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CAN BILATERAL AGREEMENTS ON MIGRATION CONTROL BE A NEW WAY FOR THE GLOBAL COMPACT ON REFUGEES (GCR) AND THE GLOBAL COMPACT ON SAFE, ORDERLY AND REGULAR MIGRATION (GCM)?

By Ayse Yildiz-Demir¹

ABSTRACT

Both externalization and external dimension of migration control play critical roles in the contained mobility around the world, especially in the southern external borders of the EU in the last decades. Externalization aims to contain mobility of migrants (including irregular migrants, refugees, asylum seekers or economic migrants) beyond national borders of destination states by using different practices such as push-back operations at the sea or keeping migrants in the extraterritorial camps until the evaluation of their asylum claims. On the other hand, the external dimension pursues migration control via carrying out softer policies than externalization. As one of most popular destinations, Southern European countries have changed the focus on migration policies to the external dimension to contain migration mobility towards the European Union. However, such externalization practices are mostly controversial in terms of compliance with human rights obligations as well as pledges to GCR and GCM of the states pursuing these practices.

Despite these concerns, the UK, a state which left the EU, and Denmark, which is still part of the union, opened a new chapter in Europe about migration policy by refolement of asylum seekers to third countries by signing bilateral agreements to keep people in extraterritorial camps until the

outcome of their refugee status claim, which is a method of externalization. The method implemented by the UK and Denmark gives rise to debated issues such as violations of fundamental human rights and pledges of GCR and GCM. On the other hand, the EU rather prefers to sign readmission agreements, which is a part of the external dimension, with non-EU countries than those kinds of agreements.

Nevertheless, agreements signed by destination states like the UK or Denmark, and third states such as Rwanda, to externalize asylum systems have been extensively discussed in terms of their negative impacts on international human rights obligations. However, readmission agreements, such as the one in the EU-Turkey deal, have not been sufficiently scrutinized. These agreements aim to readmit asylum seekers or irregular migrants to a third state or their original country. The potential of this migration control approach to contribute to the Global Compact on Refugees (GCR) and Global Compact for Migration (GCM) as a new method of contained mobility has not been adequately explored. Moreover, the possible violations of human rights obligations and commitments to the GCR and GCM have not been thoroughly examined.

Therefore, the proposed research will firstly compare *the agreements signed between a destination state and a third state (cooperation agreements)* with the intent of keeping migrants in

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the third country until bringing a conclusion about refugee status claims of asylum seekers held in the third country to *readmission agreements signed by the EU and a non-EU state* to send people back to the state of their origin or a third state on the purpose of keeping people there in return for some incentives from the EU to non-EU state. This comparison would then reveal what kinds of similarities or differences these two contained mobility practices have in terms of violations of human rights obligations and pledges taking place in the GCR and GCM. Secondly, the research will discuss whether readmission agreements can be referred as a type of the external dimension policy helping fulfillment of pledges to the GCR and GCM.

INTRODUCTION

To contain migration mobility, states pursue different methods both within and beyond their borders. In the case of enforcing immobility of migration flows beyond the national borders, known as the externalization and the external dimension of migration control, states need cooperation and to legalize their activities occurring out of their state's jurisdiction area by signing bilateral or multilateral agreements, or statements and memorandums, with different names but the same objective. In the last decade, the literature mostly encounters agreements which pursue two main purposes: the first one is to return immigrants to their original countries or the transit country where they came from, and the second is to send immigrants to a third country and keep people there until deciding on their refugee claim.¹ While the first type of document is called the readmission agreement in the law, as well as politics and international relations, there is not any explicit term for the second kind, which is sometimes entitled the memorandum of understanding, or statement on cooperation agreement.² Whatever they are entitled (*they will be referred as **cooperation agreements on holding asylum seekers from now on for convenience***), the main objective is apparent—to contain the flows of migration, and to increase the cooperation between states against migration mobility. At the same time, the effects of these agreements on human rights violations and their adherence to international human rights obligations are being debated. This discussion also includes the commitments made

within the Global Compact on Refugees (GCR) and the Global Compact on Safe, Orderly and Regular Migration (GCM). The topic is currently a subject of debate in the fields of migration, refugee, and human rights law.

In addition to hard law, such as the 1951 Refugee Convention and its Protocol (1967)³ which enshrines refugee rights, as well as several conventions⁴ regulating fundamental human rights law and states parties' obligations against human rights violations, soft law guides states to cooperate and share responsibilities despite being non-legally binding agreements. The GCR and the GCM cover essential roles in soft law approved by the UN General Assembly to draw a framework encapsulating reasonable and durable solutions on refugee and migration situations. When evaluating the primary goals of the GCR and GCM, it is important to consider the system these Compacts aim to establish, with a focus on migration mobility. While the GCR tries to guide states on burden and responsibility sharing of the refugee issue, and the GCM aims to facilitate migration safely and orderly, main objectives of Compacts need to be discussed over whether agreements serving external migration control may contribute to relevant objectives or the immobility of migration. When evaluated by legal scholars or even by ordinary people, cooperation agreements on holding asylum seekers are mostly demonstrated as purely biased with regard to human rights violations. On the other hand, readmission agreements are accepted as a redeemer against migrations' flows and unsafe migration. Differences between readmission agreements and cooperation agreements on holding asylum seekers will be further analyzed in the second part of this study in terms of how relevant agreements might contribute to the external dimension of migration control. Based on the analysis from the second part, the third part will cover whether relevant agreements are a supportive way to fulfill pledges in the GCR and the GCM or contain migration mobility considering their impacts on refugee rights. Thence, the conclusion reveals whether readmission agreements—shown as a legal method of the external migration control⁵ in comparison with cooperation agreements on holding asylum seekers in the third countries—can be a new way for the GCR and GCM.

I. ANALYSIS

A. CONTAINING MIGRATION MOBILITY THROUGH AGREEMENTS

Controlling migration influx overflows beyond national borders and reaches to third country territories by bilateral or multilateral agreements permitting repatriation or readmission of irregular migrants including asylum seekers. Although the common and main purpose of agreements is to divert migration control towards original, transit or third countries, they are categorized under different names in the international area. “Readmission agreement” is the most widespread term used for them as part of the external dimension of migration immobility of the EU.⁶

The external dimension of the EU's migration control pursued by readmission agreements regulates how to send asylum seekers passing the destination country's (requesting state) borders irregularly back to the transit, original or a third country (requested state). This is usually seen at the regional level; for example, Greece, Spain, and Italy have signed bilateral agreements whose purpose is to transfer irregular immigrants to their neighbor countries to ensure the external dimension of migration flows coming from southern and eastern Europe.⁷ Further, the EU Community prefers signing readmission agreements with requested states in the European neighborhood such as Albania⁸, Bosnia-Herzegovina⁹, and Turkey.¹⁰ In compliance with provisions of agreements signed between the EU and neighbor countries, both the EU and country parties to above-mentioned agreements have reciprocal obligations to return people who unauthorizedly reside in their territories to contracting states and to readmit people returned by one of the contracting states.¹¹ Unauthorized residents subjected to these readmission agreements is not only limited to citizens of contracting states, but also covers stateless people and citizens of third countries staying irregularly in other contracting states' territories. If the agreement only regulated the return and readmission of their citizens residing in the other contracting states' territories irregularly, it could be claimed that relevant agreements were signed to prevent irregular transition. However, the agreements refer to all irregular immigrants including stateless and third country citizens

arriving to the retrocedent (requesting) state via redeeming (requested) state.¹²

Therefore, despite the provisions of agreements stating that temporary permissions based on the process of asylum applications are not prejudiced,¹³ since these agreements aim to return irregular immigrants to their transit or original countries and restrain new resumptive asylum applications, the burden of irregular immigrants is diverted out of national territories, which paves the way for the external dimension of migration control.

Another agreement type establishing a ground to send irregular immigrants from the destination country to a third country is most commonly known as cooperation agreements on holding asylum seekers. Nevertheless, there are certain aspects distinguishing these kinds of agreements from readmission agreements. Cooperation agreements on holding asylum seekers are not solely an act where a state seeks to send irregular migrants to transit or original countries; on a bigger scale, it is a plan where a third state is chosen to send asylum seekers arriving to the destination country by irregular ways. Accordingly, the third state commits to admit irregular migrants whose asylum applications are not considered by the destination state to which asylum seekers arrived irregularly.¹⁴ Hence, in these sorts of agreements, there is no “**readmission**,” but only “**admission**.” According to the Memorandum of Understanding between the government of the United Kingdom of Great Britain and Northern Ireland and the government of the Republic of Rwanda for the provision of an asylum partnership arrangement, the Republic of Rwanda pledges to admit the relocation of asylum seekers whose claims are not considered by the UK to Rwanda and evaluate their claims in Rwanda based on Rwanda domestic law, the Refugee Convention, and other international human rights law instruments.¹⁵ Whether Rwanda shall be a transit or original country of the relevant irregular immigrants is not mentioned at all in the memorandum.¹⁶ Therefore, Rwanda can be considered as a third state which commits to admit asylum seekers residing irregularly in the UK.

Another difference between readmission agreements and cooperation agreements is the reciprocity in terms of returning or admitting irregular immigrants.

Under cooperation agreements, while one state is in a position of admitting irregular immigrants and the other state is in a position of sending people to the admitting state, it does not work the other way around. In another regional example as in Rwanda, Papua New Guinea committed to admit irregular immigrants coming to Australia and hold these people in its territories in accordance with the “Pacific Solution.”¹⁷ Otherwise, states that do not consider asylum requests of irregular arrivals, but rather send them to the third state, are only under the obligation of funding the third state.¹⁸ This is unlike the obligations member states to the EU have as parties to readmission agreements.¹⁹

The final distinction is that, in cooperation agreements on holding asylum seekers, the third state agreeing to admit irregular immigrants is responsible for processing and determining their refugee claims within its territories. On the other hand, in readmission agreements involving the EU, readmitting states are not required to assess their asylum applications or detain them within their territories unless it is a matter of border security.

To summarize, readmission agreements differ from cooperation agreements in three main ways. Beside these differences, cooperation agreements have an important aspect in common with readmission agreements, which is to contain migration mobility. Destination states intend to send people having arrived in their territories through various ways to a third state through cooperation agreements ensuring that refugee claims of returned immigrants would be determined by the third state. Additionally, in readmission agreements, the requesting state (the EU or its member states) aims to send irregular immigrants back to their transit or origin country (such as Turkey, Albania, Libya). The requested state is then burdened with the responsibility of ensuring border security to prevent the returned migrants from leaving the readmitting country. Consequently, relevant agreements give rise to the externalizations of asylum requests of irregular immigrants transferred by destination states.

B. THE ROLE OF AGREEMENTS IN THE IMPLEMENTATION OF THE COMPACTS

In addition to the role of above-mentioned agreements on externalization of migration mobility,

the main objective of contracting states for both readmission and cooperation agreements on holding asylum seekers remains a cooperation for the eradication of irregular migration and sharing responsibilities and burdens of “refugee crisis.” On the other hand, fundamental objectives of the GCR are to decrease pressure on host countries and increase solutions at the third countries,²⁰ while the GCM aims to combat human trafficking and smugglers as well as prevention of collective expulsion and refoulement²¹ subsequently. Thus, there is an undeniable nexus between relevant agreements and pledges of the GCR and the GCM; however, this nexus should not be assessed without due regard to the fundamental rights of refugees affected by these agreements.

Firstly, the principle of non-refoulement²² needs to be considered on whether the principle is implicated by relevant agreements. This principle is an impediment in order for these agreements to contribute to fulfill the pledges of the Compacts. At first glance, both readmission agreements and cooperation agreements on holding asylum seekers are signed to extend third-countries solutions by the return and readmission of irregular immigrants. Also thanks to financial funding derived from relevant agreements, both conditions in countries of origin, transit or third where asylum seekers are returned are enhancing and living standards of asylum seekers are supported in accordance with objectives of the GCM.²³ Still, the safety of people in need of protection in those countries accepting irregular immigrants needs to be discussed despite the fact that above-mentioned agreements explicitly upheld that relevant immigrants would not be subjected refoulement.²⁴ In order not to violate the principle of non-refoulement according to the Refugee Convention article 33(1)²⁵, a state shall not expel or return a refugee to a place where his/her freedom or life can be under threat because of his/her nationality, race, religion, membership of a particular social group or political opinion. Although the Convention enshrines the non-refoulement of refugees and both readmission and cooperation agreements regulate the return of irregular immigrants, the principle of non-refoulement should be interpreted broadly and its role in the customary law should not be overlooked. Considering the motives of the convention, the principle should not be interpreted as a rule applied

on only people whose asylum requests are accepted, but also on people who are still fighting to seek asylum. Additionally considering the *jus cogens* role of the principle of non-refoulement²⁶, the principle applies not only to a specific group of migrants but every immigrant because communities/nations throughout history have not returned an individual seeking asylum, refugee, or protection to a place where his/her life or freedom might be endangered.²⁷ Therefore, people seeking asylum in a country but staying there irregularly shall enjoy the principle of non-refoulement. In this context, destination countries aiming to return irregular immigrants in their own countries shall at least sign relevant agreements with the safe countries. Countries whose safety and security are controversial with regards to the readmission or assessment of asylum seekers as part of the relevant agreements cast doubt on the objectives of these agreements and their impacts on human rights and the Compacts' pledges.

Secondly, the prohibition of collective expulsion of aliens,²⁸ which is one of the gravest violations of human dignity, shall be considered before signing or implementing the agreements. The externalization and external dimension of migration control tend to give rise to collective expulsion, since considering every asylum seeker request individually becomes difficult with the increasing burdens of migration influxes. On the other hand, ensuring that both negative effects of migration are minimized and solutions are based on human rights are the central objectives of the Compacts.²⁹ For these agreements to contribute to pledges and objectives of the Compacts, fundamental human and refugee rights should not be violated since the Compacts target people-centered solutions with dignity and safety. To create an effective legal structure for the fulfillment pledges of the Compacts, the ways of readmission or cooperation agreements shall comprise the prohibition of collective expulsion and enshrine individual assessment and return process. Especially during the implementation of relevant agreements, irregular migrants staying in the destination country to seek asylum shall not be expelled collectively if the agreements are produced to ensure human rights and dignity during externalizing migration flows.

Thirdly, the right to seek asylum in other countries

under a grave threat because of externalization and the external dimension of containing mobility. In particular, the cooperation agreements on holding asylum seekers in the UK and Rwanda, as well as Australia and Pacific countries, are the most visible menace in terms of limiting people seeking asylum in other countries. According to these agreements, a third country is bound to accept irregular immigrants in the destination country to consider their asylum requests.³⁰ At first peek, the relevant agreements appear to be contributing to the resettlement of immigrants, which is one of pledges of the GCR.³¹ However, immigrants cannot be contained to resettle in a country or region without their consent.³² All agreements are signed between governments without any participation or interference of individuals; hence, provisions of agreements only bind states—not individuals.³³ Further, holding people in a country where they are sent by an agreement signed between two states and processing their asylum requests there—not the first country that they arrived/stayed irregularly—is the implicit restriction to the right to seek asylum in other countries.³⁴ This restriction contradicts with the essence of seeking asylum. Likewise, readmission agreements are signed between requested and requesting states to readmit irregular immigrants in the requesting state by the requesting state.³⁵ Unlike cooperation agreements on holding asylum seekers, determining asylum requests of readmitted/returned immigrants by requested states is not mentioned in the readmission agreements—at least not in the ones signed by the EU and its neighbor countries.³⁶ Nevertheless, the right to seek asylum in other countries can be adversely affected by readmission agreements, since the return of people to another country, where they stayed before as a country of origin or transit, get them to search alternative ways to leave again. Returning people to where they transited or lived before cannot be a sustainable solution, which can contribute to human rights-based resettlements in light of the GCR and the GCM.

Fourthly, the main point of the relevant agreements is to fight against irregular migration, and the primary objective of the GCM is to ensure safe migration.³⁷ Thus, these purposes might serve a mutual relationship that instruments can grow stronger when implemented together. That is to say, if irregular migration is exterminated, safe migration can be secured. However, how many returns of

irregular immigrants to another country becomes effective on the termination of irregular migration and establishment of safe migration needs to be considered and forecasted. Moreover, returned people who need to find a safe place cannot be held in a specific region or country in compliance with relevant agreements. The report of the UN Refugee Agency office in Kigali displays that only nine people remained in Rwanda out of thousands of people who were returned by Israel to Rwanda based on “Israel Voluntary Departure Policy.”³⁸ People fleeing from wars, internal conflicts, or any human rights violations cannot be kept in another country suffering from deprivation or instability.³⁹ Moreover, sending irregular migrants back to same or similar place from where they fled is becoming a form of punishment for these people.

Regarding the motive of fleeing from somewhere to seek asylum in a safe place, applying for the visa, purchasing tickets, or pursuing any legal asylum requests cannot always be expected from the people struggling for their lives and freedom. Accordingly, the cycle of irregular immigrant returns via readmission or cooperation agreements on holding asylum seekers, and then their re-arrival, is only a procrastination to face actual refugee issues and containment of the migration mobility for a while. Thus, instead of returning irregular migrants to a transit, origin or third country to fight irregular migration at the individual level, fighting against the organizations of human traffickers and smugglers on a larger scale should be in the foreground to strengthen the safe migration.

Finally, states parties to both readmission agreements and cooperation agreements on holding asylum seekers claim that relevant agreements strengthen solidarity between states to share the burdens and responsibilities. Concordantly, the GCM and the GCR target international cooperation and hope to ease the pressure on hosting countries, respectively. Relevant agreements can contribute to international cooperation and solidarity through assisting each other in terms of financial funding, educating officials, or arrangements of joint operations against human smugglers. However, while readmitting irregular immigrants from other countries via these agreements, the share of burdens and responsibilities could be endangered. According to the above-mentioned agreements including

readmission agreements, the burden and responsibility of holding immigrants in its territories are always on shoulders of the transit, origin or third country which is much less developed than the destination country that returned irregular immigrants.⁴⁰ Less developed countries such as Rwanda, Uganda, or Kosovo are always in the position to readmit and hold immigrants in their countries; on the other hand, more developed countries such as member states of the EU are in the supportive role by financial or educational means.⁴¹ All pressure of hosting immigrants and/or evaluation of their asylum requests are overlaid on the countries accepting immigrants, and yet other parties to the agreements could simply get away from the burden with limited subsidiary and support.⁴² The most well-known and current example is the situation around Turkey, which has become a host to 3.7 million Syrian temporary refugees as of July 2022⁴³ in exchange for a fairly small sum of funds on the grounds of agreements signed between Turkey and the EU (2014) and the EU-Turkey statement (2016). Under such circumstances, the agreements—whose scope and borders are not thoroughly planned or drawn—can disproportionately increase the burden on hosting countries, instead of easing.

II. CONCLUSION

The balance between the externalization of contained migration and pledges of the GCR and GCM is quite difficult to strike. Therefore, some instruments used for immigration influxes can serve towards different purposes rather than their actual targets. For instance, signing agreements aimed at the fair share of international burdens and responsibilities on irregular migration have become an instrument to contain mobility. Considering two main aims of relevant agreements—to fight against irregular migration, and to cooperate with each other by returning/readmitting irregular immigrants to a third, transit or original country—a close relationship can be established between these agreements and pledges of the GCR and GCM. Within this context, two types of agreements, cooperation agreements on holding asylum seekers and readmission agreements, need to be further discussed whether they might contribute to the containment of migration and/or pledges of the Compacts.

Cooperation agreements on holding asylum seekers give rise to diversion of asylum requests of immigrants having irregularly arrived in the destination country from the destination country to a third country where irregular immigrants are returned through the agreement. According to the relevant agreements, the right to seek asylum of irregular immigrants is limited with the third country which is party to the agreement to accept immigrants into its territories. Further, returned immigrants are usually detained in the centers under different names, which are commonly referred to as detention, reception, or migration camps. Then, not only the right to seek asylum, but many other rights of refugees, are under threat in third countries. The right to non-refoulement is one of the endangered rights because the safety of third countries for refugees is also a controversial issue. Having caused potential fundamental human and refugee rights violations, cooperation agreements are far away from contributing to the pledges of both Compacts—such as promoting third state solutions, providing volunteer resettlement in safety and dignity, and strengthening international cooperation along with human rights-based approaches. Otherwise, the agreements centered around returning asylum seekers to third countries could only increase the contained migration via the externalization of migration control.

Readmission agreements, which are more common and hold a stronger legal basis of the external dimension of migration control, in comparison to cooperation agreements on holding asylum seekers, include several risks on human and refugee rights violations as do cooperation agreements. Readmission agreements may not contribute to the commitments of the Compacts, as they involve sending people back to potentially unsafe countries or those violating the principle of non-refoulement. Additionally, the prohibition of collective expulsion serves as a primary obstacle in this context. If readmission agreements are to be prepared through managing present risks, they can directly contribute to international cooperation, voluntary resettlement, or the fight against irregular migration considering fundamental human and refugee rights. At present, readmission agreements have a tendency to make host countries open-air prisons instead of easing the pressure on host countries. Also, deficiencies and

risks of these agreements are unambiguously high. As a party to these agreements, states move not only the immigrants but all the opportunities of international cooperation and creation of humane paths far away from the pledges of the Compacts.

ENDNOTES

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- ⁸ Agreement between the European Community and the Republic of Albania on the readmission of persons residing without authorisation – Declarations, OJ L124 22-40 (2005), <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A42000A0922%2801%29>.
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- ¹⁰ Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation, OJ L134 3-27 (2014), accessed [https://eur-lex.europa.eu/legalcontent/en/TXT/?uri=celex:22014A0507\(01\)](https://eur-lex.europa.eu/legalcontent/en/TXT/?uri=celex:22014A0507(01)).
- ¹¹ Agreement between the European Community and the Republic of Albania, Bosnia and Herzegovina and the Republic of Turkey at 8, 9, 10.
- ¹² *Ibid.*
- ¹³ Agreement between EU and Bosnia and Herzegovina (n 7) art 16, 17; Agreement between EU and Turkey (n 8) art 2,7,8.
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- ²⁰ UN International Organization of Migration (IOM), 'Global Compact on Refugees' (GCR).
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- ²² Convention Relating to the Status of Refugees (n 3) art 33: 1. Prohibition of expulsion or return ("refoulement") No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers 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; UNGA, 'Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (adopted 10 December 1984, entered into force 26 June 1987) UN Doc A/RES/44/144 art 3; UNGA, 'International

