

**THEMATIC COMMENT N° 2:
FUNDAMENTAL RIGHTS IN THE EXTERNAL ACTIVITIES
OF THE EUROPEAN UNION
IN THE FIELDS OF JUSTICE AND ASYLUM AND IMMIGRATION IN 2003***

4 February 2004

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The E.U. Network of Independent Experts on Fundamental Rights has been set up by the European Commission upon request of the European Parliament. It monitors the situation of fundamental rights in the Member States and in the Union, on the basis of the Charter of Fundamental Rights. It issues reports on the situation of fundamental rights in the Member States and in the Union, as well as opinions on specific issues related to the protection of fundamental rights in the Union. The content of these conclusions does not bind the European Commission. The Commission accepts no liability whatsoever with regard to the information contained in this document.

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Le Réseau UE d'Experts indépendants en matière de droits fondamentaux a été mis sur pied par la Commission européenne (DG Justice et affaires intérieures), à la demande du Parlement européen. Depuis 2002, il assure le suivi de la situation des droits fondamentaux dans les Etats membres et dans l'Union, sur la base de la Charte des droits fondamentaux de l'Union européenne. Chaque Etat membre fait l'objet d'un rapport établi par un expert sous sa propre responsabilité, selon un canevas commun qui facilite la comparaison des données recueillies sur les différents Etats membres. Les activités des institutions de l'Union européenne font l'objet d'un rapport distinct, établi par le coordinateur. Sur la base de l'ensemble de ces (26) rapports, les membres du Réseau identifient les principales conclusions et recommandations qui se dégagent de l'année écoulée. Ces conclusions et recommandation sont réunies dans un Rapport de synthèse, qui est remis aux institutions européennes. Le contenu du rapport n'engage en aucune manière l'institution qui en est le commanditaire.

Le Réseau UE d'Experts indépendants en matière de droits fondamentaux se compose de Elvira Baltutyte (Lituanie), Florence Benoît-Rohmer (France), Martin Buzinger (Rép. slovaque), Achilleas Demetriades (Chypre), Olivier De Schutter (Belgique), Maja Eriksson (Suède), Teresa Freixes (Espagne), Gabor Halmai (Hongrie), Wolfgang Heyde (Allemagne), Morten Kjaerum (Danemark), Henri Labayle (France), M. Rick Lawson (Pays-Bas), Lauri Malksoo (Estonie), Arne Mavcic (Slovénie), Vital Moreira (Portugal), Jeremy McBride (Royaume-Uni), Bruno Nascimbene (Italie), Manfred Nowak (Autriche), Marek Antoni Nowicki (Pologne), Donncha O'Connell (Irlande), Ian Refalo (Malte), Martin Scheinin (suppléant Tuomas Ojanen) (Finlande), Linos Alexandre Sicilianos (Grèce), Dean Spielmann (Luxembourg), Pavel Sturma (Rép. tchèque), Ineta Ziemele (Lettonie). Le Réseau est coordonné par O. De Schutter, assisté par V. Verbruggen.

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The EU Network of Independent Experts on Fundamental Rights is composed of Elvira Baltutyte (Lithuania), Florence Benoît-Rohmer (France), Martin Buzinger (Slovak Republic), Achilleas Demetriades (Cyprus), Olivier De Schutter (Belgium), Maja Eriksson (Sweden), Teresa Freixes (Spain), Gabor Halmai (Hungary), Wolfgang Heyde (Germany), Morten Kjaerum (Denmark), Henri Labayle (France), M. Rick Lawson (the Netherlands), Lauri Malksoo (Estonia), Arne Mavcic (Slovenia), Vital Moreira (Portugal), Jeremy McBride (United Kingdom), Bruno Nascimbene (Italy), Manfred Nowak (Austria), Marek Antoni Nowicki (Poland), Donncha O'Connell (Ireland), Ian Refalo (Malta), Martin Scheinin (substitute Tuomas Ojanen) (Finland), Linos Alexandre Sicilianos (Greece), Dean Spielmann (Luxemburg), Pavel Sturma (Czech Republic), Ineta Ziemele (Latvia). The Network is coordinated by O. De Schutter, with the assistance of V. Verbruggen.

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CONTENTS

INTRODUCTION.....	7
I. THE APPLICABILITY OF THE CHARTER OF FUNDAMENTAL RIGHTS TO THE EXTERNAL DIMENSION OF THE EU’S ACTIVITIES.....	9
The EU Charter covers all activities of the Union.....	9
The EU Charter imposes a general obligation to prevent violations of fundamental rights.....	10
The protection of fundamental rights after the conclusion of a treaty.....	11
II. CONTEXT OF THIS THEMATIC COMMENT.....	12
III. THE CONCLUSION OF AGREEMENTS ON EXTRADITION AND MUTUAL LEGAL ASSISTANCE BETWEEN THE EUROPEAN UNION AND THE UNITED STATES OF AMERICA.....	13
Procedures for the conclusion of international agreements in the relevant areas of Title VI of the Treaty on European Union.....	14
Monitoring procedures for international agreements relating to respect for fundamental rights.....	15
Conclusion.....	17
IV. THE CONCLUSION OF AGREEMENTS FOR THE READMISSION OF THIRD COUNTRY NATIONALS TRAVELLING THROUGH THE EUROPEAN UNION AND MEMBER STATES.....	18
The context of the conclusion of readmission agreements with third countries.....	18
Identification of third countries targeted by readmission agreements.....	19
Formulation of the national and Community competences in the area of readmission agreements.....	20
V. RISK OF INFRINGEMENT OF FUNDAMENTAL RIGHTS IN THE AREA OF CRIMINAL JUDICIAL CO-OPERATION WITH THE UNITED STATES.....	21
The requirements of fair trial.....	21
Death penalty.....	23
Irreducible sentences.....	25
VI. RISK OF VIOLATION OF FUNDAMENTAL RIGHTS IN THE EUROPEAN POLICY OF RETURN TO THIRD COUNTRIES.....	25
Principles of respect for fundamental rights in return procedures.....	25
Risks of infringement of fundamental rights posed by return procedures.....	27
Introduction of the concepts of “safe third country” and “safe country of origin” in return procedures.....	28
Readmission to “safe countries of origin”.....	29
Readmission to “safe third countries”.....	30
“Safe third countries”.....	30
“First country of asylum”.....	31
“Neighbouring safe third country”.....	32
Procedural implications of these distinctions.....	32
Readmission and the devolution of responsibilities in the area of international protection.....	33
VII. CONCLUSIONS.....	36

INTRODUCTION

The EU Network of Independent Experts on Fundamental Rights has decided to focus its Thematic Comment n°2, concerning the year 2003, on the exercise by the Union or the Community of their external competences in the fields of justice and asylum or immigration. This choice takes into account the growing importance of this dimension of the activities of the Union in Justice and Home Affairs, as manifested by the conclusion between the European Union and the United States of America of two agreements, respectively on extradition¹ and on mutual legal assistance², and by the use made by the European Community of its new competences in the field of immigration policy³, in combination with its parallel external powers, by the conclusion of readmission agreements.

The Network has consistently held that the EU Charter of Fundamental Rights, as an instrument for the protection of human rights, should be interpreted and applied in accordance with the general principles of the international law of human rights. This entails that the Charter necessarily impacts upon the external dimension of the activities of the Union, and should be taken into account in the exercise of the treaty-making powers of the EC/EU. The argument is detailed in part I of the Thematic Comment. Part II then recalls the context of this Thematic Comment, explaining further why the Network considered that this area called for a specific analysis in 2003, and constituted an adequate follow-up on the Thematic Comment n°1 on the balance between freedom and security in the adoption of counter-terrorism measures by the European Union and its Member States. Part III analyses the process which led to the conclusion of the agreements between the European Union and the United States of America on extradition and mutual legal assistance. Part IV analyses the process which led to the current situation concerning the conclusion of readmission agreements with third States, either by the European Community or by the Member States. Focussing on the requirements of fair trial, on the question of the death penalty and on the question of life imprisonment without any possibility of early release, Part V examines which questions are raised by the conclusion of the agreements on extradition and on mutual legal assistance with the United States of America. Part VI examines the fundamental rights issues raised by the conclusion of readmission agreements. Part VII concludes that the requirements of fundamental rights, as derived from the Charter of Fundamental Rights and the international law of human rights, should be more explicitly taken into account in the negotiation and conclusion of international agreements by the Union/Community. The conclusion warns against the present tendency of leaving it to the Member States to ensure the compatibility with fundamental rights of the practices implementing the international agreements concluded in the fields of justice and home affairs. It advocates a more preventive, and proactive, approach, in line with the proposal made in the introductory part of the Report on the situation of fundamental rights in the European Union in 2003 prepared by the Network.

¹ OJ L 181 of 19.7.2003, p. 27.

² OJ L 181 of 19.7.2003, p. 34.

³ Article 63, al. 1, 3), EC.

I. THE APPLICABILITY OF THE CHARTER OF FUNDAMENTAL RIGHTS TO THE EXTERNAL DIMENSION OF THE EU'S ACTIVITIES

The argument that the Charter of Fundamental Rights should be fully respected in the exercise by the Union or the Community of their external competences is based on the following considerations:

1. The Charter addresses *all* activities of the institutions and bodies of the Union, without excluding specific policy areas or types of activities. This implies that the Union institutions, when negotiating or concluding a treaty, should be guided by the rights and freedoms in the same way as when engaging in 'domestic' policies.
2. In accordance with general principles of international law, any good faith application of a human rights instrument entails a general obligation to *prevent* violations thereof. Reasonable and appropriate measures must be taken to avoid breaches of human rights. Hence, if there is a real risk that the adoption and subsequent implementation of a treaty would lead to violations of human rights, then *effective* respect for human rights requires that the draft will be amended so as to take away the danger.
3. Where contracting parties fail to take human rights properly into account, or where a treaty unexpectedly leads to infringements of human rights, the parties concerned can be held responsible for the latter violations: the obligation to secure the enjoyment of human rights and fundamental freedoms simply continues to exist after the conclusion of a treaty with third parties.

The EU Charter covers all activities of the Union.

Article 51 of the EU Charter of Fundamental Rights provides, *inter alia*, that "the institutions and bodies of the Union ... shall respect the rights, observe the principles and promote the application thereof". The EU Network of Independent Experts in Fundamental Rights notes that no policy areas are excluded from this general obligation, and that there is no indication that there are specific types of activities where the institutions and bodies of the Union would be released from their obligation to respect the rights of the Charter. This implies that the Charter applies with equal force to the Union institutions and bodies when negotiating or concluding a treaty.

It is well-established in public international law that the responsibility of a State may arise for acts of *all* its organs, agents and servants.⁴ Moreover, the European Court of Human Rights has confirmed that Article 1 ECHR, which requires the States Parties to secure for everyone within their jurisdiction the rights and freedoms defined in the Convention, "makes no distinction as to the type of rule or measure concerned". The Court insisted that Article 1 ECHR "does not exclude any part of the member States' 'jurisdiction' from scrutiny under the Convention. It is, therefore, with respect to their 'jurisdiction' as a whole – which is often exercised in the first place through the Constitution – that the States Parties are called on to show compliance with the Convention".⁵

This implies that a State party to the Convention would also be bound by its provisions when it is exercising its 'jurisdiction' by negotiating or concluding a treaty – irrespective of whether the other States involved in the negotiations are also parties to the Convention. In the opinion of the EU Network of Independent Experts on Fundamental Rights, the same principle applies to the Union,

⁴ See for instance Article 4 ILC Articles on State Responsibility (as adopted in 2001); Eur. Comm. HR, 25 January 1976, Ireland v. United Kingdom (5310/71, Yearbook 19, p. 758); ECtHR, 26 October 1988, Martins Moreira v. Portugal (11371/85; Series A vol. 143), para. 60; ECtHR, 20 March 1997, Lukanov v. Bulgaria (21915/93; Reports 1997, 543), para. 40; ECtHR, 28 October 1999, Wille v. Liechtenstein (28396/95; Reports 1999-VII, 279), para. 46.

⁵ ECtHR, 30 January 1998, United Communist Party of Turkey (TBKP) a.o. v. Turkey (19392/92; Reports 1998, 1), para. 29; ECtHR, 18 February 1999, Matthews v. United Kingdom (24833/94; Reports 1999-I, 251), para. 29.

whose institutions have undertaken to abide by the EU Charter of Fundamental Rights: when negotiating and concluding a treaty, the Union institutions should be guided by the rights and freedoms as laid down in the EU Charter in the same way as when they engage in ‘domestic’ policies. The EU Network of Independent Experts in Fundamental Rights notes, moreover, that Article 11 TEU states that one of the objectives of the Union’s common foreign and security policy is “to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms”. It would be difficult to deny that the EU Charter of Fundamental Rights is *the* obvious standard of reference of the Union’s policy in this area.

The EU Charter imposes a general obligation to prevent violations of fundamental rights

Article 19 of the EU Charter of Fundamental Rights codifies an important principle of migration law: “nobody may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or inhuman or degrading treatment or punishment”. This precautionary principle was introduced by the European Court of Human Rights in the *Soering* case (1989):

“the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where *substantial grounds* have been shown for believing that the person concerned, if extradited, faces a *real risk* of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country”.⁶

A similar approach has been followed by the UN Human Rights Committee.⁷

The duty to prevent violations of fundamental rights has been considerably developed since *Soering*. In 1998 the Court accepted that in certain well-defined circumstances there is a “positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk”.⁸ The same principle applies in the context of the right to physical integrity.⁹ In 2003, the Court’s Grand Chamber referred in very broad terms to a “power of preventive intervention on the State’s part [which] is also consistent with Contracting Parties’ positive obligations under Article 1 of the Convention to secure the rights and freedoms of persons within their jurisdiction”.¹⁰

The European Convention on Human Rights is therefore opposed to States parties negotiating and concluding a treaty, where there are “substantial grounds” for believing that there is a “real risk” that the treaty, once implemented, will lead to violations of fundamental rights. To enter into such an engagement would not be compatible with a *bona fide* application of the European Convention on Human Rights. The EU Network of Independent Experts on Fundamental Rights considers that the same reasoning should apply, *mutatis mutandis*, to the EU Charter: it must be considered to prevent Union institutions from engaging in such treaties. This prohibition is even more compelling where the international agreement is capable of directly affecting the individual’s rights and freedoms.

The EU Network of Independent Experts on Fundamental Rights sees a confirmation of this position in the decision of the European Commission of Human Rights in the case of *M. & Co.*: “the transfer of powers to an international organisation is not incompatible with the Convention provided that within that organisation fundamental rights will receive an equivalent protection”.¹¹ The transfer of powers to an international organisation takes place by treaty. The European Convention on Human Rights is not

⁶ ECtHR, 7 July 1989, *Soering v. United Kingdom* (Appl. No. 14038/88; Series A vol. 161), para. 91.

⁷ HRC, 5 August 2003, *Judge v. Canada* (Comm. No. 829/1998).

⁸ ECtHR, 28 October 1998, *Osman v. United Kingdom* (23452/94; Reports 1998, 3124), para. 115; ECtHR, 9 June 1998, *L.C.B. v. United Kingdom* (23413/94; Reports 1998, 1390), para. 36.

⁹ ECtHR, 10 October 2002, *D.P. & J.C. v. United Kingdom* (38719/97), para. 109.

¹⁰ ECtHR, 13 February 2003, *Refah Partisi a.o. [Welfare Party] v. Turkey* (Grand Chamber) (41340/98 a.o.), para. 103.

¹¹ ECommHR, 9 February 1990, *M & Co. v. Germany* (admissibility decision) (13258/87; D&R 64, 138).

opposed to the conclusion of such a treaty, provided that the risk of future violations is avoided. The duty to prevent violations takes the shape of a duty to ensure “an equivalent protection” of the rights and freedoms under the new treaty’s regime.

The protection of fundamental rights after the conclusion of a treaty.

The European Court of Human Rights also has confirmed that the obligation to secure the enjoyment of human rights and fundamental freedoms continues to exist after the conclusion of a treaty with a third State. Already in 1958 the European Commission of Human Rights noted:

“If a State contracts treaty obligations and subsequently concludes another international agreement which disables it from performing its obligations under the first treaty it will be answerable for any resulting breach of its obligations under the earlier treaty”.¹²

The reason behind this approach is simple: parties should not be allowed to unilaterally avoid their obligations under the Convention by entering into agreements with third parties. Thus, where contracting parties fail to take human rights properly into account, or where a treaty leads to infringements of human rights, the parties concerned may be held responsible for the latter violations. The obligation to secure the enjoyment of human rights and fundamental freedoms continues to exist after the conclusion of a treaty with third parties.

In the case of *M. & Co.*, which was already mentioned above, the Commission took the same approach, this time in the specific context of a treaty whereby powers are transferred to an international organisation:

“A transfer of powers does not necessarily exclude a State’s responsibility under the Convention with regard to the exercise of the transferred powers. Otherwise the guarantees of the Convention could wantonly be limited or excluded and thus be deprived of their peremptory character”.¹³

More recent confirmation was given by the European Court of Human Rights in two judgments of 1999 regarding the attribution to certain international organisations of competences and immunities that may have implication as to the protection of fundamental rights:

“Where States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution. It should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective”.¹⁴

The Court underlined:

“The Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be “secured”. Member States’ responsibility therefore continues even after such a transfer”.¹⁵

Along similar lines, the fact that a party is ‘merely’ executing its obligations under a treaty does not diminish its obligations under applicable human rights treaties.¹⁶

¹² ECommHR, 10 June 1958, *X v. Germany* (admissibility decision) (235/56, Yearbook 2 p. 300).

¹³ ECommHR, 9 February 1990, *M & Co. v. Germany* (admissibility decision) (13258/87; D&R 64, 138).

¹⁴ ECtHR, 18 February 1999, *Waite & Kennedy v. Germany* (26083/94; Reports 1999-I, 393), para. 67. Confirmed, in the context of the Dublin Convention – i.e. an international agreement –, in ECtHR, *T.I. v. United Kingdom* (43844/98; adm. dec.).

¹⁵ ECtHR, 18 February 1999, *Matthews v. United Kingdom* (24833/94; Reports 1999-I, 251), para. 32.

The EU Network of Independent Experts in Fundamental Rights considers that the same approach should be adopted vis-à-vis the EU Charter of Fundamental Rights. If Article 51 of the Charter provides that the institutions and bodies of the Union “shall respect the rights, observe the principles and promote the application thereof”, then this obligation should not be escaped from, or limited in the protection it affords to the individual, by the fact that the Union has chosen to enter into international agreements with third parties.

It is in the light of these considerations concerning the obligations which the Charter of Fundamental Rights imposes that the EU Network of Independent Experts on Fundamental Rights examined the conclusion of bilateral agreements between the European Union and the United States of America concerning extradition and mutual legal assistance¹⁷, as well as the question of the readmission of illegal foreign nationals in a Member State of the Union through specific agreements with third countries. The EU Network of Independent Experts on Fundamental Rights considers that the importance which the external dimension of European Union action has acquired over the last few years in the area of security and justice justifies a detailed scrutiny of the respect for the fundamental rights enshrined in the Charter of Fundamental Rights.

II. CONTEXT OF THIS THEMATIC COMMENT

The emergence of the external dimension of the area of freedom, security and justice is to be found at the start of the conclusions of the Tampere Council, which call upon the Council to make full use of the possibilities offered by the Treaty, in particular those set out in Title V EU on common foreign and security policy. The European Councils of Santa Maria de Feira in June 2000¹⁸ and of Laeken in December 2001¹⁹ gave definite shape to this option. The events of 11 September 2001 accelerated the adoption of instruments to this effect, in the areas of security as well as of immigration. One of the immediate consequences of these events was the emergence of the principle of police and judicial cooperation with the United States in the form of two bilateral agreements. The attacks of 11 September 2001 led to a request from the United States of America to “explore the possibilities of a formal agreement with the European Union on judicial cooperation in criminal matters”. This was politically relayed at the informal Justice and Home Affairs Council of Santiago de Compostella in February 2002 before a mandate for negotiation was fixed during the Spanish presidency. At the same time, serious differences between the Member States at the European Council in Seville on the issue of combating illegal immigration led to a call to step up efforts at the external level in order to stem the influx of immigrants on the one hand and to remove illegal third country nationals from the territory of the European Union on the other²⁰.

The mechanisms examined in this Thematic Comment are not new. Repressive bilateral agreements and readmission agreements are known procedures. The novelty of the present situation, which has caught the attention of the EU Network of Independent Experts on Fundamental Rights, lies in the action taken in these areas by the European Union, which it currently shares with the Member States. It is indeed important that when the European Union takes action on behalf of its Member States in certain areas of external action linked to issues of justice and home affairs, this does not lead to a lowering of standards in respect of fundamental rights, despite the fact that the Union is not linked internationally to the same international instruments for the protection of human rights that are presently binding on the Member States. The emergence of an external dimension of Union policy in the areas of justice and home affairs is today leading to a debate on the demarcation of the respective

¹⁶ See for instance ECtHR, 15 November 1996, *Cantoni France* (17862/91; Reports 1996, 1614): “The fact (...) that Article L. 511 of the Public Health Code is based almost word for word on Community Directive 65/65 (...) does not remove it from the ambit of Article 7 of the Convention” (para 30).

¹⁷ OJ L 181 of 19.7.2003, pp. 27 and 34.

¹⁸ Recital 51 of the conclusions of the Council of 19 June 2000, Press Release no. 200/1/00

¹⁹ Recital 37 of the conclusions of the Council of 14 and 15 December 2001, Press Release 300/1/01

²⁰ Recital 33 of the conclusions of the Council, 21 and 22 June 2002, Doc.13463/02 (revised version), doc. 13463/02 of 24 October 2002

responsibilities of the European Union and the Member States at the international level with respect to the observance of fundamental rights. There is a risk that the Union and its Member States will offload this responsibility to one another, so that eventually neither the Union nor its Member States consider themselves obliged to take this responsibility.

III. THE CONCLUSION OF AGREEMENTS ON EXTRADITION AND MUTUAL LEGAL ASSISTANCE BETWEEN THE EUROPEAN UNION AND THE UNITED STATES OF AMERICA

The Agreements on Extradition and Mutual Legal Assistance between the European Union and the United States of America²¹ must be analyzed taking into account the need affirmed by the European Court of Human Rights in the case of *Soering*, for:

“a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights (...). As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition. These considerations must also be included among the factors to be taken into account in the interpretation and application, in extradition cases [of the European Convention on Human Rights]”²².

This led the Court to declare:

“the Convention does not prevent cooperation between States, within the framework of extradition treaties or in matters of deportation, for the purpose of bringing fugitive offenders to justice, provided that it does not interfere with any specific rights recognized in the Convention”²³.

The United States of America are linked with several Union Member States by extradition or judicial cooperation agreements.

In extradition matters, there are the bilateral agreements with Portugal (1908), Greece (1931), Spain (1970), Sweden (1961), Denmark (1972), Finland and the United Kingdom (1976 and 2003), Germany (1978), the Netherlands (1980), Ireland and Italy (1983), Belgium (1987), France and Luxembourg (1996), and Austria (1998).

In matters of judicial cooperation, 11 Union Member States have already signed or ratified a treaty for mutual legal assistance with the United States (Mutual Legal Assistance Agreement), namely Austria (signed in 1995, effective in 1998), Belgium (1988/2000), France (1998), Greece (1999/2001), Spain (1990/1993), Italy (1982/1985), Ireland (2001), Luxembourg (1997/2001), Sweden (2001), the Netherlands (1981/1983) and the United Kingdom (1994/1996).

The substitution of the two agreements concluded by the European Union to these bilateral agreements induces us to compare the guarantees that usually accompany the conclusion of such international agreements by the Member States with the mechanisms in place within the European Union.

²¹ Agreement on extradition between the European Union and the United States of America, OJ, 19 July 2003, L181, p. 27; Agreement on mutual legal assistance between the European Union and the United States of America, OJ, 19 July 2003, L181, p. 34.

²² ECtHR, *Soering v. United Kingdom*, judgment of 7 July 1989, Series A n°161, para.89.

²³ ECtHR, *Stocké v. Germany*, judgment of 12 October 1989, Series A n°199, para. 167 and 169, cited by ECtHR, *Ocalan v. Turkey*, judgment of 12 March 2003, application no. 46221/99 para. 88.

Procedures for the conclusion of international agreements in the relevant areas of Title VI of the Treaty on European Union

In the Member States of the European Union, the conclusion of international agreements generally involves a parliamentary stage, where Parliament supervises the executive and gives its consent to the conclusion of treaties. This is particularly the case in matters linked to individual freedoms, such as extradition and judicial cooperation.

At European Union level, the procedure for concluding international agreements in the relevant areas of Title VI of the Treaty on European Union (judicial cooperation in criminal matters) is based on the combined Articles 24 and 38 EU. Article 38 EU provides that the relevant matters of Title VI of the Treaty on European Union may give rise to the conclusion of agreements such as those referred to in Article 24 EU. The latter provision was amended by the Treaty of Nice, which became effective on 1 February 2003. As it is currently formulated, it reads as follows:

1. When it is necessary to conclude an agreement with one or more States or international organisations in implementation of this title, the Council may authorise the Presidency, assisted by the Commission as appropriate, to open negotiations to that effect. Such agreements shall be concluded by the Council on a recommendation from the Presidency.

The Council shall act unanimously when the agreement covers an issue for which unanimity is required for the adoption of internal decisions.

3. When the agreement is envisaged in order to implement a joint action or common position, the Council shall act by a qualified majority in accordance with Article 23(2).

4. The provisions of this Article shall also apply to matters falling under Title VI. When the agreement covers an issue for which a qualified majority is required for the adoption of internal decisions or measures, the Council shall act by a qualified majority in accordance with Article 34(3).

5. No agreement shall be binding on a Member State whose representative in the Council states that it has to comply with the requirements of its own constitutional procedure; the other members of the Council may agree that the agreement shall nevertheless apply provisionally.

6. Agreements concluded under the conditions set out by this Article shall be binding on the institutions of the Union.

The EU Network of Independent Experts on Fundamental Rights observes that agreements concluded under the conditions defined in Article 24 EU are binding on the European Union as such, although the Member States are equally obliged to abide by them, except in the case referred to in Article 24(5)EU. The international agreements referred to by Articles 24 and 38 of the Treaty on European Union are agreements concluded by the “Council”, which is one of the institutions of the European Union, and forms part of the “single institutional framework” common to the Union and the Communities on which it is founded²⁴. Article 5 of the Treaty on European Union specifies that the Council, like the other institutions of the European Union, “shall exercise its powers under the conditions and for the purposes provided for, on the one hand, by the provisions of the Treaties establishing the European Communities and of the subsequent Treaties and Acts modifying and supplementing them and, on the other hand, by the other provisions of this Treaty”. The Council, which is empowered to conclude international agreements by virtue of Articles 24 and 38 of the Treaty on European Union, acts here as an institution of the European Union. Similarly, the Presidency, which the Council can authorize to enter into negotiations, acts here as “representing the Union in

²⁴ See Article 1, par. 3, and Article 3, par. 1, EU

matters coming within the common foreign and security policy²⁵. Like common actions or common positions²⁶, these international agreements are presented as acts by the Union, and not by individual Member States which resort to the Union as a framework for cooperation.

In its version in the Treaty of Amsterdam, Article 24 of the Treaty on European Union provides that international agreements are concluded unanimously by the Council. This is no impediment to the observation that these agreements are binding on the Union as such. Moreover, it should be noted that, despite this unanimity requirement, certain Member States may abstain without this preventing the agreement from being adopted. The abstaining State may also make a formal declaration that exempts it from applying the decision, “but shall accept that the decision *commits the Union*”²⁷.

Article 24(5) of the Treaty on European Union provides, “No agreement shall be binding on a Member State whose representative in the Council states that it has to comply with the requirements of its own constitutional procedure”²⁸. This means that, like international agreements concluded by the European Community²⁹, international agreements concluded by the Union are not only binding on the latter, but also on the Member States which, duty bound to cooperate loyally with the European Union, must enable the latter to meet its international commitments. No different conclusion can be drawn from Declaration no. 4 on Articles J 14 and K 10 (now Articles 24 and 38 EU) annexed to the Final Act of the Treaty of Amsterdam, according to which these provisions and any agreements resulting from them “shall not imply any transfer of competence from the Member States to the European Union”. This point is simply meant to confirm that, by concluding international agreements, the Union cannot extend the competences that have been accorded to it by the Treaty from which it emerged. This limitation ensues from the very principle of the particularity of the legal personality of an international organization.

Following the amendments made to Article 24 of the Treaty on European Union by the Treaty of Nice, where it concerns the implementation, through the conclusion of an international agreement, of a common action or a common position adopted in the context of Title V of the Treaty on European Union, or where, in the context of Title VI of the Treaty on European Union, the international agreement concerns an issue for which only a qualified majority is required in the Council, a qualified majority suffices to allow the Council to conclude an agreement with one or several States or international organizations. Moreover, the new Article 24(6) of the Treaty on European Union adds, “Agreements concluded under the conditions set out by this Article shall be binding on the institutions of the Union”. This clearly confirms the capacity of the Union to conclude international treaties³⁰, and asserts its international legal personality³¹.

Monitoring procedures for international agreements relating to respect for fundamental rights

Since the Union can commit itself alone towards the United States, independently of the commitments of the Member States acting individually, no action is required from the Member States for the Union to conclude an international agreement. The responsibility for ensuring that the fundamental rights will be preserved in the context of such an agreement therefore rests entirely with the institutions of the Union.

²⁵ Article 18 para. 1 EU.

²⁶ See Articles 14 and 15 EU.

²⁷ Article 23 (1) par. 2 EU.

²⁸ See Article 24(4) EU.

²⁹ In the wording of Article 300 (7) EC, “Agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States”.

³⁰ See document “The European Union’s capacity for action” by the Legal Service of the Council of the European Union, SN 1628/00, 16 February 2000.

³¹ International Court of Justice, Advisory Opinion of 11 April 1949 concerning “Reparation for injuries suffered in the service of the United Nations”, Reports 1949, p. 174.

Of course, Article 24(5) EU allows the Member States to monitor to a certain extent the obligations that ensue for them from international agreements concluded by the Union. The Member States have adopted diverse attitudes in this respect following the signature on 6 June 2003 by the European Union and the United States of America of the two agreements on extradition and mutual legal assistance with the United States³². The Greek government considered that it did not need to refer these agreements to Parliament. France concluded that it could not refer them to the National Assembly. Austria, which considered that these agreements did not require parliamentary ratification in the legal sense of the word, thought that it did not have to rely upon Article 24(5) EU, but nevertheless did refer them to Parliament for information in accordance with Article 23e of its Constitution. This also happened in the United Kingdom, and should take place in Spain. On the other hand, Finland has initiated a ratification procedure for both those agreements. Such a procedure should also be initiated by the Federal Republic of Germany in accordance with Article 59(2) of the Basic Law, by Italy in accordance with Article 80 of its Constitution, as well as by the Kingdom of Belgium, Ireland and Luxembourg. Sweden has also announced that it will prepare a bill in this sense³³.

It emerges from the very terms of Article 24 EU that neither the Commission (although it may be involved in the negotiation), nor the European Parliament are involved in the procedure leading to the conclusion of international agreements in the name of the Union. Moreover, the Court of Justice of the European Communities cannot be requested to give an opinion on the compatibility of the planned agreement with the Treaty on European Union³⁴, and it has no control whatsoever over such an agreement subsequent to its adoption³⁵. The procedure is therefore exclusively in the hands of the executives of the Member States in the Council. This is also the case with the agreements signed with the United States on 6 June 2003 on extradition and mutual legal assistance. These agreements were concluded in the absence of any control by the European Parliament and, therefore, without a public debate, despite the reservations that have been expressed with regard to certain aspects of the administration of justice in the United States and the compatibility with the fundamental rights of certain measures taken by that State in the fight against terrorism.

The way these agreements have been concluded has provoked reactions from certain national parliaments, notably in France³⁶ and the United Kingdom. The Select Committee on European Union of the House of Lords expressed itself in the following terms with regard to the attitude of the executive of the Union and its own administration:

“We must record our opinion that the decision of the Presidency to retain the ‘confidential’ classification on these Agreements after the negotiations between the EU and the US had been concluded and their content had been agreed both by the EU Member States and by the US was unnecessary and contrary to the democratic accountability that ought to inform decisions by EU institutions regarding access to documents.

The decision was also, of course, inimical to the proper conduct of scrutiny procedures by national Parliaments and was responsible for the time constraints within which the Committee had to carry out its scrutiny. The decision is especially regrettable in the context of the effective parliamentary scrutiny of multilateral Treaties. It is in marked contrast to the position in the United States where the Senate advises on and consents to the ratification of Treaties that are not self-executing. We express the hope that in future a clearer understanding of the requirements and importance of open government will prevail”³⁷.

³² Council Decision 2003/516, OJ, 19 July 2003 L181 p. 25.

³³ Ministry of Justice, Democracy Department, Ju2003/9147/D, 8 December 2003, p. 1.

³⁴ Compare, in the context of the EC Treaty, with Article 300 (6) EC

³⁵ The Court of Justice may, however, verify whether an agreement concluded by reliance upon Article 24 EU does not encroach upon the competences of the European Community: ECR, 12 May 1998, Commission v. Council, C-170/96, ECR, p. I-2763. For the rest, Article 46 EU does not extend its competence to acts adopted under Title V of the Treaty on European Union, including where international agreements are concerned.

³⁶ See National Assembly, Delegation for the European Union, Report by D. Quentin on judicial cooperation between the European Union and the United States of America, 2003, n°716 p. 26.

³⁷ House of Lords, Select Committee on the European Union, Session 2002-03, 38th Report, r 153, EU/US Agreements on Extradition and Mutual Legal Assistance, 15 July 2003, p. 8.

This concern is in line with those which the European Parliament had expressed at the outset, where it wished to be consulted on draft agreements despite the fact that the Treaty is silent on this possibility³⁸ and expressed the regret that it had not been fully informed about what in its opinion fell within the scope of the “fundamental choices” of the Union³⁹.

The lack of transparency and parliamentary debate at the European level has been further underscored by the fact that, in most Member States, the national parliaments have been excluded from the procedure. In France, the traditional procedure for the approval and ratification of international agreements involves, in principle, the intervention of Parliament on the basis of Article 53 of the Constitution, accompanied where necessary by a preventive constitutionality review by the Constitutional Court (Conseil Constitutionnel). The French Council of State, however, considered in an opinion delivered on 7 May 2003 that the French Parliament did not have to give its authorization to ratify, and that its only option, in case of doubt by the French government, was to oppose the application of the text. These agreements have therefore been deprived of effective parliamentary control. This provoked protest from the National Assembly⁴⁰ and the Senate⁴¹. In Greece, the government refused to transmit the agreements to the Greek Parliament, stating the responsibilities incumbent upon it on account of its Presidency of the European Union. The Greek National Human Rights Commission therefore chose to take the initiative to examine the wording of the agreements in accordance with Act no. 2667/1998. The Commission unanimously concluded that certain provisions of the agreements needed to be re-examined because of their impact on the fundamental rights⁴².

Conclusion

It emerges from this organization of the relations between the European Union and the Member States in the conclusion of international agreements that the responsibility for ensuring that those agreements contain the necessary guarantees in the area of fundamental rights is definitely incumbent on the Member States. However, the consequences are twofold: the lack of unity in European Union law and the risk of conflict with the standards adopted by the Member States.

It should also be remembered that the agreements on extradition and mutual legal assistance concluded between the European Union and the United States of America are complementary to the bilateral agreements in existence at the time of conclusion of the agreements. Neither do they preclude the conclusion of future bilateral agreements, which however are assumed to be in conformity with the agreements that are binding on the Union, implying that they cannot diminish the guarantees contained therein⁴³. Finally, in order to avoid any doubt as to the legal validity of the agreements between the European Union and the United States of America, it is provided that each Member State distinctly confirms its commitment towards the United States. Article 3(2)(a) of the agreement on extradition provides, “The European Union, pursuant to the Treaty on European Union, shall ensure that each Member State acknowledges, in a written instrument between such Member State and the United States of America, the application, in the manner set forth in this Article, of its bilateral extradition treaty in force with the United States of America”.

In fact, while the guarantees contained in the agreements concluded between the European Union and the United States of America refer to the earlier bilateral agreements between the Member States and

³⁸ See the Resolution of the European Parliament on judicial cooperation between the European Union and the United States of America in the fight against terrorism, B5-0813/2001, OJ C 177 of 25.7.2002, p. 288.

³⁹ Report by J. Hernandez Mollar, A5-0172/2003, 22 May 2003, and the Recommendation of the European Parliament to the Council on these points, 2003 (0239) of 23 June 2003, recital 7.

⁴⁰ French National Assembly, Resolution no. 120 on judicial cooperation between the European Union and the United States of America, 10 April 2003

⁴¹ Senate, Resolution no. 103, 22 April 2003

⁴² Opinion of 6 June 2003

⁴³ Articles 3 and 18 of the Agreement on Extradition; Articles 3 and 14 of the Agreement on Mutual Legal Assistance

the United States of America, it cannot be ruled out that a Member State, in a subsequent bilateral agreement concluded with the United States, reconsiders the guarantees contained in an earlier bilateral agreement, within the limits imposed by its internal constitutional law and the international commitments of that State, notably under the European Convention for the Protection of Human Rights and Fundamental Freedoms. This situation may lead therefore to weakening the guarantees relating to fundamental rights contained in those agreements.

IV. THE CONCLUSION OF AGREEMENTS FOR THE READMISSION OF THIRD COUNTRY NATIONALS TRAVELLING THROUGH THE EUROPEAN UNION AND MEMBER STATES

The context of the conclusion of readmission agreements with third countries

A readmission agreement is an “agreement setting out reciprocal obligations on the contracting parties, as well as detailed administrative and operational procedures, to facilitate the return and transit of persons who do not, or no longer fulfil the conditions of entry to, presence in or residence in the requesting state”⁴⁴. The purpose of such an agreement is to resolve one of the major difficulties in immigration law resulting from the refusal of third countries to readmit their nationals or to deliver the necessary travel documents for their removal from the territory of the European Union.

In the mid-1990s, the Community established a link between the policy of readmission and its objective of combating illegal immigration, whether this involves including readmission clauses in its conventional cooperation agreements with third countries or favouring the conclusion of “mixed agreements”. This linking led to the adoption of documents which are not binding, but which embody the underlying inspiration of European policy on combating illegal immigration. On the basis of the principles that emerged in 1992 from the Edinburgh summit, a series of non-binding documents established the central place that the readmission procedures should occupy in the Community’s external action⁴⁵. Subsequently, since the Central and Eastern European countries had become the hub of illegal immigration to the European Union as countries of origin and as transit countries, this led to the conclusion of a series of so-called “second generation” agreements between the acceding countries and the Member States, placing the responsibility for dealing with foreign nationals with the future acceding States.

The entry into force of the Treaty of Amsterdam on 1 May 1999 led to a further acceleration of the policy of readmission and to a change in its methods. Article 63(3)(b) EC establishes the authority of the Community to take “measures on immigration policy (...) in the area of illegal immigration and illegal residence, including repatriation of illegal residents”. In this context, it was decided to take advantage of the new provisions of the Treaty to make the policy of readmission the centrepiece of the plan of action to remove foreign nationals from the Union⁴⁶, notably by systematically including readmission clauses in Community agreements concluded with third countries⁴⁷.

The Council considered on this subject, “The third countries with which new readmission agreements need to be negotiated and concluded must be identified, and common measures adopted aimed at

⁴⁴ Return Action Programme, doc.14673/02 p.29

⁴⁵ Council Recommendation of 30 November 1994 concerning a specimen bilateral readmission agreement between a Member State and a third country, OJ C274 of 19 September 1996, p. 20; Council Recommendation of 24 July 1995 on the guiding principles to be followed in drawing up protocols on the implementation of readmission agreements, OJ C274 of 19/09/1996, p. 25; Council Recommendation of 22 December 1995 on harmonizing means of combating illegal immigration and illegal employment and improving the relevant means of control, OJ C5 of 10 January 1996, p. 1; Council Conclusions of 4 March 1996 concerning readmission clauses for future mixed agreements (4272/96 ASIM 6 and 5457/98 ASIM)

⁴⁶ See for example the Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice, OJ C19 of 23 January 1999, p. 29

⁴⁷ Council Decision of 25 November 1999, doc. 1309/99

ensuring that such countries fulfil their obligation to readmit their own nationals in accordance with the rules already established under international law. These agreements should also include an obligation to readmit third-country nationals and stateless persons coming from or having resided in the country concerned⁴⁸.

More recently, recital 64 of the Return Action Programme⁴⁹ adopted in November 2002 indicated:

“Furthermore, considerable emphasis must be added on the conclusion of readmission agreements covering own nationals as well as third country nationals and stateless persons. Depending on the Commission's assessment of the state of play of negotiations on readmission agreements, the Council must take appropriate action with regard to relevant third countries. In this respect it is also important for the European Union to consider the use of all appropriate instruments available in the context of the Union's external relations to further negotiations with third countries without jeopardizing the fundamental legal position, that the readmission of own nationals is a non-negotiable obligation incumbent on any state”.

Identification of third countries targeted by readmission agreements

In November 2003, new mandates for negotiation⁵⁰ were given to the Commission on the basis of the criteria for the identification of countries with which new agreements needed to be concluded, sometimes by including them in a more comprehensive scheme such as Action Plans with Morocco, Afghanistan or Sri Lanka. These criteria are essentially based on the intensity of the migration pressure and on the existence of an “added value” in relation to the existing bilateral agreements, by emphasizing the relationship of proximity to the European Union that could justify readmission⁵¹.

The identification of the third countries concerned should be based on the following considerations:

1. The migration pressure exerted by flows of persons from or via third countries, together with the number of persons awaiting return, needs to be assessed. In addition, account may be taken of relevant obstacles to return, including the information provided by Member States in the framework of the Council conclusions on obtaining travel documents for the repatriation of people who do not fulfil or no longer fulfil entry or residence conditions.
2. Given the European Union's forthcoming enlargement, countries with which it is negotiating accession agreements should not be included. However, third countries with which the European Community has concluded Association or Cooperation Agreements containing a readmission clause should be included.
3. In view of the pressure which illegal migration flows exert on the European Union's frontiers, the fact that a third country is adjacent to a Member State should be considered when negotiating such agreements.
4. When the European Community signs a readmission agreement with a third country, this should involve added value for Member States in bilateral negotiations.
5. A comprehensive approach to the fight against illegal immigration calls for a geographical balance to be maintained between the various regions of origin and transit of illegal migration flows.

⁴⁸ Point 77 of the Comprehensive Plan to combat illegal immigration and trafficking of human beings in the European Union, OJ C142 of 14 June 2002, p. 23.

⁴⁹ Conclusions of the JHA Council of 28 November 2002, doc. 14817/02 p.10. For the text, see doc.14673/02. See also recital 9 of the conclusions of the European Council of 19 and 20 June 2003, doc. 11638/03.

⁵⁰ JAH Council of 6 November 2003, doc. 13747/03 p. 6

⁵¹ Doc. 7990/02 COR1.

In accordance with these criteria, the Commission has been called upon to negotiate with a group of States including China, Turkey, Algeria and Albania, in addition to the group comprising Morocco, Pakistan, Russia, Sri Lanka, Hong Kong, Macao and Ukraine, with which negotiations had already begun. This means that a total of eleven third countries are concerned by the Community's readmission policy. To date, readmission agreements have been concluded with the Hong Kong Special Administrative Region in November 2001⁵², Macao in October 2002, Sri Lanka in May 2002, and Albania in November 2003.

Moreover⁵³, it was agreed to reactivate the provisions of the Cotonou agreement that was concluded between the Africa-Caribbean-Pacific (ACP) countries and the European Union, and which in its Article 13 contains a readmission clause⁵⁴. More generally, the use of "*readmission clauses*" has also become widespread. Such clauses, which are not actual readmission agreements, merely authorize the states concerned to readmit their nationals and the nationals of third countries concerned. Such readmission clauses have been included since 1996 in agreements concluded with Algeria⁵⁵, Armenia⁵⁶, Azerbaijan⁵⁷, Croatia⁵⁸, Egypt⁵⁹, Georgia⁶⁰, Lebanon⁶¹, Macedonia⁶², Uzbekistan⁶³.

Formulation of the national and Community competences in the area of readmission agreements

Although it confers on the European Community the authority to conclude readmission agreements with third countries, Article 63(3)(b) EC does not deprive the Member States of their authority in this area, whether or not they have exercised this authority previously⁶⁴. This means that, in accordance with Articles 300 and 307 EC, the existing bilateral agreements with third countries remain in force, insofar as they are compatible with the readmission agreements concluded by the Community.

Furthermore, the case law of the Court of Justice of the European Communities does not seem to rule out that Member States retain the power to conclude such agreements as long as the Community has not exercised its own competence or even, alternatively, insofar as they act in conformity with such agreements⁶⁵.

The uncertainties that remain on this point constitute a source of dispute between the European Commission and the Member States, as is illustrated by the infringement proceedings that were instituted against the Federal Republic of Germany for having negotiated and signed a readmission agreement with China, even though the Commission had embarked on a process of negotiation with that state⁶⁶. The national practices of negotiating and concluding readmission agreements with states of origin of asylum-seekers or immigrants or with transit states did not end with the establishment of Community competence in this area. In the case of Italy, for example, bilateral negotiations are "in

⁵² Council Decision of 17 December 2003 concerning the conclusion of the Agreement between the European Community and the Government of the Hong Kong Special Administrative Region of the People's Republic of China on the readmission of persons residing without authorization, OJ L17 of 24 January 2004, p. 23

⁵³ Doc 14528/02

⁵⁴ In the form of a mutual acceptance of the return and readmission of nationals and by opening up the possibility of extending this to readmission from third countries, Article 13 (5), c). It should also be noted that this text is the only part of the instrument that is deliberately governed by the obligation to respect fundamental rights

⁵⁵ Signed on 19 December 2001.

⁵⁶ OJ L 239 of 9.9.1999, p. 22

⁵⁷ OJ L 246 of 17.9.1999, p. 23

⁵⁸ COM(2001) 371 final of 9 July 2001, p. 46

⁵⁹ OJ C 304 E of 30.10.2001, p. 16

⁶⁰ OJ L 205 of 4.8.1999, p. 22

⁶¹ Signed on 10 January 2002.

⁶² OJ C 213 E of 31.7.2001, p. 44

⁶³ OJ L 229 of 31.8.1999, p. 22

⁶⁴ This is confirmed by Article 63 par. 2 EC

⁶⁵ See ECJ, 5 November 2002, United Kingdom v. Commission, C-466/98.

⁶⁶ Agency Europe, 15 October 2003

progress” for the conclusion of bilateral agreements between Italy and the countries of origin of many immigrants (Ghana, Syria, Lebanon, Philippines, Moldavia, Russia, Ukraine, Byelorussia, Nigeria, Senegal, Egypt, China). In Luxembourg, a bill for the approval of readmission agreements with Romania, Bulgaria, Estonia, Lithuania, Latvia and Croatia has recently been tabled in the House of Representatives⁶⁷. Austria is negotiating with Nigeria, while negotiations have taken place between Belgium and Albania, as well as between Belgium and Turkey.

These national practices lack unity: while some Member States choose to target their partners, like the Federal Republic of Germany, others prefer an “open” policy to the point of reaching a substantial number of agreements, like France, which so far has thirty-five agreements in force, with others still under negotiation. Moreover, certain Member States, such as the Netherlands, prefer the framework of the Benelux agreements in their approach. Attention should also be drawn to the diversity of action plans proposed by the Member States. In certain cases, only third country nationals are concerned, while in other cases the obligation incumbent on the third country concerns all nationals, including those having passed through its territory illegally. Finally, the operational modalities of those practices vary considerably.

V. RISK OF INFRINGEMENT OF FUNDAMENTAL RIGHTS IN THE AREA OF CRIMINAL JUDICIAL CO-OPERATION WITH THE UNITED STATES

The requirements of fair trial

When examining the two agreements concluded by the European Union and the United States of America on judicial cooperation in criminal matters and extradition⁶⁸, the European Parliament expressed the regret that “the judicial system of some US States does not offer the same level of guarantees that the ECHR and EU measures seek to provide for EU Member States”⁶⁹.

A more specific risk is that of seeing the American concept of special courts, and notably military courts, benefiting from the cooperation in criminal matters instituted with the European Union. A particular difficulty results from the remodelling of the American judicial system by the events of 11 September 2001, namely creating the risk of seeing a defendant brought before special military courts instituted by the *Military Order* of 13 November 2001⁷⁰. Bearing in mind their composition and the modalities of their operation, as well as the discrimination they operate between defendants having American nationality and other defendants, these special courts are not reconcilable with the requirements of fundamental rights as defined within the European Union. The European Court of Human Rights has had cases referred to it concerning civilians brought before either military courts, or courts composed for the most part of military personnel⁷¹. On such occasions, it has repeatedly ruled

⁶⁷ Parl. doc., n°4691

⁶⁸ Agreement on extradition between the European Union and the United States of America, OJ 19 July 2003, L181 p.27; Agreement on mutual legal assistance between the European Union and the United States of America, OJ 19 July 2003, L181 p. 34.

⁶⁹ See the Recommendation of the European Parliament to the Council on the EU-USA agreements on judicial cooperation in criminal matters and extradition, 2003 (0239) of 23 June 2003 point E

⁷⁰ Military Order of 13 November 2001, Federal Register, vol. 66, n. 222, Presidential Documents, 16 November 2001, p. 57863

⁷¹ ECtHR, judgment of 25 February 1997, Findlay; Rec. 1997-I; ECtHR, judgment of 24 September 1997 Coyne Rec. 1997-I p.279; ECtHR, judgment of 9 June 1998, Incal v. Turkey, Rec. IV p.1573; judgment of 28 October 1998, Ciraklar v. Turkey, Rec. VII p. 3071; judgments of 8 July 1999, Gerger v. Turkey, Karatas v. Turkey, Sûrek v. Turkey Rec. 1999-IV; judgment of 18 July 2000, Sener v. Turkey; judgment of 21 December 2000, Büyükdag v. Turkey; judgment of 6 March 2001, Sana v. Turkey; judgment of 25 September 2001, Ari v. Turkey; judgment of 12 March 2003, Ocalan v. Turkey, application no. 46221/99

that there has been a violation of Article 6(1) ECHR on account of “objectively justified” fears expressed by the defendants⁷².

The fears expressed during the negotiations have led to include in the Preamble of each of the two agreements on mutual legal assistance and extradition of the specification that the agreement is concluded by the parties “mindful of the guarantees under their respective legal systems which provide for the right to a fair trial to an extradited person, including the right to adjudication by an impartial tribunal established pursuant to law”. Moreover, each of the two agreements contains a “non-derogation clause”⁷³. Such a clause allows for the application of existing bilateral agreements with the United States for “any matter not governed by this Agreement”, which would appear to include the rule of fair trial⁷⁴.

In the absence of an agreement or in case of silence, paragraph 2 of Article 17 of the agreement on extradition provides compensation by indicating, “Where the constitutional principles of, or final judicial decisions binding upon, the requested State may pose an impediment to fulfilment of its obligation to extradite, and resolution of the matter is not provided for in this Agreement or the applicable bilateral treaty, consultations shall take place between the requested and requesting States”. The agreement on mutual legal assistance, similarly, provides that the requested State may, in order to evade its obligations, invoke “its applicable legal principles” (Article 13).

These formulations remain exceedingly vague and ambiguous. In the absence of an explicit reference to the standards of a fair trial or to fundamental rights - and the exclusion of any form of judicial cooperation in criminal matters or extradition if this leads to or contributes to a violation of these standards -, any person facing prosecution does not know precisely enough the extent of the guarantees that he or she has, and the obligations of Member States of the European Union with which he or she is requested to cooperate remain uncertain.

It would have been desirable that the agreements expressly exclude trial before special courts. This point of view was expressed by non-governmental organizations⁷⁵, the European Parliament⁷⁶, the French Parliament⁷⁷, and the House of Lords⁷⁸. As they are formulated today, the above-mentioned clauses offer no absolute guarantee that no extradition would take place in violation of the requirements formulated by the European Court of Human Rights in the *Einhorn* case⁷⁹, where the

⁷² For a typical formulation, see ECtHR, *Sahiner v. Turkey*, judgment of 25 September 2001, para 45: « The Court considers in this connection that where, as in the present case, a tribunal’s members include persons who are in a subordinate position, in terms of their duties and the organization of their service, vis-à-vis one of the parties, accused persons may entertain a legitimate doubt about those persons’ independence. Such a situation seriously affects the confidence which the courts must inspire in a democratic society (see, mutatis mutandis, *Sramek v. Austria*, judgment of 22 October 1984, Series A no. 84, p. 20, para 42). In addition, the Court attaches great importance to the fact that a civilian had to appear before a court composed, even if only in part, of members of the armed forces (see *Incal*, cited above, p. 1573, para 72) ».

⁷³ Article 17 of the agreement on extradition is, however, far more complete than Article 13 of the agreement on mutual legal assistance.

⁷⁴ Article 17.1

⁷⁵ See in this sense the Press Release by Amnesty International, « EU-US Agreement Still Flawed on Human Rights », 4 June 2003

⁷⁶ See in this sense the report by J. Hernandez Mollar, A5-0172/2003, 22 May 2003

⁷⁷ Senate, Fauchon report on Resolution 230, p.12

⁷⁸ House of Lords, Select Committee on the European Union, Session 2002-03, 38th Report, r 153 EU/US Agreements on Extradition and Mutual Legal Assistance, 15 July 2003 p.12 : "We recommend that the Government adopt a practice of requiring, as a condition of extradition in cases where trial before a military tribunal or other similar exceptional court is an option under US or State law (as the case may be), an assurance that the extradited person will be tried before a normal federal or State court."

⁷⁹ ECtHR, decision of 16 October 2001, *Einhorn v. France*, application n° 71555/01, para 34. See also ECtHR, *Mamatkulov and Abdurasulovic v. Turkey*, judgment of 6 February 2003, application n°46827/99 and 46951/99 (judgement referred to the Grand Chamber of the European Court of Human Rights). On this point, Article 19 of

Court reiterated that “it cannot be ruled out that an issue might exceptionally be raised under Article 6 of the Convention by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of justice in the requesting country”⁸⁰. Although the *Einhorn* case concerns the hypothesis of an extradition to the United States, it may be inferred from the case law of the European Court of Human Rights that the States parties to the European Convention on Human Rights should abstain from lending their support to a flagrant denial of justice in a State that is not a party to the European Convention on Human Rights (ECHR), including in other situations, and notably in fulfilling their obligations under an agreement on mutual legal assistance⁸¹.

Death penalty

It should also be remembered that, while the death penalty has been abolished in the European Union - as is confirmed lastly by Article 2(2) of the Charter of Fundamental Rights of the European Union and the entry into force on 1 July 2003 of Additional Protocol n°13 to the European Convention on Human Rights -, thirty-eight States of the USA have maintained capital punishment. In its judgment of 12 March 2003 in the *Öçalan v. Turkey* case, the European Court of Human Rights indicated⁸²:

“The *de facto* abolition noted in that case in respect of twenty-two Contracting States in 1989 [at the time of the judgment in the *Soering v. United Kingdom* case, in which the European Court of Human Rights considered that the death penalty was not, as such, contrary to the Convention, having regard to the wording of Article 2(1) of the European Convention on Human Rights] has developed into a *de jure* abolition in forty-three of the forty-four Contracting States – most recently in the respondent State – and a moratorium in the remaining State which has not yet abolished the penalty, namely Russia. This almost complete abandonment of the death penalty in times of peace in Europe is reflected in the fact that all the Contracting States have signed Protocol No. 6 and forty-one States have ratified it, that is to say, all except Turkey, Armenia and Russia. It is further reflected in the policy of the Council of Europe which requires that new member States undertake to abolish capital punishment as a condition of their admission into the organisation.”

The Court concludes, that, due to this development, the territories falling within the jurisdiction of the Member States of the Council of Europe presently constitute an area free from the death penalty.

It adds that it follows from the requirement in Article 2(1) that the deprivation of life must be pursuant to the “execution of a sentence of a court”, that the “court” which imposes the penalty must be an independent and impartial tribunal within the meaning of the Court’s case law (paragraphs 203-204). Indeed, in the Court’s view (paragraph 207):

“To impose a death sentence on a person after an unfair trial is to subject that person wrongfully to the fear that he will be executed. The fear and uncertainty as to the future generated by a sentence of death, in circumstances where there exists a real possibility that the sentence will be enforced, must give rise to a significant degree of human anguish. Such anguish cannot be dissociated from the unfairness of the proceedings underlying the sentence which, given that human life is at stake, becomes unlawful under the Convention. Having regard to the rejection by the Contracting Parties of capital punishment, which is no longer seen as having any legitimate place in a democratic society, the imposition of a capital sentence in such circumstances must be considered, in itself, to amount to a form of inhuman treatment.”

the Charter of Fundamental Rights of the European Union falls short of the requirements of the European Convention on Human Rights.

⁸⁰ See the aforementioned *Soering* judgment, p. 45, para 113; see also, *mutatis mutandis*, *Drozd and Janousek v. France and Spain*, judgment of 26 June 1992, Series A n° 240, p. 34, para 110.

⁸¹ The case of *Drozd and Janousek v. France and Spain*, which the Court cites in support of its decision in the *Einhorn* case, concerns the execution in France of a prison sentence passed by the courts of the Principality of Andorra, which at the time was not bound by the European Convention on Human Rights.

⁸² ECtHR, judgment of 12 March 2003, *Öçalan v. Turkey*, application n° 46221/99 para 185. This judgment was referred to the Grand Chamber of the Court.

The agreement on mutual legal assistance appears to content itself on this question with the “non-derogation” clause of Article 13 to overcome the risk of judicial information being transmitted in the context of procedures that are liable to lead to the imposition of the death penalty. This article thus makes it possible either to invoke the content of a bilateral agreement in order to overcome this difficulty, where such an agreement settles this problem⁸³, or to invoke “in the absence of a treaty, [the] applicable legal principles [of the requested states], including where execution of the request would prejudice its sovereignty, security, public order or other essential interests”. It is regrettable, however, that this impossibility is not asserted more clearly.

Article 13 of the agreement on extradition, specifically devoted to the issue of capital punishment, provides:

“Where the offence for which extradition is sought is punishable by death under the laws in the requesting State and not punishable by death under the laws in the requested State, the requested State may grant extradition on the condition that the death penalty shall not be imposed on the person sought, or if for procedural reasons such condition cannot be complied with by the requesting State, on condition that the death penalty if imposed shall not be carried out. If the requesting State accepts extradition subject to conditions pursuant to this Article, it shall comply with the conditions. If the requesting State does not accept the conditions, the request for extradition may be denied.”

This represents a slight improvement on the existing bilateral treaties⁸⁴ and on the practice followed by the different Member States. A legal obligation is clearly asserted and a hierarchy is also established between the imposition and the execution of the penalty, whereby non-execution clearly appears to be a less desirable alternative to non-conviction. On this point, this provision appears to have satisfied the national parliaments, considering that this constitutes a “first stage”⁸⁵, and that its application should take into account the rule of speciality in extradition⁸⁶.

Portugal, however, considered that it needed to be expressly specified in the conclusions of the JHA Council of 5 and 6 June 2003 that, “According to its constitutional law, [Portugal] will not use the faculty provided for in Article 13 of the Extradition Agreement, and will not grant extradition where the offence is punishable with death penalty. Portugal may, however, subject the extradition to the condition that, according to the law of the requesting State, binding on its courts and the authorities competent to enforce the penalties, it will not be legally possible to consider to apply death penalty to the case, or it will not be legally possible to enforce that penalty, where it has already been imposed prior to the extradition request”⁸⁷.

A more fundamental shortcoming of Article 13 of the extradition agreement lies in the fact that the possibility of refusing extradition without the requisite guarantees is presented as a mere faculty for the requested State. The Network recalls that the Member States of the European Union are obliged to implement the extradition agreement in accordance with the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights. Although the extradition agreement refers to the possibility for a State to refuse extradition as a mere faculty, this should be considered as constituting an *obligation* on its part.

⁸³ Which was the case for France on the basis of Article 6 (1) of the agreement between France and the United States of 1998.

⁸⁴ For example in relation to certain bilateral agreements that put on an equal footing the prohibition of imposing or executing the sentence (see Article 7 of the treaty between France and the US of 28 April 1996)

⁸⁵ House of Lords, Select Committee on the European Union, Session 2002-03, 38th Report, r 153

EU/US Agreements on extradition and mutual legal assistance, 15 July p 11

⁸⁶ As is expressed in the above-mentioned report of the Select Committee on the European Union of the House of Lords: "It is our understanding from the Government's oral evidence to us that if, post extradition, a charge for a capital offence were to be substituted for, or added to, the extradition offence not carrying such a penalty, even though based on the same facts, the Government would regard it as an act of bad faith for the capital offence to be prosecuted otherwise than on the footing that the death penalty would not be imposed or, if imposed, would not be executed", p.12

⁸⁷ Conclusions of the Council, doc. 9845/03 p. 23

Irreducible sentences

A number of Member States, notably Portugal, are opposed to a cooperation in criminal matters in cases that are punishable by irreducible life sentences. This position has led to obstructions in judicial cooperation procedures within the Union, in particular between France and Portugal. The European Court of Human Rights considers that where an individual runs the risk of being sentenced to irreducible life imprisonment, this could raise an issue under Article 3 of the European Convention on Human Rights⁸⁸. Within the Council of Europe, this rule has also been formulated in the General Report on the treatment of long-term prisoners of Subcommittee n° XXV of the European Committee on Crime Problems⁸⁹ as well as in Resolution (76) 2 on the treatment of long-term prisoners and in the guidelines adopted by the Council of Europe on 11 July 2002 in the fight against terrorism⁹⁰.

The initial mandate for negotiation given to the Council had provided that the United States of America should be requested to give assurances on this point⁹¹. This is all the more understandable since this guarantee is also imposed in criminal judicial cooperation procedures between the EU Member States. The Framework Decision of 13 June 2002 on the European arrest warrant⁹² expressly provides, under the heading “Guarantees to be given by the issuing Member State” enumerated in Article 5:

“If the offence on the basis of which the European arrest warrant has been issued is punishable by custodial life sentence or life-time detention order, the execution of the said arrest warrant may be subject to the condition that the issuing Member State has provisions in its legal system for a review of the penalty or measure imposed, on request or at the latest after 20 years, or for the application of measures of clemency to which the person is entitled to apply for under the law or practice of the issuing Member State, aiming at a non-execution of such penalty or measure.”

It is regrettable that the final version of the agreements remains silent on this point and that the Union contented itself with implicitly and indirectly referring to the “constitutional principles of the requested State” and to the bilateral international commitments referred to in Article 17 of the extradition agreement, thereby shifting the full burden of responsibility to national law.

VI. RISK OF VIOLATION OF FUNDAMENTAL RIGHTS IN THE EUROPEAN POLICY OF RETURN TO THIRD COUNTRIES

Principles of respect for fundamental rights in return procedures

The Green Paper presented by the European Commission on a Community return policy on illegal residents recalls:⁹³

“A European return policy should be fully respectful of human rights and fundamental freedoms and as such be seen in the context of the European Union's human rights policies both within the European Union and in its external relations. Article 6 of the Treaty on European Union, reaffirms that the European Union “is founded on the principles of liberty, democracy, respect for human rights and

⁸⁸ ECtHR, *Weeks v. United Kingdom*, judgment of 2 March 1987, Series A, n° 114; ECtHR, *Nivette v. France*, decision of 14 December 2000 (application n° 44190/98); ECtHR, *Sawoniuk v. United Kingdom*, decision of 29 May 2001 (application n°63716/00); ECtHR, *S. Einhorn v. France*, decision of 16 October 2001 (application n° 71555/01), § 27. See also in the case law of the European Commission of Human Rights : *Weeks v. United Kingdom*, application n° 9787/82, report of 12 December 1983, § 72, and decision of 6 May 1978 in the case of *Kotalla v. Netherlands* (application n°7994/77, DR 14, p. 238).

⁸⁹ Publications of the Council of Europe, 1977

⁹⁰ *op. cit.*, para48.

⁹¹ See their text, as published by Statewatch on 5 April 2002, doc. 6438/2/02, recital 15

⁹² Framework Decision 2002/584, OJ L190 of 18 July 2002 p. 1

⁹³ COM(2002)175 of 10 April 2002 p. 10

fundamental freedoms, and the rule of law, principles which are common to the Member States”. Both the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the Charter of Fundamental Rights of the European Union proclaimed in Nice in December 2000 contain provisions which are applicable to a policy on return of illegal residents (Art. 3, 5, 6, 8 and 13 of the ECHR and Art. 3, 4, 19, 24 and 47 of the Charter of Fundamental Rights”).

However, although the readmission agreements raise important questions as to their compatibility with the requirements of fundamental rights, this dimension only appears implicitly or indirectly in the agreements. The recent Communication from the Commission on the development of a common policy on illegal immigration, smuggling and trafficking of human beings, external borders and the return of illegal residents⁹⁴ is also particularly discreet on this dimension of the policy on readmission of third-country nationals⁹⁵. The Geneva Convention of 28 July 1951 relating to the status of refugees prohibits expulsion or return to frontiers of territories where the person seeking protection would be threatened, by virtue of Article 33 of the Convention⁹⁶, and also obliges states to grant “effective protection” to asylum-seekers⁹⁷. Furthermore, the so-called “subsidiary” protection that follows from the international law of human rights⁹⁸ and certain national constitutions also requires Member States not to return foreign nationals to territories where they would suffer prohibited treatments, as is asserted by Article 19(2) of the Charter of Fundamental Rights. The European Court of Human Rights considers that “expulsion by a Contracting State may give rise to an issue under Article 3 [ECHR], and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In these circumstances, Article 3 implies the obligation not to expel the person in question to that country”⁹⁹.

As regards the risk of being subjected to torture, the prohibition of imposing the return of a person is also contained in Article 3(1) of the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984. The European Court of Human Rights also considered that the execution of an expulsion order where this would result in the interruption of vital medical treatment received in the host State could be interpreted as inhuman treatment¹⁰⁰. In an inadmissibility decision delivered on 7 March 2000 in the case of *T.I. v. United Kingdom*¹⁰¹, the European Court of Human Rights considered, “The indirect removal [...] to an intermediary country, which is also a Contracting State, does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention”. This lesson is even more obviously valid where the State to which a person is being expelled, and from where he fears being sent to a third country, is not a Member State of the Council of Europe and a party to the European Convention on Human Rights¹⁰².

⁹⁴ Communication from the Commission to the European Parliament and the Council in view of the European Council of Thessaloniki on the development of a common policy on illegal immigration, smuggling and trafficking of human beings, external borders and the return of illegal residents, COM(2003)323 final, of 3.6.2003.

⁹⁵ COM (2003) 323 of 3 June 2003

⁹⁶ “No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontier of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”

⁹⁷ UNHCR, Asylum Processes (Fair and Efficient Asylum Procedures), Global Consultations on International Protection, 2d meeting, EC/GC/01/12, 31 May 2001; UNHCR, Agenda for Protection, Summary Conclusions on the Concept of “Effective Protection” in the Context of Secondary Movements of Refugees and Asylum-Seekers, Lisbon, 9-10 Dec. 2002

⁹⁸ Article 7 of the International Covenant on Civil and Political Rights.

⁹⁹ ECtHR, *Soering v. United Kingdom*, judgment of 7 July 1989, Series A n° 161, p. 35, para 88; ECtHR, *Chahal v. United Kingdom*, judgment of 15 November 1996 (application n° 22414/93), para 74.

¹⁰⁰ ECtHR, *D. v. United Kingdom*, judgment of 2 May 1997 (application n° 30240/90); ECtHR, *Bensaïd v. United Kingdom*, judgment of 6 February 2001 (application n° 44599/98).

¹⁰¹ Application n° 43844/98

¹⁰² In its interpretation of Article 3 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, according to which “No State Party shall expel, return

Finally, certain rights that protect a foreign national, even when residing illegally, such as his right to respect family life, for example, may also prohibit his expulsion¹⁰³.

Risks of infringement of fundamental rights posed by return procedures

As a means to effectuate the return of person illegally residing in the EU, the readmission to a third country therefore poses two different risks of infringement of the fundamental rights of the person being readmitted. The first risk concerns the hypothesis that the receiving third country directly infringes the rights of the person being readmitted, hence the need to ensure that this country is a democratic country. The second risk, is that the third country does not afford effective protection to the foreign national and returns this person to another State where such a risk does materialize. The interest of the procedure of readmission agreements lies in the establishment of an obligation to receive and readmit the foreign national, thus avoiding that persons seeking protection will be part “in orbit”, having been removed from a State without the guarantee of being readmitted by another State¹⁰⁴. In this way, the readmission agreement contributes to the protection of the fundamental rights of illegal foreigners on the territory of a Member State of the European Union and thus overcomes a major difficulty facing foreigners arriving in the EU. On the other hand, it is still capable of improvement as regards the extent of the obligations imposed on third countries.

Another risk associated with readmission is that no distinction is made between the different categories of foreigners affected by expulsion¹⁰⁵. Owing to its general nature, readmission may tend to “lump together” all illegal foreign nationals, making no distinction between economic immigrants from other types of immigrants. However, within the category of persons characterized by their illegal presence in the Union, there exists a wide diversity of people in different situations: ordinary foreigners and foreigners for whom special protection may be justified. An explicit reminder of the international protection due in certain cases could have helped to limit the risks.

Such is the question raised by the definition of the personal scope of the readmission agreements, that is to say, the determination of which foreign nationals fall within the scope of the readmission agreements concluded by the European Union. The model readmission agreement of 1994, like the text of the recent agreements concluded with Macao or Sri Lanka, identifies the persons concerned by this measure. The third country shall readmit to its territory, upon application by a Member State and without further formalities other than those provided for in the Agreement,

“any persons who do not, or who no longer, fulfil the conditions in force for entry to, presence in, or residence on, the territory of the requesting Member State provided that it is proved, or may be validly established on the basis of prima facie evidence furnished, that they are nationals of [the requested third country]”

(“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”, the United Nations Committee against Torture adopted the same interpretation (see in its recent case law the decision of 11 November 2003 on Communication no. 153/2000, R.T. v. Australia, recital 6.4.).

¹⁰³ On all these guarantees, see UNHCR, Legal Land Protection Policy Research Series, S. Legomsky, “Secondary Refugee Movements And The Return Of Asylum Seekers to Third Countries: The Meaning of Effective Protection”, February 2003

¹⁰⁴ The procedure that consists in forcing foreigners into “orbit” situations by obliging them to leave the country without the assurance that they will be allowed to enter the territory of another country may constitute inhuman or degrading treatment contrary to Article 3 ECHR (ECtHR, Manitu Giama v. Belgium, application no. 7612/97, report of 17 July 1980, DR 21, p. 73). In the case of Harabi v. the Netherlands, citing Giama, the Commission recalled that it “held that the repeated expulsion of an individual, whose identity was impossible to establish, to a country where his admission is not guaranteed, may raise an issue under Article 3 of the Convention (...). Such an issue may arise, a fortiori, if an alien is over a long period of time deported repeatedly from one country to another without any country taking measures to regularize his situation.” (application n° 10798/84, decision of 5 March 1986, DR 46, p. 112).

¹⁰⁵ UNHCR, “Position on Readmission Agreements: Protection Elsewhere and Asylum Policy”, August 1994

or

“all third-country nationals or stateless persons who do not, or who no longer, fulfil the conditions in force for entry to, presence in, or residence on, the territory of the requesting Member State provided that it is proved, or may be validly established on the basis of prima facie evidence furnished, that such persons at the time of entry held a valid visa or residence authorisation issued by this third country, or entered the territory of the Member States unlawfully coming directly from the territory¹⁰⁶”.

The persons concerned are therefore either nationals of those third countries, or foreigners “who do not, or who no longer, fulfil the conditions in force for entry to or presence in the territory of the requesting Member State”¹⁰⁷. The general nature of the terms used by the European Union does not dispel the ambiguity associated with the wide diversity of individuals affected by the readmission agreements. Characterizing the persons qualifying for readmission simply on the basis of the regularity of their residence is not sufficient. These persons may be conventional illegal immigrants who do not, or who no longer, fulfil the legal conditions for residence in the European Union, or they may be persons whose asylum application has been turned down, individuals who are ready to return voluntarily to their country of origin, or foreigners who are forcibly expelled. Since they no longer have a legal status authorizing them to stay in the Union, these persons qualify for readmission measures.

However, this category may also include persons who should be able to claim international protection. To define these persons, the readmission agreements solely use the criterion of the “legality” or “regularity” of their presence on the territory. However, the indiscriminate character of this criterion is not remedied by an equivalent reminder of the “legal” obligations incumbent on the Member States¹⁰⁸. Moreover, the definition of legality of residence is often relative and liable to tacitly infringe fundamental rights. It would have been preferable if the scope of the readmission agreements had been defined more precisely by specifically asserting that the case of persons seeking international protection in the European Union is excluded and that their removal from the territory of the Union must be in keeping with the international obligations of the Member States.

Introduction of the concepts of “safe third country” and “safe country of origin” in return procedures

The objective that has been implicitly assigned to the readmission agreements is clear: to transfer and keep outside the borders of the Union the migration pressure by shifting it to third countries, irrespective of the limits imposed by the fundamental rights. Two justifications have been put forward to this effect by the Member States of the Union: the return of an illegal foreign national is possible either because his country of origin is considered “safe”, or because the third country to which he will be readmitted is “safe”, since it is able to offer the expected protection.

The idea of “safe third country” has found its way into the law and practices of the Member States¹⁰⁹. The Federal Republic of Germany¹¹⁰, Denmark, Finland, the United Kingdom and the Netherlands

¹⁰⁶ Articles 2 and 3 of the agreement concluded with Sri Lanka

¹⁰⁷ Articles 2 and 3 of the agreement concluded with Macao

¹⁰⁸ This reminder was rightly given by the Commission in its Communication (2002)564 of 14 October 2002 on a Community return policy, point 1.2.2

¹⁰⁹ See the study by the Danish Refugee Council, "Safe Third Country, Policy In European Countries", 1997; J. Van Selm, "Access To Procedures Safe Third Countries, Safe Countries of Origin and Time Limits", 2001 p. 15

¹¹⁰ Article 16a of the German Basic Law on the right of asylum was drawn up after constitutional amendment: “Persons being persecuted for political reasons shall have right of asylum. Paragraph 1 cannot be invoked by persons who enter the Federal territory from a Member State of the European Communities or from another third country where the application of the Convention relating to the Status of Refugees and the Convention for the Protection of Human Rights and Fundamental Freedoms is guaranteed. States that are not members of the European Communities that satisfy the conditions of the first sentence shall be determined by a law requiring the

have introduced the concept of safe third country into their substantive law. France has recently admitted the principle of “safe countries of origin”¹¹¹. Inasmuch as many Member States and the Union are currently tending towards the recognition of such concepts, they need to be examined in the perspective of readmission in the context of which they are used. This is all the more important since this concept will play an important part in the future Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status. The Justice and Home Affairs Council of 2 and 3 October 2003 endorsed the principle of a list of safe third countries without however having reached unanimity yet on the conditions and criteria to be adopted for drawing up this list.

A new article of this future Directive suggests authorizing the Council to draw up, in collaboration with the European Commission and the United Nations High Commissioner for Refugees (UNHCR), a “minimum common list of third countries designated as safe countries of origin”¹¹², enabling each Member State to go beyond this list by drawing up a national list that is complementary to the first¹¹³. Defined by criteria attached to the Directive¹¹⁴, this concept would authorize the Member States to speed up the procedures and to remove persons whose request for protection has been rejected on the grounds that it is “manifestly unfounded”¹¹⁵. This concerns nationals of this country of origin as well as foreign nationals who have their habitual residence in that country.

Readmission to “safe countries of origin”

The readmission agreements are called upon to operate normally in classic cases and serve, on a reciprocal basis, to oblige a partner to readmit its own nationals. If this partner is “safe”, that is to say, if no treatment contrary to the fundamental rights is to be feared there for the persons being repatriated, the intended objective is achieved, since the partner is reliable and there is no need for

approval of the Bundesrat. In the case provided for in the first sentence, measures putting an end to residence may be executed irrespective of the appeal lodged against them. A law requiring the approval of the Bundesrat may determine the States where the rule of law, the enforcement of the law and the general political situation guarantee that there is no political persecution, nor inhuman or degrading treatment or punishment. A foreign national from such a country is presumed not to suffer persecution, unless he produces evidence to suggest that he does suffer political persecution.”

¹¹¹ France, however, remains hostile to the concept of “safe third country”: Act n° 2003-1176 amending Act n° 52-893 on the right of asylum, *Journ. off. Rép. fr.* n° 286 of 11 December 2003 p. 21080. See also the reserved opinion of the National Consultative Commission on Human Rights, Opinion, 24 April 2003 and decision n°2003-485 DC of 4 December 2003 of the Constitutional Council, OJ of 11 December 2003.

¹¹² Article 30 b

¹¹³ Article 30 c

¹¹⁴ Doc. 15198/03 of 4 December 2003, Annex II, Designation of safe countries of origin, “A country is considered as a safe country where, on the basis of the legal situation, the application of the law within a democratic system and the general political circumstances, it can be shown that there is generally and consistently neither persecution as defined in Article 11 of Council Directive .../... [Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection] nor serious harm as defined in Article 15 of the said Council Directive.

In making this assessment, account shall be taken inter alia of the extent to which protection is provided against persecution and mistreatment through:

- a) the relevant laws and regulations of the country and the manner in which they are applied;
- b) observance of the rights and freedoms laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms and/or the International Covenant for Civil and Political Rights and/or the Convention against Torture, in particular the rights from which derogation cannot be made under Article 15(2) of the said European Convention;
- c) respect of the non-refoulement principle according to the Geneva Convention;
- d) provision for a system of effective remedies against violations of those rights and freedoms.”

¹¹⁵ Articles 27 and 28 of the Proposal for a Directive

international protection¹¹⁶. In the past, this line of reasoning justified the “second wave” of readmission agreements with countries applying for accession to the European Union. It explains the current attempts to generalize the search for reliable partners in order to shift the migration pressure to them and to send back to them persons seeking protection who originally come from their territory.

The UNHCR declared it does not, on principle, oppose the concept of “safe countries of origin”¹¹⁷. However, it takes care to point out that it should be “used as a tool to decide which asylum seekers are subjected to accelerated procedures”¹¹⁸. The procedures themselves should have sufficient safeguards, including some form of review, and particularly an individual examination in each case. An asylum seeker needs to be given the opportunity to explain why he or she might be at risk in a country that is generally considered to be safe. In any case, any kind of automatism in this area should be avoided, for fear of infringing the obligations incumbent on the Member States¹¹⁹.

This is why we should not brush aside the proposal made by the UNHCR in the context of the “Convention Plus” initiative¹²⁰, of becoming directly involved in the consideration and management of this question through a monitoring system ensuring the identification of “safe” countries of origin, with a view to guaranteeing a correct application of the right to international protection in the Union¹²¹. Under the conditions that have been outlined, this development should be examined since it does not appear to be contrary to substantive law.

Readmission to “safe third countries”

“Safe third countries”

In the case of readmission to a “safe third country”, the aim is to have persons who are seeking international protection readmitted in a “transit” or “first host” country. Such a form of readmission may be conceivable under certain conditions¹²². However, it cannot bring about a transfer of responsibilities to a third country who takes care of the person seeking protection for and on behalf of the State that has legal responsibility for him¹²³.

¹¹⁶ UNHCR Executive Committee, Conclusion 96(LIV) on the return of persons found not to be in need of international protection

¹¹⁷ UNHCR’s Summary Observations on the Amended Proposal by the European Commission for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, Geneva, January 2003. See also UNHCR Global Consultations in Budapest, Background Paper No. 2, The application of the “safe third country” notion and its impact on the management of flows and on the protection of refugees, May 2001

¹¹⁸ UNHCR, Press release, 1 October 2003

¹¹⁹ UNHCR Global Consultations in Budapest, Background Paper No. 3, Inter-State agreements for the re-admission of third country nationals, including asylum seekers, and for the determination of the State responsible for examining the substance of an asylum claim, May 2001

¹²⁰ The “Agenda for Protection” and the “Convention Plus” initiative of UNHCR are two mechanisms that are aimed at adapting and strengthening the system of international protection. The international community adopted the Agenda for Protection after two years of consultation at world level. These initiatives are designed to offer a response to the challenges set today by the management of the refugee question in the world on account of the difficulties encountered in the application of the rules of international protection, in a context of mixed migration flows and continuous persecution, risks and threats obliging millions of people to choose countries of exile where they need protection. The objective of Convention Plus, which is inspired by the Agenda, is to improve the implementation of the Geneva Convention, to promote solidarity and to develop the management of the migration flows associated with asylum through additional instruments or policies. This document acknowledges that the system of international protection and asylum may be seriously threatened if it is used for other purposes.

¹²¹ See in this sense UNHCR, “UNHCR’S three pronged proposal”, Working Paper, June 2003

¹²² See UNHCR, Excom Conclusions n°58, Problem of refugees and asylum-seekers who move in an irregular manner from a country in which they had already found protection, 1989

¹²³ On these questions, see UNHCR, Asylum Processes (Fair and efficient asylum procedures), Global consultations on international protection, EC/GC/01/12 31 May 2001

Recommendation R(97)22 of the Committee of Ministers of the Council of Europe to the Member States containing guidelines on the application of the safe third country concept makes the use of this concept subject to the following criteria:

1. observance by the third country of international human rights standards relevant to asylum as established in universal and regional instruments including compliance with the prohibition of torture, inhuman or degrading treatment or punishment;
2. observance by the third country of international principles relating to the protection of refugees as embodied in the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, with special regard to the principle of non-refoulement;
3. the third country will provide effective protection against refoulement and the possibility to seek and enjoy asylum;
4. the asylum-seeker has already been granted effective protection in the third country or has had the opportunity, at the border or within the territory of the third country, to make contact with that country's authorities in order to seek protection there before moving on to the member State where the asylum request is lodged or, as a result of personal circumstances of the asylum-seeker, including his or her prior relations with the third country, there is clear evidence of the admissibility of the asylum-seeker to the third country¹²⁴.

The Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status suggests authorizing Member States to “retain or introduce legislation that allows for the designation by law or regulation of safe third countries, where, on the basis of the legal situation, the application of the law and the general political circumstances, they have the assurance that applicants for asylum are generally treated there in accordance with the following criteria: a) in those countries, applicants for asylum do not have to fear for their life or freedom on the grounds of their race, religion, nationality, membership of a particular social group or their political views; b) the principle of non-refoulement is observed there in accordance with the Geneva Convention; c) the countries in question observe the obligation not to subject any person to expulsion measures or to treatment that is contrary, as the case may be, to the European Convention on Human Rights or the International Covenant on Civil and Political Rights of 1966; d) applicants for asylum have the possibility of asking to be recognized as refugees by the host country or by the representative of the UNHCR in that country and of enjoying the protection of that country or of the UNHCR”¹²⁵.

“First country of asylum”

To this first hypothesis should be added the concept of “first country of asylum”, which means that the applicant for asylum has passed through that third country. In the wording of the proposal for a Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, “A country can be considered to be a first country of asylum for an applicant for asylum if he or she a) has been granted refugee status in that country by that country or by the UNHCR representative and can still avail himself of that protection, or b) enjoys sufficient protection, for any other reasons, in that country, where he also has the benefit of the principle of non-refoulement”¹²⁶.

¹²⁴ Recommendation R (97)22 of 25 November 1997

¹²⁵ Article 27 of the Amended Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, COM(2002)0326 final, OJ C 291 of 26.11.2002

¹²⁶ Article 26 of the Amended Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, COM(2002)0326 final, OJ C 291 of 26.11.2002

“Neighbouring safe third country”

Finally, there is the category of “neighbouring safe third countries” through which the applicant for international protection has passed. These countries are identified by the existence of a common border with a Member State of the European Union and can only be considered as safe third countries if “a) they have ratified the Geneva Convention and its Protocol without any geographical limitation and they observe the provisions thereof regarding the principle of non-refoulement and the rights of the persons who have been recognized and admitted as refugees; b) they have an asylum procedure provided for by law; c) they have ratified the Convention for the Protection of Human Rights and Fundamental Freedoms and they observe the provisions thereof, notably the standards relating to effective remedies; and they have been designated as neighbouring safe third countries by an act of Parliament or by national law, with the consent of Parliament”¹²⁷.

Procedural implications of these distinctions

The procedural implications of these distinctions are significant: they make it possible to establish summary examination procedures with respect to neighbouring safe countries and to declare applications inadmissible or unfounded when they arrive, respectively, from safe third countries or safe countries of origin. However, these exceptions to a normal examination of asylum applications cease to be effective “when the safe third country does not readmit the asylum applicant in question”¹²⁸, that is to say, they will only operate to the detriment of the person seeking international protection “on condition that he is readmitted”¹²⁹ to the State that is presumed “safe”. Although it is in principle no more than a technical device to facilitate the effectuation of removal of foreigners illegally staying in the EU, readmission therefore may justify a reduction in the guarantees attached to a normal examination of asylum applications and may facilitate the realisation of a major risk, namely that of a refusal and refoulement of the asylum applicant to the country where he is at risk of persecution. The approach of the European Union may therefore be challenged, particularly in view of the practices of some of its neighbours, such as the Russian Federation and Byelorussia, states whose authorities behave in a way that falls short of the most elementary requirements in terms of democratic principles and human rights¹³⁰.

The United Nations High Commissioner for Refugees considered that, in the absence of a common system of legally compulsory standards, similar to those contained in the “Dublin” rules, the assessment of the “safe” nature of a third country can only depend on a case-by-case analysis, and that it can on no account be determined on the basis of lists constituting the source of absolute presumptions¹³¹. The fears expressed by the UNHCR are shared by several non-governmental

¹²⁷ Article 28 b

¹²⁸ Article 28 (4), 28 b (3). This provision however has not been retained in the text adopted by the Council on 29 April 2004, after the finalisation of this Thematic Comment.

¹²⁹ Article 26

¹³⁰ See ECRE, *The right to seek asylum, the Republic of Belarus, the Russian Federation and Ukraine*, 2003

¹³¹ UNHCR, *Memorandum on UNHCR's recommendations for the Italian Presidency of the EU*, June 2003: “an assessment must be made on a case-by-case basis, taking into account the individual circumstances of the applicant. The third country must expressly agree to readmit the person to its territory and to consider the application in substance. The applicant should have an effective link with the third country, beyond mere transit, so that it appears both reasonable and fair to transfer responsibility to that third country”. See also UNHCR annotated comments on the amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status (COM(2002) 326 final of 18 June 2002, presented by the Commission), January 2003: “UNHCR is very concerned about this provision, which allows Member States to deny an applicant access to the procedure and remove him or her to a third country where there are “grounds for considering that this particular applicant will be re-admitted to [the third country’s] territory”. Removal following a decision of inadmissibility may thus take place without the third country having consented to admit or re-admit the person to its territory and to consider the asylum application. Since the agreement of another State cannot be presumed, the State’s express consent to accept responsibility for examining the application must be a key factor in any decision on admissibility. The relevance of consent also derives from the principle of international co-operation to address refugee matters. Most importantly, however, the need for

organizations¹³². In this respect, it is surprising how easily the readmission agreement concluded with Hong Kong remains silent about the obligations of international protection that are incumbent on the parties¹³³. The fact that the Hong Kong Special Administrative Region is not bound by the Geneva Convention was certainly an obvious complicating factor, yet it did not prevent the European Union from expecting Hong Kong to undertake in writing not to expel persons admitted to its territory to another State without having examined their application for international protection¹³⁴, a precaution which, in any case should be considered of general application.

Readmission and the devolution of responsibilities in the area of international protection

In accordance with Article 33 of the Geneva Convention of 28 July 1951 relating to the status of refugees, Articles 2 and 3 of the European Convention on Human Rights and Article 3 of the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the Member States of the European Union must not expose any person under their jurisdiction to the risk of a threat to his/her life or to the risk of torture or ill-treatment by returning him/her to the frontiers of a State where he/she runs such a risk. They cannot escape from this international obligation by concluding readmission agreements, even in the assumption that such agreements are concluded with states that are subject to the same international obligations. These international obligations are incumbent on each individual state. This has been mentioned earlier in this thematic comment.

Unilaterally designating a third country as safe in order to allow the readmission of persons in search of protection to that country in fact amounts to devolving to that country a responsibility which is incumbent on the host country. Therefore, “where applicants for asylum from third countries are concerned, the prime objective of the readmission agreements should be to adequately share among States the responsibility for determining refugee status. The best way to achieve this objective is to put in place coordinated multilateral approaches for the sharing of responsibilities, preferably in the form of binding agreements of the same type as the Dublin Convention”¹³⁵. However, as the delegate of the UNHCR pointed out at the hearing held by the EU Network of Independent Experts on Fundamental Rights on 16 October 2003:

“States cannot devolve responsibilities for dealing with asylum-seekers to other States without agreement on mutual assistance and responsibility-sharing. Also, it would be too easy to blame just the increasing numbers of undeserving asylum applications on the applicants. State administrations also have a responsibility to address perpetuating situations of too lengthy administrative procedures and multi-layered appeal procedures. States should make some serious efforts in investing the necessary human and financial resources for fair and efficient asylum processing, right from the beginning of the screening process (“frontloading”)¹³⁶.

The use of readmission agreements for other purposes than those of a multilateral legal system aimed at protection and the search for efficiency is therefore unacceptable. This, however, seems to be the

consent is based on the basic protection preoccupation that, if no State assumes responsibility for an asylum-seeker, he or she risks to face, at best, “orbit” situations between national jurisdictions, and at worst refoulement”; see also the warnings of the UNHCR during the EU negotiations on the concept of “safe country”, Press release of 1 October 2003.

¹³² See ECRE's Recommendations to the Justice and Home affairs Council on the "Safe third country", AD/01/2004 of 15 January 2004; Amnesty International, Memorandum, Amnesty International Comments on articles 28 and 28 A of the Commission's amended proposal for a Council Directive on minimum standards for granting and withdrawing refugee status before the informal Justice and Home affairs Council 22-23 January 2004, 20 January 2004.

¹³³ Particularly on account of the doubts surrounding its asylum policy: UNHCR, Press Release, 11 March 2003

¹³⁴ See ECRE, Position on return by the European Council on refugees and exiles, October 2003

¹³⁵ UNHCR, Memorandum to the Greek Presidency, p.5

¹³⁶ UNHCR Paper for the EU Network of Independent Experts on Fundamental Rights, Hearing, Brussels, 16 October 2003

purpose which certain proposals appear ready to attribute to it. For instance, the proposal of the United Kingdom to externalize the processing of asylum applications in regional centres outside the European Union is evidence of this intention to instrumentalize the readmission agreements. One of the four objectives identified for this action on a regional basis is defined as “raising awareness and acceptance of state responsibility to accept returns perhaps through new readmission agreements...”; the same applies for the forced return to Transit Processing Centres (TPC)¹³⁷.

For all these reasons, the standard text of the readmission agreements would have benefited by the inclusion of an explicit reference to those obligations. According to the suggestions of the non-governmental organizations and the UNHCR, an explicit reference to the protection which a third country must mandatorily guarantee and the commitments - in writing where appropriate - which it should assume in this respect would have been welcome. Only under such conditions would a possible exemption of a Member State from its responsibility have been conceivable. Attention should also be drawn to the silence kept by the agreements of the European Union on an important aspect of the issue, namely that of the situation facing the foreign national on his return, irrespective of any persecution in the traditional sense of the word. The lessons of Recommendation R(99)12 of the Committee of Ministers of the Council of Europe to Member States on the return of rejected asylum-seekers, notably as regards the obligations of the host country, should be kept in mind. The States are requested:

1. to respect their obligation under international law to readmit their own nationals without formalities, delays or obstacles,
2. to refrain from applying sanctions against returnees on account of their having filed asylum applications or sought other forms of protection in another country,
3. to take into account the principle of family unity, in particular as it concerns the admission of such family members of the persons to be returned who do not possess its nationality,
4. not to arbitrarily deprive the person concerned of its nationality, in particular, to avoid statelessness,
5. not to permit the renunciation of nationality when it may lead to statelessness as a means to prevent the return of the rejected asylum seeker;

It would be desirable if the readmission agreements explicitly enumerated all the obligations to be respected by the States being requested to readmit persons who are illegally residing in the requesting States, beyond the elementary principles formulated by the Recommendation R(99)12 cited above¹³⁸. In connection with the detention of asylum-seekers, Recommendation R(2003)5 of 16 April 2003 of the Committee of Minister to Member States of the Council of Europe on measures of detention of asylum-seekers¹³⁹ provides that restriction of the freedom of movement of asylum-seekers can only be allowed insofar as this is necessary. This Recommendation provides measures of detention of asylum-

¹³⁷ Letter of Prime Minister Tony Blair to the President of the EU, 10 March 2003. On this proposal and the assessment that may be made of it, see the Report on the situation of fundamental rights in the European Union in 2003, under Article 18 of the Charter.

¹³⁸ See also Council of Europe, Recommendation from the Commissioner for Human Rights concerning the rights of aliens wishing to enter a Council of Europe member State and the enforcement of expulsion orders, CommDH/Rec(2001)1, 19 September 2001.

¹³⁹ See also Conclusion n° 44 (XXXVII) of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees on the detention of refugees and asylum-seekers, the Resolution on the detention of asylum-seekers of the Sub-commission on the promotion and protection of human rights of the United Nations Commission on Human Rights, the Body of Principles of the United Nations for the Protection of All Persons under Any Form of Detention or Imprisonment, Deliberation no. 5 of the United Nations Working Group on arbitrary detention, and the United Nations Rules for the protection of juveniles deprived of their liberty.

seekers may be resorted to only in the following situations: when their identity, including nationality, has in case of doubt to be verified, in particular when asylum seekers have destroyed their travel or identity documents or used fraudulent documents in order to mislead the authorities of the host state; when elements on which the asylum claim is based have to be determined which, in the absence of detention, could not be obtained; when a decision needs to be taken on their right to enter the territory of the state concerned, or when the protection of national security and public order so requires. Other requirements may be formulated with respect to legal remedies against deprivation of liberty or expulsion following a refusal to grant refugee status, on the basis of Articles 5(4) and 13 of the European Convention on Human Rights.

It is not necessary, for the purposes of this Thematic Comment, to give a detailed overview of all the guarantees that may be formulated in readmission agreements for the benefit of persons seeking international protection. What must be insisted on, however, is the fact that the imposition of such obligations on States being obliged to readmit their own nationals or, depending on the substance of the agreement, other persons having passed through their territory, by States requesting the readmission of persons under their control constitutes for the latter States an international obligation. A State cannot expel persons under its jurisdiction, even in the context of a readmission agreement, to another State without ascertaining that this will not result in an infringement of the fundamental rights of the persons concerned. The incorporation of guarantees in the readmission agreement proper is the most advisable method in this respect. Such an approach, where a high level of protection of fundamental rights is ensured through an approach that prevents the risk of infringements, is preferable to an approach that is based definitively on a form of mutual recognition, where the State being obliged to readmit certain categories of persons is presumed to offer sufficient guarantees on account of the substance of its international commitments or the absence of systematic violations of human rights by that State. The European Union could show the way in this respect in its exercise of the external competences that have been assigned to it under Article 63(1)3 EC.

A more explicit and complete identification of the guarantees to be given for the fundamental rights in the readmission agreements concluded by the European Union, thereby binding the Member States in addition to any readmission agreements they have concluded individually¹⁴⁰, has an additional advantage, namely that of preventing a progressive lowering of standards in areas where - in the absence of such identification - there would be a trend towards the lowest common denominator between the States. The case of the length of detention with a view to expulsion is typical of that risk. As long as the Community legislator does not take action to harmonize this aspect of the laws of the Member States, the existence of significant variations between Member States in terms of length of detention could provide an incentive for States offering greater guarantees to diminish these. For example, the extension of the permissible length of detention in France by Article 49 of Act n° 2003-1119 of 26 November 2003 on immigration control, residence of foreign nationals in France and nationality¹⁴¹, was justified by the observation that the length of such detention was far shorter in France than in the other Member States of the European Union. On the other hand, the explicit guarantee of the protection of personal data in the readmission agreements concluded by the European Union establishes a high level of protection, the imposition of which on the Member States represents a welcome improvement¹⁴².

¹⁴⁰ See commentary on Article 63(2) EC above.

¹⁴¹ *Journ. off. Rép. fr.* n° 274 of 27.11.2003, p. 20136.

¹⁴² For example, Article 15 of the readmission agreement with Sri Lanka: "The communication of personal data shall only take place if such communication is necessary for the implementation of this Agreement by the competent authorities of Sri Lanka or a Member State as the case may be. The processing and treatment of personal data in a particular case shall be subject to the domestic laws of Sri Lanka and, where the controller is a competent authority of a Member State, to the provisions of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 28 of 23 November 1995, p. 31) and of the national legislation of that Member State adopted pursuant to this Directive. Additionally the following principles shall apply: a) personal data must be processed fairly and lawfully; b) personal data must be collected for the specified, explicit

VII. CONCLUSIONS

In connection with the agreements on extradition and mutual legal assistance between the European Union and the United States of America, the European Parliament recommended:

“that the agreements should refer explicitly to Article 6 of the EU Treaty and to the Charter of Fundamental Rights of the European Union so that the provisions of those agreements are binding: firstly, because the Union may not lawfully negotiate in areas outside the powers conferred and constraints imposed on it by its founding treaty and, secondly, on grounds of good faith towards the United States which, being a party neither to the European Convention nor to the control mechanisms, must not be surprised by the constraints on the Union deriving therefrom; believes that an explicit reference to the Charter of Fundamental Rights (where appropriate, in the explanatory notes to the agreements) would also be more than appropriate, given that it was formally proclaimed at the Nice European Council on 7 December 2000¹⁴³”.

This solution - similar to that embodied in Article 1(3) of the Framework Decision on the European arrest warrant¹⁴⁴ - would in fact have been preferable to the introduction of “non-derogation” or “non-affectation” clauses, like that in Article 17 of the extradition agreement, of which paragraph 2 provides, “Where the constitutional principles of, or final judicial decisions binding upon, the requested State may pose an impediment to fulfilment of its obligation to extradite, and resolution of the matter is not provided for in this Agreement or the applicable bilateral treaty, consultations shall take place between the requested and requesting States”.

This latter solution makes the extent of the obligations of the European Union dependent on the constitutional provisions of the Member States, which is disputable as a matter of principle and prejudices the uniformity of application of European law. It would have been better to refer to the obligations ensuing, for the Union as well as for its Member States, from Article 6(2) of the Treaty on European Union, the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights, to which the Charter refers for the corresponding provisions. This explains why the French Parliament, like the Dutch House of Representatives¹⁴⁵, called for “an express reference to Article 6 of the Treaty on European Union”¹⁴⁶, while the Select Committee on European Union of the House of Lords considered:

It would be preferable, [...] if the Agreement explicitly provided for the possibility of extradition being refused on ECHR grounds, as the Convention forms an integral part of Union law. Such express reference would constitute considerable “added value” in an agreement concluded between the EU (and not each Member State individually) and the US. It might also enhance human rights safeguards in future bilateral agreements between Member States and the US, which must, according to Article 18, be consistent with this Agreement¹⁴⁷.

A similar wish may be expressed in connection with the readmission agreements. The Council asserts in the Return Action Programme:

and legitimate purpose of implementing this Agreement and not further processed by the communicating or by the recipient authority in a way incompatible with that purpose...”

¹⁴³ Recommendation of 20 May 2003, PE 332.951

¹⁴⁴ According to the terms of this provision, “This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union”.

¹⁴⁵ Handelingen II, 2002-2003, 23490, No. 75, pp. 4228-4234

¹⁴⁶ French National Assembly, 12^e Legislature, Rapport Quentin n°715, Proposal for a resolution on cooperation with the United States of America. In France, too, the Council of State considered that, in order to “dispel all ambiguity”, it was agreed to “introduce in the draft agreement an explicit reference to the fundamental principles referred to in Article 6 paragraph 2 of the Treaty on European Union” (French Council of State (general meeting), Opinion of 7 May 2003).

¹⁴⁷ House of Lords, Select Committee on the European Union, Session 2002-03, 38th Report, r 153. EU/US Agreements on extradition and mutual legal assistance, 15 July 2003 p. 10.

“...return of third country nationals must of course be performed in accordance with all relevant international obligations and human rights instruments. Several aspects of the return of third country-nationals are regulated in international human rights instruments, such as the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the 1951 Geneva Convention on the Status of Refugees and the 1967 Protocol attached thereto. Furthermore in all actions regarding children, the 1989 UN Convention on the Rights of the Child prescribes, that the child's best interest must be a primary consideration. Finally the Charter of Fundamental Rights of the European Union proclaimed in Nice in December 2000 also contains several provisions applicable to a Return Action Programme. The Committee of Ministers of the Council of Europe in 1999 has also adopted a recommendation on the return of rejected asylum-seekers¹⁴⁸.”

It will be noted that the mechanisms implemented in the negotiation and conclusion of the readmission agreements fall short of these commitments. The “non-affectation clause” contained in the various agreements merely emphasizes:

“This agreement shall be without prejudice to the rights, obligations and responsibilities of the Community, the Member States and [the third country concerned] arising from International Law.”

This referral, however, to the international obligations of the States concerned does not suffice. Where the relationship with the countries bordering on the Member States of the European Union falls within the scope of the European Convention on Human Rights and the Geneva Convention of 28 July 1951, this does not apply for the other third countries. Certain partners of the Union, such as the Hong Kong Special Administrative Region, have not ratified the Geneva Convention. In many others, the actual observance of this instrument leaves much to be desired. From China to Algeria, a large number of prospective partners of the Union require that more serious precautions be taken.

There is a genuine urgency. Nevertheless, the level of protection has diminished significantly in this context. The Recommendation of 30 November 1994, which proposed a model readmission agreement between a Member State and a third country provides for a non-affectation clause which specifically enumerates the obligations to be imposed on the parties¹⁴⁹. The initial proposals for model Community agreements following the Treaty of Amsterdam contain such a clause¹⁵⁰. A number of Member States, such as Denmark, Finland, Sweden, Italy¹⁵¹, the United Kingdom¹⁵² or the Benelux countries included this clause in their bilateral agreements¹⁵³. The current practice of the European Union, on the other hand, marks a step back. This may lead Member States, in keeping with this practice, to diminish the level of guarantees they offer to persons seeking international protection¹⁵⁴.

This is all the more a cause for concern since the practice of Member States is not constant, but characterized by significant variations, even within the same State. This is the case in the Federal Republic of Germany. The example of the Netherlands adequately illustrates these hesitations. The

¹⁴⁸ Plan mentioned above, doc.14673/02 recital 13.

¹⁴⁹ “This agreement shall not affect the Contracting Parties’ obligations arising from: 1) the Convention of 28 July 1951 on the Status of Refugees as amended by the Protocol of 31 January 1967 on the Status of Refugees; 2) international conventions on extradition and transit; 3) the Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms; 4) international conventions on asylum, in particular under the Dublin Convention of 15 June 1990 determining the State responsible for examining applications for asylum lodged in a Member State of the European Community; 5) international conventions and agreements on the readmission of foreign nationals.”

¹⁵⁰ Doc. 10.338 of 9 July 1999.

¹⁵¹ Some agreements (Cyprus, Croatia, Swiss Confederation, France, Greece, Macedonia, Malta, Slovakia, Spain, Romania) contain an article stipulating that the provisions of those bilateral agreements shall be without prejudice to the implementation of the provisions contained in the international agreements and conventions on human rights in force in one of the States Parties. In other agreements, the preamble contains a reminder of the respect for the European Convention on Human Rights.

¹⁵² Article 21(1) of the agreements of February 2003 with Bulgaria and Romania.

¹⁵³ See for example Article 14 of the Benelux agreement with Lithuania (2002)

¹⁵⁴ Greece did not incorporate such a clause in its agreement with Turkey, which provoked criticism from the Greek National Commission on Human Rights (Opinion of 31 January 2002)

1999 agreement between the Netherlands and Croatia¹⁵⁵ refers, in Article 8, to the Geneva Convention, European Community law and the Schengen Agreements. No reference is made, however, to the ECHR or to international human rights instruments in general, despite the fact that Croatia joined the Council of Europe in 1996 and ratified the European Convention and its Protocols 1, 4, 6 and 7 in November 1997 – i.e. well before the readmission agreement with the Benelux countries was concluded. The same applies to the 2002 agreement with Slovakia¹⁵⁶: references to the Geneva Convention, European Community law and the Schengen Agreements (Article 9), but *not* to the ECHR or to international human rights instruments in general¹⁵⁷. Finally in the agreement with the Former Republic of Yugoslavia, also from 2002, article 15(1) provides that “the provisions of this Agreement shall not effect [sic] the obligations accepted by the Contracting States on the basis of other international agreements”. Article 15(2) refers expressly to the Geneva Convention, whereas Article 15(3) states that “the provisions of this Agreement shall not affect obligations resulting from international conventions on the protection of human rights, in for the Contracting States”. The failure to mention the ECHR may be explained by the fact that the FRY, which joined the Council of Europe in April 2003, is not a party to that Convention yet.

It was proposed that, in the readmission agreements concluded by the European Community, the latter should include “a joint declaration, annexed to the Agreement itself, making the obligation deriving from international treaties in the sphere of respect for human dignity, rights and fundamental freedoms more explicit”¹⁵⁸. This would avoid a diversification of national practices, which proves detrimental to fundamental rights, according to a trend that has been clearly visible over the last ten years.

¹⁵⁵ Tractatenblad 1999, No. 140: Agreement between the Governments of the Kingdom of the Netherlands, the Kingdom of Belgium and the Grand Duchy of Luxembourg and the Government of the Republic of Croatia on the readmission of persons residing without authorization (Zagreb, 11 June 1999)

¹⁵⁶ Tractatenblad 2002, No. 128: Agreement between the Governments of the Kingdom of the Netherlands, the Kingdom of Belgium and the Grand Duchy of Luxembourg and the Government of the Slovak Republic on the readmission of persons residing without authorization (Bratislava, 21 May 2002)

¹⁵⁷ This agreement does, however, contain a clause concerning data protection (Article 13) – something altogether missing in the ‘Croatia agreement’.

¹⁵⁸ European Parliament, Watson report, 7 November 2002, on the agreement with the Hong Kong Special Administrative Region, A5-0381/2002; see also ECRE, Position on return by the European Council on refugees and exiles, October 2003, §52