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Finding Its Place In Africa: Why has the EU opted for flexible arrangements on readmission?

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Cooperation on migration and border controls was at the centre of discussions during the [5th African Union-European Union Summit](#) held in Abidjan on 28-29 November 2017. This focus was predictable given the objectives that had already been prioritised at the [AU-EU Summit](#) held in Brussels in April 2014. Furthermore, we have seen the emergence of a number of policy and border ‘crises’ within the European bloc, including the reintroduction of intra-Schengen controls, vocal criticisms from some European political leaders regarding the ability of the EU to deal with irregular migration and the ascent of populist and nationalist political parties in the West. In a context marked by growing economic insecurity and resilient social inequalities, these factors combine to create a sense of emergency to which both the EU and European leaders had to reply.

It is against this backdrop that an array of policy dialogues and initiatives have been promoted over the last few years, comprising the [Rome Programme \(2015-2017\)](#) and the EU-Horn of Africa Migration Route Initiative (or [Khartoum Process](#)) dated November 2014, the May 2015 [European Agenda on Migration](#), the [Emergency Trust Fund for Africa](#) launched at the [Valletta Summit on Migration](#) in November 2015, the establishment of a new [Partnership Framework](#) with third countries in June 2016, the proposal of a revamped [partnership with the members of the African, Caribbean and Pacific Group of States](#) (or ACP countries) in November 2016, and finally, the July 2017 [Tunis Declaration](#).

Whilst analysis of the rationale behind these initiatives is beyond the scope of this brief, they deserve a mention given their impact on how the EU has dealt with a key component of its external action, namely, cooperation on readmission.

If we were to define the current common readmission policy of the EU in Africa, the words “flexibility”, “arrangements”, “non-legally binding” and “practical instruments” would be used repeatedly. Similarly, making an [inventory](#) based exclusively on the number of formal readmission agreements the EU has entered into with third countries would never suffice to illustrate the scope of its common readmission policy.

New informal arrangements dealing with readmission and readmission-related matters have indeed flourished. In a recent [letter](#) addressed to the Chair of the Committee on Civil Liberties, Justice and Home Affairs (LIBE Committee) of the European Parliament, the European Commission explained that:

Most third countries do not want to engage in negotiations on readmission agreements mainly due to internal political considerations, as such agreements can be a source of public hostility. As a result, the ongoing negotiations with Morocco and Algeria are at a standstill and those that were launched in 2016 with Nigeria, Jordan and Tunisia have not progressed as needed. The EU must therefore remain flexible on the form a cooperation framework takes, and focus on the feasibility of achieving results, while respecting international and European law. [...] Practical arrangements [...] also represent a first step in establishing mutual trust as well as towards the launch of formal negotiations for fully-fledged [EU] readmission agreements.

This explanation raises some necessary questions. Why should a flexible cooperative framework on readmission be more effective than a fully-fledged EU readmission agreement? Is cooperation on readmission contingent on “mutual trust” in the short to long-term? Are there other factors explaining why “ongoing negotiations with Morocco and Algeria are at a standstill” today? To what extent can a flexible cooperative framework on readmission overcome “internal political considerations” and “public hostility” in third countries? In this context, it is submitted, that there are perhaps additional (unavowed) factors in *domestic* EU policy that might explain in a more convincing manner the EU drive for flexible arrangements on readmission with African countries. These factors will now be discussed.

The added-value challenge

In 2002, when the [General Secretariat of the Council](#) (GSC) listed the key criteria that need to be taken into consideration in order to identify non-EU (or third) countries with which to negotiate EU readmission agreements, it underlined that EU readmission agreements “should involve added value for Member States in bilateral negotiations” with a given third country.

Since the entry into force of the [Treaty of Amsterdam](#) (ToA) in 1999 (that gave the European Commission the power to negotiate and conclude EU readmission agreements with third countries), adding value for Member States has not only been a key criterion in negotiations, as recommended by the GSC, it has also been a growing concern for the European Commission. Externally, negotiations with some third countries, especially with those located in the Southern Mediterranean have either been deferred or thorny. Internally, the European Commission has been confronted with growing criticisms by those who mandated it to negotiate readmission agreements, namely the EU Member States. However, such criticisms are not new in the history of EU institution-building. Invariably, since 1999, they have accompanied the creation and development of the [Common European Asylum System](#), including the need to adopt common rules and procedures aimed at protecting the fundamental rights of asylum-seekers and people in need of international protection. Member States’ criticisms have therefore been symptomatic of the resilient and unsolved tensions between bilateralism and supranationalism.

Powerful bilateralism: The centrality/periphery paradox

Arguably, the European Commission has been aware that providing added value to Member States’ *modus operandi* and practices as applied to readmission constitutes a daunting challenge. All the more so when realizing that, since 1999, its action has been powerfully embedded in a context marked by the predominance of bilateral patterns of cooperation on readmission. Various EU Member States had already concluded numerous bilateral agreements linked to readmission while adopting a [dual approach to their cooperation](#), based on both standard bilateral readmission agreements and non-standard bilateral arrangements (e.g., memoranda of understanding, exchanges of letters, police cooperation agreements including a clause on readmission and administrative arrangements).

Additionally, a number of EU Member States have learned that the conclusion of bilateral agreements, be they standard or not, does not necessarily lead to their full implementation. Readmission inevitably implies [unequal costs and benefits for the contracting parties](#), even if the terms of the agreement are framed in a reciprocal context. These aspects have been amply addressed by [scholars across disciplines](#). As a result of their long and varied experiences in the field, they have also learned that bringing pressure to bear on uncooperative third countries needs to be cautiously evaluated, lest other issues of high politics be jeopardized. For readmission cannot be isolated from a broader framework of interactions including other strategic, if not more crucial, issue-areas such as police cooperation on the fight against international terrorism, energy security, border controls and other diplomatic and geopolitical concerns. Exerting pressures on uncooperative third countries may even turn out to be a risky or counterproductive endeavour, especially when the latter may capitalize on their empowered position as applied to other strategic issue-areas.

Taking into consideration these past lessons is important to understand the complex reasons as to why the existence of an agreement does not automatically lead to its full implementation. Using an oxymoron, it is possible to state that, over the past decades, bilateral cooperation on readmission constitutes a central priority in EU Member States’ external relations which, at the same time, remains peripheral to other strategic issue-areas.

In other words, if readmission is rhetorically presented by various Member States as a top priority in domestic policy-making, it cannot be presented as *the* compelling priority in their bilateral interactions with strategic third countries. This is especially true when the latter are capable of defending their own vested interests and views. Some Member States have gained much experience in dealing with the abovementioned centrality/periphery paradox which often characterizes their bilateral cooperation on readmission. Arguably, these oft-overlooked considerations shed light on the European Commission’s decision, made in 2011, to [call](#) on the EU Member States to “support [its] readmission negotiating efforts more wholeheartedly and not lose sight of the overall interest that a concluded EU readmission agreement represents for the entire EU”.

The drive for flexibility

In a context marked by unsolved tensions between bilateralism and supranationalism, the European Commission set out to respond to the [added-value challenge](#) by building on the bilateral experiences of some EU Member States. This implied adhering gradually to the EU Member States' dual approach mentioned above. Admittedly, this idea had long been in the pipeline in Brussels. However, it found its full and explicit expression in the [April 2014 AU-EU Brussels Summit](#), and then in the November 2014 Rome Declaration. The 2016 [New Partnership Framework \(PF\)](#) and its "compacts" translated the initiative into an array of non-legally binding, tailor-made informal arrangements linked to readmission.

The new PF draws on the political declaration of the November 2015 Valletta Summit which, in its action plan, identified five priority domains on migration management with African countries including the need for "mutually agreed arrangements on return and readmission." Since then, various types of EU-wide arrangements have been agreed or are being negotiated under the umbrella of the PF. For example, Standard Operating Procedures (SOPs) for the identification and return of persons without authorization to stay are aimed at swiftly improving cooperation between national consulates in order to accelerate procedures for identification, redocumentation and readmission. Joint Migration Declarations (JMDs) on migration management deal with, among others, readmission and enhanced cooperation on the "timely delivery of travel documents". Common Agendas on Migration and Mobility (CAMMs) are described as non-exhaustive flexible frameworks for cooperation of mutual interest based on the principle of voluntary participation of the EU Member States. Joint Ways Forward (JWF) are not legally binding in the sense that, formally, they do not create legal rights or obligations for the contracting parties which cooperate on migration issues, especially on readmission. Finally, and similarly to SOPs, Good Practices (GPs) for the efficient operation of the return procedure define joint actions on identification, the delivery of consular laissez-passers and the transfer (namely the removal) of irregular migrants.

Implications: The grey zone

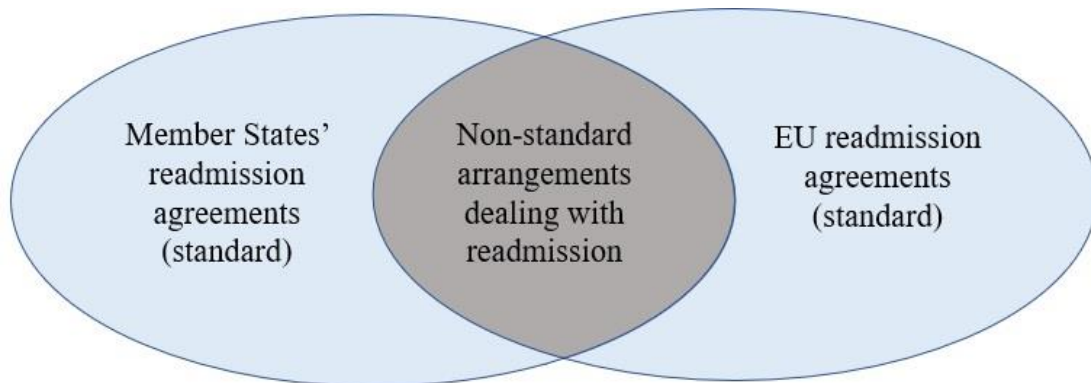
The drive for flexibility was a *fait accompli* at a bilateral level, when the 1999 ToA empowered the EU to negotiate and conclude supranational EU readmission agreements with third countries. Today, the drive for flexibility is also a *fait accompli* at the EU level. This alignment responds to the unavowed added-value challenge described above more than to the officially declared need for "practical cooperation".

Today, Member States' bilateral arrangements on readmission, on the one hand, and the new "compacts" resulting from the new EU-wide PF, on the other, share three common denominators:

1. They both reify the capacity of law-enforcement authorities and decision-makers to control legal and irregular migration while showing European constituencies that policy measures aimed at responding to "emergencies" and external shocks are, or can be adopted, whether or not their response is adequate.
2. Their rationale lies in making cooperation on readmission more flexible while avoiding lengthy ratification procedures and, consequently, parliamentary oversight, at both national and European levels. Technically, they do not fall within the scope of Article 218 of the Treaty on the Functioning of the European Union (TFEU) which regulates the adoption of international agreements in accordance with the ordinary legislative procedure (or co-decision procedure shared between the European Parliament and the Council) and with the Treaties. Practically, however, it seems that the commitments and intentions of the contracting parties explicitly mentioned in the various texts of these EU-wide arrangements call for closer scrutiny of their concrete implications for migrants' fundamental rights.
3. Atypical arrangements are not only beyond public purview, they are also deniable by the signatory parties when needed. Neither are they transparent when their concrete implementation can be subcontracted to non-state actors.

Reification, flexibility and deniability are useful concepts for capturing the rationale for the aforementioned EU-wide atypical arrangements on readmission. Perhaps, never before has bilateralism been so intertwined with supranationalism. Such policy developments have resulted in the emergence of a grey zone, as shown in the figure below, which is likely to grow in the near future.

The grey zone of intertwined bilateralism and supranationalism in the field of readmission



“The paramount priority [set by the EU] to achieve fast and operational returns, and not necessarily formal readmission agreements” starkly reflects a reconsideration of the EU’s approach to its common readmission policy. However, such a reconsideration may heighten inconsistencies and jeopardize the credibility of the EU in its claim to ensure and coordinate common and harmonized removal procedures in line with the Treaties. All the more so when realizing that the drive for flexibility turns the EU into a mere *facilitator* (not a supervisor) who lays the groundwork for highly variegated bilateral cooperative patterns. This is particularly the case when dealing with rules of identification and redocumentation of migrants, the effective protection of personal data, exchange of information between each Member State and a cooperative third country and, last but not least, with fair and legal remedy procedures.

Finally, in a readmission system where bilateralism continues to predominate, the European Commission is struggling to find its place while reinforcing its leverage in external relations. The extent to which Member States will wholeheartedly support the full implementation of these EU-wide non-legally binding atypical arrangements on readmission remains, however, an open question. For, as mentioned before, Member States know all too well that cooperation on readmission cannot be isolated from a broader framework of interactions with third countries including other strategic, if not more crucial, issue-areas. Third countries in Africa are no exception.

Flexible arrangements in EU Law

Adopting flexible arrangements on the readmission of migrants without following the procedures required by Article 218 [TFEU](#) - which include the democratic scrutiny of the Parliament - enhances legal (un)certainty on the terms of the accords; impedes proper democratic accountability and judicial oversight; subjects the operability of the agreements to the health of diplomatic relations; and also dilutes responsibilities and procedural safeguards. In doing so these flexible arrangements heighten the risk of fundamental rights violations for apprehended migrants and refugees.

As abovementioned, flexible EU-wide arrangements have been agreed or are being negotiated under the umbrella of the Partnership Framework (e.g., SOPs; JMDs; CAMMs; JWF, and GPs]. For instance, the EU Commission has made clear that the text of the [Joint Way Forward with Afghanistan](#) is not binding despite its wording, content and objectives being the same as any other standard EU readmission agreements. This arrangement is therefore “concluded” with the intention of bypassing the approval of the European Parliament, as required by virtue of Article 79 of the TFEU for the conclusion of international agreements for the readmission of third country nationals.

Another emblematic example of informalization can be seen in the [EU-Turkey deal](#), which took the form of a press ‘Statement’ published on the website of the European Council on 18 March 2016. In March 2017, the General Court of the Court of Justice of the European Union (CJEU) affirmed that it lacks jurisdiction to hear and determine the [actions of annulment](#) brought by three asylum seekers against the EU-Turkey deal. In its Order, the General Court considered that this press Statement, with which the EU communicated the new agreement, should be attributed only to the Heads of State or governments of the Member States of the EU, who met with the Turkish Prime Minister, and not to the

European Council itself. Therefore, in the absence of an act of a European institution, the Court considered to lack competence to adjudicate the case.

Under Article 218 TFEU, an international agreement in an area covered by the ordinary legislative procedure (migration being such an area), the Council of the European Union (not the European Council) shall adopt a decision on the negotiation of the agreement following recommendations by the Commission and should then conclude the agreement after receiving the consent of the European Parliament. Quite on the contrary, the EU-Turkey deal has seen only the involvement of the European Council, which is not part of the procedure set by Article 218 TFEU. The question of who would be responsible for fundamental rights breaches against migrants and asylum seekers thus remains unanswered.

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