT ON MIGRATION

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Abstract

The New York Declaration recalled everyone's right to leave any country, including his own, and to return to his or her country. Declaration also reminds that States must readmit their returning nationals and ensure that they are received without undue delay, following confirmation of their nationalities under national legislation. These and other principles were crystallized in the adoption of two non-binding Compacts, the Global Compact on Refugees (GCR) and the Global Compact for Safe, Orderly, and Regular Migration (GCM). This paper analyzes the links between these relevant non-binding documents and new trends in the European Union readmission policy. The main focus of the analysis is Objective 21 GCM which calls for increased cooperation in readmission matters in full compliance with international human rights obligations. The return and readmission of people who do not have the right to remain in European territory are one of the main objectives of the EU immigration policy. To this end, the EU already has its competence, albeit shared with states, to conclude readmission agreements with third parties that speed up identifying and returning third-country nationals. A quite new trend in EU readmission policy is to conclude practical readmission agreements (better-called arrangements or deals) in an informal form. These informal arrangements fall within the category of soft law and affect legal certainty and other structural principles in the EU legal order. With the example of the renewed arrangement with Afghanistan, the possible compatibility between these practices and the GCM would be examined. A conclusion on the future trends ahead within the proposed New Pact on Migration and Asylum is made to understand if the trend to use informal instruments is expected to continue.

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Introduction

New York Declaration reaffirms the importance of the international refugee regime and contains a wide range of commitments by the Member States to strengthen and enhance mechanisms to protect people on the move. The Declaration recalled everyone's right to leave any country, including his own, and to return as well. The Declaration also reminds that States must readmit their returning nationals and ensure that they are received without undue delay, following confirmation of their nationalities under national legislation (General Assembly, 2016). As a result of the Declaration, two different texts were approved; the Global Compact on Refugees (GCR) and the Global Compact for Safe, Orderly, and Regular Migration (GCM). Both Compacts are non-legally binding documents aiming to create a cooperative framework, foster international cooperation on migration and refugee management, and uphold obligations under international law.

For this paper, we will focus on the GCM in order to look into the links between this relevant non-binding document and new trends in the European Union's readmission policy. The main focus of the analysis is Objective 21, which calls for increased cooperation in readmission matters in full compliance with international human rights obligations. Despite its non-binding-status, Global Compact for Migration may have a considerable normative impact on the field of international migration law (Gammeltoft-Hansen et al., 2017). It has been considered the first globally agreed instrument upon where all aspects of global human mobility are encompassed (Fajardo del Castillo, 2019).

Return and readmission of people who lack the right to remain in European territory are one of the main objectives of the EU migration policy (European Commission, 2021). While developing bilateral agreements, including readmission agreements, the role of the EU as a whole international actor cannot be denied. The EU can conclude its own readmission agreements with third States on the legal basis of articles 79(3) and 218 on Treaty on the Functioning of the European Union (TFEU). This competence, albeit shared with States, enables to conclude readmission agreements with third parties that speed up identifying and returning third-country nationals. Bearing this objective in mind, we will analyse a new trend identified in readmission policy; the conclusion of practical readmission agreements (better-called arrangements or deals) in an informal manner. These informal arrangements fall within the umbrella term of soft law, are often non-transparent, and affect legal certainty and other EU legal order structural principles (Carrera, 2019; García Andrade, 2018; Santos Vara, 2019). With the example of the renewed arrangement with Afghanistan, we will try to analyse the possible compatibility of these practices with the provisions of GCM. We will also try to conclude the future trends within the New Pact on Migration and Asylum proposed in September 2020 (from now on the Pact) to understand if the trend to use informal instruments is expected to continue. By comparing specific objectives of the GCM with the current and planned EU's return policy, we will try to conclude whether the cooperation on readmission is in line with the requirements of the GCM.

1- GCM and readmission

Readmission of own nationals is deemed as a firmly established norm of customary law(Cassarino, 2010), even though there is some doctrinal debate about involuntary returns and readmissions of nationals of third countries who have transited the territory (Eisele et al., 2020; Giuffré, 2016; Majcher, 2021; Roig & Huddleston, 2007). In this sense it can be discussed whether the right to leave one's own country has a correlative right of entry into another or whether, for example, the refusal of a foreigner to leave a state would generate a "right not to return" vis-à-vis other countries(Noll, 1999).

Readmission agreements are intended to facilitate the process of return, facilitating the bases, procedures, and modalities for returning a non-national who no longer fulfils the conditions for entry or stay on its territory. However, the obligation to readmit can often be frustrated in practice, primarily due to the reluctance of States to readmit their own nationals, being this issue even more complex in the case of third-country nationals(Coleman, 2009). The agreements can manifest themselves in different forms, including standard readmission agreements, memoranda of understanding, joint declarations, or exchanges of letters (IOM, 2016).The asymmetric reciprocal obligations, costs, and benefits of the readmission process are usually pointed out as the main obstacles to an effective readmission policy (Cassarino, 2010). Reluctance by sending countries is also based on a lack of incentives to enter into this type of agreements. Thereof readmission agreements are crucial to confirm obligations regarding a State's own nationals because they provide a legal basis for a State's obligation and important details for implementation, documentation, and procedures.

Before a deeper analysis, the concept of readmission should be clarified to understand why and how readmission agreements are a crucial issue in the EU's legal system. In the first stage, it should be noted that readmission and return are not interchangeable terms. Indeed, they are both elements of the same continuum, named the "return process"(Noll, 1999). Thus, based on an agreement, a State returns a person whereas another State readmits this person. The admission by the requested State of its own nationals, or a third State national that has transited its country, is covered by the term readmission, while the term return covers the repatriation of the very same person by the requesting State(IOM, 2016).

GCM gathers the commitment of States under objective 21 to conduct safe and dignified returns in which due process, individual assessment, and effective remedy are guaranteed. A broad mention of obligations under international human rights law is made, wherein the case of readmission can be extended to the prohibition of collective expulsion and the respect of *non-refoulement* principle when there is a real risk of death, torture, and other cruel, inhuman, and degrading treatment. A broader layer of protection is added in the GCM since States have as well committed to implementing the GCM in line with their human rights obligations (GCM, p.

41); that commitment extends to all the processes of the expulsion of aliens, meaning the return process, the readmission process, and the reintegration process.

According to objective 21, States should develop and implement bilateral, regional, and multilateral cooperation frameworks and agreements, including readmission agreements. The same subparagraph determines that the procedures should be clear and mutually agreed upon, uphold procedural safeguards, and guarantee individual assessments and legal certainty. It also points out the will to cooperate in the identification of nationals and issuance of travel documents for safe and dignified return and readmissions.
In short, it could be said that the GCM reaffirms the preponderant role of human rights throughout the return process, with particular emphasis on procedural guarantees and full respect for the principle of *non-refoulement*. This principle and the undergone of an individual assessment must be present in every case prior to the actual readmission in the origin country. In the case of the EU, human rights safeguards are established in the Return Directive; however, this legislation is in the process to be amended, and the renovation includes limitations to procedural guarantees, shorter periods of review, and a more limited suspensive effect of negative decisions(Majcher, 2021).

2- Readmission policy in the EU

Cooperation with third countries in terms of readmission is an increased priority for the EU. In fact, the New Pact underlines the importance of comprehensive and mutually beneficial migration partnerships with countries outside the EU where effective readmission is an important element. The Pact also suggests how this policy would be embedded into the EU's overall relations with third countries, alongside other policies, such as development cooperation, foreign investments and trade. A more effective readmission policy is intimately linked with faster and more effective returns, which in the opinion of the EU, can only be achieved by stronger cooperation and interlinkage (or conditionality) with other policy areas. The need to improve return ratios is based on a poor 30% average rate of effective returns after national authorities have issued a return decision (European Court of Auditors, 2020; Trauner & Stutz, 2021). There is as well a significant difference between the number of return orders issued and readmission requests to third countries, as the Member States tend not to initiate the readmission process when they are not confident that the partner country will cooperate in identifying and re-documenting their nationals (European Commission, 2021). The lack of cooperation from third countries regarding identification and documentation procedures is one of the main reasons for non-return (Strik, 2020).

It has already been highlighted how the EU has its own competence to conclude readmission agreements with third countries. However, third countries have often been reluctant to negotiate readmission agreements due to domestic political considerations, rejection by their societies or the growing importance

of remittances (Coleman, 2009). The conclusion of formal readmission agreements, having pointed out their main obstacles, was not dramatically leading to high readmission rates before the 2015 crisis. After that year, a trend is detected in cooperation with third countries, informalization, and flexibility in negotiations and agreements. The clear germ of this type of practice is the EU-Turkey Statement, which is not an international agreement, neither concluded by the EU if it was so, although the terms include clauses on readmission (Ott, 2020). This type of soft law arrangement serves as an example for future cooperation with other States. On the concept and the very existence of soft law there is extensive doctrine and debate (Klabbers, 1998; Saurugger & Terpan, 2021; Senden, 2013; Terpan, 2015). For the purpose of this paper, soft law is understood as rules contained in instruments that do not have or have not been attributed a legal binding force, but which may nevertheless have some indirect legal effect or may generate practical effects(Senden, 2005). Each soft law instrument on this realm has its own peculiarities, in some cases it can be linked to previous hard law instruments, as it could be the case of EU-Turkey Statement and the previous association agreement between the two or in the case of some African countries, the informal arrangements can even be linked to the general obligation to readmit nationals set in article 13 of the Cotonou Agreement.

Since the readmission deals are non-binding, they cannot be considered formal agreements; therefore, the procedure established in the Treaties must not be followed (Ott, 2021; Santos Vara, 2019). Since the process to conclude formal agreements seems to be lengthy and difficult, the EU has opted to put several non-legally binding readmission agreements in place. A good example of readmission arrangements is the Joint Way Forward with Afghanistan (European External Action Service, 2016), or the Standard of Operations with Bangladesh(European Comission, 2017). Although appearing to have the form and language of a legally binding international treaty, the informal agreements are expressly proclaimed to have a political or operational nature (Eisele et al., 2020). The rationale for opting for informal agreements has been based on flexibility, lower cost in case of non-compliance, malleability towards security issues, and speed in its conclusion (Cassarino, 2018). However, the deliberate choice of informal avenues that circumvent the legal order of the EU can be discussed. Different voices have criticized the use of this type of instruments due to their lack of democratic and judicial control and their direct impact on the principles of the EU legal system (Sergio Carrera, 2019; García Andrade, 2018; Santos Vara, 2019; Strik, 2021). However, the future of this type of practices seems to be guaranteed as the Pact already counts formal and informal readmission agreements when calling for the 'the full and effective implementation of the twenty-four existing EU agreements and arrangements on readmission with third countries' (European Commission, 2020, p. 21). It should also be noted how these soft deals face similar challenges and obstacles than actual formal deals since the ratios of readmission are not improving(Trauner & Stutz, 2021). Perhaps the shared problem would be a good opportunity for a reflective exercise on the proliferation of these practices to the detriment of legal certainty and the Rule of law.

3- Informal deals on readmission and GCM

A brief analysis of this practice and the compatibility with the proposed protection of legal certainty, individual assessment, and protection of human rights during readmission, encompassed in objective 21, is necessary since most of the Union's members have agreed to follow in good faith the provisions set forth therein. In cooperation with Afghanistan, the EU concluded a "Joint Way Forward (JWF) declaration on migration issues" signed during a donor conference in Brussels in October 2016. This deal expired in October 2020 and has been replaced by a new document, the "Joint Declaration on Migration Cooperation between Afghanistan and the EU" (JDMC), with no expiration date (Council of the European Union, 2021).Both texts emphasize their non-binding nature and do not create obligations for the parties, even though their wording is quite similar to a formal readmission agreement (Limone, 2017).

There is an explicit reference in both texts, JDMC and JWF, to the mutual commitment with provisions of the 1951 Convention relating to the Status of Refugees and its 1967 New York Protocol, the International Covenant on Civil and Political Rights, and the EU Charter on Fundamental Rights (ECFR). Similarly, reference is made to Afghanistan's commitment to readmit its citizens who entered into the EU or are staying on the EU territory irregularly, after due consideration of each case by the EU Member States. Both arrangements promote the use of scheduled and non-scheduled flights to Kabul airport coordinated by FRONTEX. This agency, increasingly involved in the return process, already carries a number of concerns about its management and accountability mechanisms in case of human rights violations(Santos Vara, 2021). It remains to be seen whether their increasingly progressive incorporation into these infrastructural frameworks helps or hinders in clarifying the distribution of responsibilities. As an example it can be quoted how the Committee against Torture recently received a case in which serious fundamental rights violations during a return flight led by FRONTEX to Afghanistan were reported and never issued to the agency´s report channels (Fink, 2020). On a separate issue, the JWF included women and unaccompanied children as returnable subjects, for whom the text called for the adoption of special measures. However, the lack of protection of vulnerable groups was pointed out and partially fixed in the new arrangement where the child's interest is mentioned, the principle of familiar unity is introduced, and special consideration is given to sick people who cannot be treated in Afghanistan.

Quoting the safeguards established in objective 21 on GCM, the returns should allow due process, individual assessment, and effective remedy guarantees for the individuals. Since the deal fosters cooperation with a receiving country, the whole process since the expedition of the return decision should be taken into account. Thus, even though the frame on cooperation is this informal deal, *per se* non-binding and non-judicial, when EU actors return under the JWF provisions, they are also bound by the EU's Return Directive and international human rights law. European legislation contains safeguards on remedies, due process and individual assessments; however, the application of legislation varies from one country to another(Majcher, 2019). In

some countries, the resolution rejecting asylum already includes a return decision, while in others the return decision is suspended during the appeal against the refusal of international protection and becomes enforceable after the possibility of the appeal is exhausted. Nevertheless, in some circumstances (when an application is considered manifestly unfounded or inadmissible), a return decision becomes enforceable before the time limit for appealing refusal of international protection has lapsed (European Parliamentary Research Service, 2020).

In terms of legal certainty, a term that encompasses effective remedies and due process, it is debatable how informal arrangements exclude the European Parliament's control role and CJEU's jurisdiction. They become structurally incapable of ensuring compliance with EU fundamental rights (Moreno-Lax et al., 2021) . It must be reminded here how according to art. 52 ECFR, all measures that interfere with individual rights must be provided by law. Soft law agreements on readmission are not suitable *per se* as long as they affect the rights of individuals as they do. The obscurantism and lack of data surrounding this type of practice do not help to make a precise analysis; however, it must be noted how almost all of the returns in this framework have been coordinated or financed by FRONTEX (European Court of Auditors, 2021), which hypothetically raises the level of control as the Agency´s regulation requires for a system for monitoring on the protection of fundamental rights (Moreno-Lax et al., 2021).

It is debatable whether, before this summer's outbreak, the practices carried out in this framework were in accordance with the principle of *non-refoulement*, which is enshrined both in international law and in the EUCFR. Refoulement to a country where inhuman or degrading treatment may be inflicted is prohibited, and Afghanistan has been considered an unsafe country for years for various reasons (ECRE, 2019). It must not be forgotten that JWF operates under the basic assumption that EU member States may regard Afghanistan as a safe country as this is a precondition for allowing return operations(Slominski & Trauner, 2021). Human rights organizations have strongly criticized the ongoing returns to Afghanistan, which have repeatedly stressed that Afghanistan is not a safe country. Given the situation that has unfolded over the past summer, it is impossible to claim that Afghanistan is a safe country. The evolution of the situation is difficult to foresee since, for example, six EU countries sent a joint letter on August 5th to the European Commission warning against halting non-voluntary returns of Afghan migrants, considering that any suspension of deportations would act as a migration magnet. Several of them days later suspended deportations to Afghanistan for six months; however, Austria maintains its position and, as these lines are being written, continues to carry out deportations. The Council of Europe has also called for returns to be suspended in line with UNHCR's position on returns to Afghanistan (Council of Europe, 2021; UNHCR, 2021). A new venue of legal analysis shall open up with the political change in the country, since it is worth consider the succession of commitments in cases of informal agreements concluded by a government other than the current one.

A last reflection on objective 21 refers to the promotion of "mutually agreed procedures". It is questionable whether such agreements, as the one with Afghanistan, are based on a mutual dialogue among equals since most of them are signed with highly dependent countries, whether on foreign aid or remittances, and where political stability is not a trend. Conditionality can be dangerous when it undermines the aims of other policies, such as the ultimate goal of development policy, which is the eradication of poverty (art. 208 TFEU). Several studies have warned against the use of development funds for purely migratory issues(Carrera et al., 2018; Castillejo, 2016; den Hertog, 2016). Indeed, it has been argued in the past how the format already introduced by the Partnership Framework in 2016 fosters a connection between development aid and the third country's willingness to cooperate for the management of migration flows (Limone, 2017).This conditionality expands to other areas such as visa liberalization and trade and continues in the proposals of the new Pact. A clear example already codified is art. 25 a) of the Visa Code, where depending on the level of cooperation of a third country with the Member States on the readmission certain limitations can be imposed on nationals of that State. Establishing unfavourable conditions depending on the level of cooperation o readmission goes against the will of GCM to conclude mutually agreed agreements. However, the Pact seems to entrench this tendency, as it expressly foresees the possibility of applying restrictive visa measures to nationals of countries not cooperating on readmission. One of the innovations proposed by the Commission is the possibility to take "any measures" against a country that "is not cooperating sufficiently on the readmission of illegally staying third-country nationals" as it is stated in art. 7 of the proposed Regulation on Asylum and Migration management (European Commission, 2020). This type of measures can be taken against countries even if they refuse to readmit non-nationals who transited through their territory (Spijkerboer, 2021). It is debatable how all these positions seek to create an environment of mutual cooperation among equals or even whether visa conditionality measures can potentially be effective towards countries that already enjoy a very restricted regime at the present.

4- Provisional conclusions

Although the GCM is a non-binding text, it reflects a consensus on specific practices and standards for migration management that should not be undermined. It would be an exercise in hypocrisy to denigrate the GCM for its non-binding nature and at the same time use soft law instruments at the EU level to undermine the guarantees provided therein and already recognized in the EU's own legal system. In the interest of legal certainty, human rights protection should always be regulated through hard law instruments rather than soft law. The use of these instruments in migration matters and, more specifically, in readmission, lowers protection standards. However, within the framework of European law, the guarantees provided by the legislation itself should not be forgotten, and their full compliance should be demanded. Relations with third countries should be conducted in an atmosphere of joint cooperation, on an equal footing, and not introduce unacceptable conditionalities or disfigure the objectives of other policies for the sake of migration, as already happens with development aid or visa policy. The conclusion of informal agreements is yet another soft law practice that raises legal problems regarding the principles of institutional balance, transparency, and protection of human rights.

The example of Afghanistan serves to illustrate the trends in the field of EU cooperation on readmission and return. It can be noted how the protection standards are decreasing and the conditionality is growing even if the rates of return do not increase considerably. It may be necessary to open a discussion on the sacrifice that the use of soft law entails in terms of principles and legal certainty when the proposed return policy is not being effectively achieved. In the same way, liability in case of possible violations is diluted between non-formal texts, the intervention of member States' agents and FRONTEX itself, and the absence of legal certainty about the actionable process. Finally, although the GCM calls for greater legal certainty around return and readmission processes, current practices suggest that standards of protection are falling, and this trend is also reflected in the Pact. A loss of legal certainty is observed in the lack of processes for concluding readmission agreements informally and the difficulty of tracking possible human rights violations.

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