

Original scientific paper

UDC: 341.231.14-054.73

DOI: 10.11643/issn.2217-995X171SPC79

Received: 6 February 2017 / Accepted: 15 August 2017

Refugees, Readmission Agreements, and “Safe” Third Countries: A Recipe for Refoulement?

HALLEE CARON*

Department of Political Science, University of California, USA

Abstract: As states in the global North have adapted to the changing nature of irregular immigration through the adoption of legal instruments such as readmission agreements, academics in international relations (IR) and international law as well as human rights organizations have responded by critiquing failed attempts at refugee protection, putting forward their own frameworks, and documenting human rights violations and/or breaches of international law. Drawing upon Jennifer Hyndman and Alison Mountz’s argument that current policies contribute to the externalization of asylum as well as Alexander Betts’s work on cross-persuasion, this paper argues that readmission agreements with “safe third country” clauses are inherently problematic in terms of refugee protection. Specifically, it examines the 1992 Readmission Agreement between Spain and Morocco as a way to investigate how these agreements work in practice as well as an illustration of how the North–South impasse (identified by Betts) is reified in international law. Focusing on readmission agreements with safe third country clauses and supplementing academic research on treaty interpretation and international law with analysis by policy experts and reports from human rights organizations, the analysis considers the consequences of third-party readmission agreements with regards to international cooperation on refugee protection.

Keywords: refugee protection, Spain, Morocco, international human rights law, UNHCR, readmission agreement, safe third country

**hcaron@uci.edu*

Introduction

As the number of forcibly displaced persons recognized by the UN's High Commissioner on Refugees (UNHCR) swelled to over 60 million in 2015, governments around the world have taken differing and sometimes contradictory approaches to addressing what can only be called "a refugee crisis." Readmission agreements are one tool that are being increasingly (although not exclusively) used by EU Member States and Australia to manage irregular immigration. In his article for the Middle East Institute, Jean-Pierre Cassarino summarizes the general characteristics of readmission agreements:

Readmission is the process through which individuals (e.g., unauthorized migrants, rejected asylum-seekers and stateless persons) are removed from the territory of a country, whether in a coercive manner or not. Readmission has become part and parcel of the immigration control systems consolidated by countries of origin, transit, and destination. Technically, it requires cooperation at the bilateral level with the foreign country to which the readmitted or removed persons are to be relocated, for readmission cannot be performed without its prior agreement to cooperate and to deliver travel documents or *laissez-passers*.¹

In other words, readmission agreements involve a requesting state (a destination state where irregular immigrants and refugees aspire to relocate) and a requested state (an origin state that is a source of irregular immigration to the destination state), and require the requested/origin state to re-admit its own nationals if they are found to be in the requesting/destination state illegally.

Readmission agreements have been criticized by international human rights organizations (such as Amnesty International and Human Rights Watch) for impeding asylum-seekers and refugees.² In a 2015 report, UNHCR (United Nations High Commissioner on Refugees) expressed concern "about reports that some EU countries are placing barriers to entry or forcibly returning asylum-seekers and refugees."³ More recently, human rights

1 Cassarino, Jean-Pierre. 2012. "An Overview of North African Countries' Bilateral Cooperation on the Removal of Unauthorized Migrants: Drivers and Implications." *Middle East Institute*, May 4. Accessed March 14, 2016. <https://www.mei.edu/content/overview-north-african-countries-bilateral-cooperation-removal-unauthorized-migrants-drivers>.

2 "Our Campaign for Refugees and Asylum Seekers." *Amnesty Australia*. Accessed April 23, 2016. <http://www.amnesty.org.au/refugees/comments/24019/>; "EU: Asylum Proposals Go in Wrong Direction." *Human Rights Watch*. 2016. Accessed April 23, 2016. <https://www.hrw.org/news/2016/04/08/eu-asylum-proposals-go-wrong-direction>.

3 "Spain." *UNHCR News*. Accessed April 23, 2016. <http://www.unhcr.org/pages/49e48eed6.html>.

groups have expressed concern over Turkey's readmission agreement with the EU.⁴ The EU–Turkey readmission agreement includes a "safe third country" clause.⁵ This means that Turkey has agreed to re-admit not only its own nationals, but third-country nationals and stateless persons (i.e., Syrian refugees) as well. Third-country nationals are defined in the EU–Turkey readmission agreement as "...any person who holds a nationality other than that of Turkey or one of the [EU] Member States"⁶). In this case, third-country nationals are people who pass through Turkey on their way to a destination state (an EU member state such as Greece). The circumstances of the EU–Turkey readmission agreement, particularly its inclusion of a safe third-country clause, reflect the changing realities of migration and displacement worldwide.

As states have adapted to the changing nature of irregular immigration through the adoption of legal instruments like readmission agreements, scholars in international relations (IR) and international law as well as human rights organizations have responded by critiquing failed attempts at refugee protection, putting forward their own frameworks, and documenting human rights violations and/or breaches of international law. Analysis by Jennifer Hyndman and Alison Mountz suggests that readmission agreements are emblematic of a wider shift toward protection in regions of origin in the international refugee regime. They argue that these policies constitute a conscious externalization of asylum on the part of destination states (such as Australia, the U.S., Canada and EU member states), which can lead to *neo-refoulement*, or the return of refugees to situations of persecution.

Neo-refoulement... refers to a geographically based strategy of preventing the possibility of asylum through a new form of forced return different from non-refoulement, the strictly legal term that prohibits a signatory state from forcibly repatriating a refugee against its commitment codified in Article 33 of the 1951 Refugee Convention.⁷

Hyndman and Mountz make an important point in terms of the responsibility that destination states have to international refugee protection: Readmission agreements are inevitably initiated by destination states (e.g., countries in the global north) and place additional burdens on countries of transit/origin, straining asylum infrastructures that are

4 "EU: Turkey Mass-Return Deal Threatens Rights." *Human Rights Watch*, March 15, 2016. Accessed May 27, 2016. <https://www.hrw.org/news/2016/03/15/eu-turkey-mass-return-deal-threatens-rights>; EU/Greece: First Turkey Deportations Riddled With Abuse." *Human Rights Watch*, April 19, 2016. Accessed May 27, 2016. <https://www.hrw.org/news/2016/04/19/eu/greece-first-turkey-deportations-riddled-abuse>; "EU–Turkey Readmission Agreement Comes with Risks to Asylum Seekers' Human Rights – European Council on Refugees and Exiles." *European Council on Refugees and Exiles*. Accessed May 27, 2016. <http://ecre.org/component/content/article/70-weekly-bulletin-articles/392-eu-turkey-readmission-agreement-comes-with-risks-to-ylum-seekers-human-rights.html>.

5 European Council 2016.

6 Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorization.

7 Hyndman and Mountz 2008, 249–269.

already, in many cases, underfunded and underdeveloped.

Alexander Betts's work on fostering international cooperation on refugee protection through cross-issue persuasion is based upon this very notion. Betts identifies this underlying dynamic:

A *North–South impasse* may be defined as a situation in which a problem primarily originates in and remains relatively confined to the South while the economic and political means to address the problem are largely held by the North.⁸

Betts argues that as a result, various methods of persuasion (i.e., cross-issue persuasion) must be utilized to convince the North to contribute to burden-sharing within the international refugee regime. Examining four case studies involving international efforts toward refugee protection, Betts concludes that while Northern states often have few incentives for cooperation (i.e. burden-sharing), when UNHCR has been able to create issue linkages, Northern states have been more willing to contribute. For Betts, the UNHCR is the key facilitator of this relationship—persuading Northern states that there is a relationship between their wider (economic, social, political) interests and refugee protection in the South.

When the international refugee regime is cross-stitched by legal agreements—treaties, conventions, protocols, agreements, memorandums of understanding, etc, how does the international community ensure the human rights of refugees? What are the consequences of readmission agreements with regards to international cooperation on refugee protection? Drawing upon Hyndman and Mountz's argument that current policies contribute to the externalization of asylum as well as Betts's work on cross-persuasion, I argue that the implementation of readmission agreements with "safe third country" clauses are inherently problematic in terms of refugee protection. First among these issues is the assumption (implicit in the designation of a safe third country) that the state in question is indeed safe for the individual being returned. Media and human rights reports have documented inhumane treatment of irregular migrants in states designated as safe for return—in detention centers, at border fences, and at the outskirts of border cities in makeshift settlements. This is not to suggest that destination states are not also guilty of violating the human rights of irregular migrants. At the same time it is important to keep in mind the power and resource differentials between destination states and designated safe third countries or transit states, which often lack the capacity to absorb and give fair process to large numbers of asylum-seekers.

Specifically, I examine the 1992 Readmission Agreement between Spain and Morocco as a way to investigate how these agreements work in practice. Geographically, Spain is closer to the coast of Africa than any other EU country, including the only two shared land borders between Europe and Africa along the outskirts of the Spanish enclaves of Melilla and Ceuta. This proximity attracts large numbers of irregular migrants and asy-

8 Betts 2009.

lum-seekers whose ultimate goal is to get to the EU. Most of these irregular migrants and refugees never even make it to Spain, but are detained in or sent back to Morocco. However, readmission agreements with safe third-country clauses (like Spain's agreement with Morocco) prevent even those who do make it to Spanish territory from filing a claim for asylum there. Instead, they are sent back to Morocco where the asylum infrastructure is comparably inadequate, to say the least.⁹

I choose to focus on the implementation process of this particular readmission agreement with a safe third country clause for a few reasons. I find the geographical aspects of the Spanish-Moroccan readmission agreement to be particularly interesting. Spain is the only EU member state that shares a land border with the African continent. This geographical proximity causes additional tensions between the requested (Morocco) and the requesting (Spain) state as illegal immigration occurs both by land (at the fences of Ceuta and Melilla) and sea (through various routes departing from North and West Africa). Reinforcement efforts for this particular border zone require the coordination of border patrol actions both on land and at sea.

While the Spanish-Moroccan readmission agreement is unique because of its geographical implications, it is also representative of a larger trend among EU member states. Cassarino and his colleagues have determined a pattern among EU member states—a sort of readmission bulge—in which the number of readmission agreements (33 among the 12 states of the European Community in 1986) exploded to over 300 (including 25 member states' agreements with 85 non-EU member states) as of June 2014.¹⁰ The Spain–Morocco readmission agreement was signed in 1992 and underwent several phases of implementation during this very period of, as Cassarino describes it, “unprecedented expansion of the cobweb of bilateral agreements linked to readmission.”¹¹ Thus, the Spanish-Moroccan readmission agreement provides a case study or snapshot within the larger trend toward member states adopting these agreements as part of their immigration/foreign policy.

Another reason I chose to examine this particular agreement is that Morocco (despite being designated as a safe third country) has a reputation for not respecting the human rights of irregular migrants and asylum-seekers, in particular those from Sub-Saharan Africa.¹² Hyndman and Mountz admirably wrestle with the normative implications of readmission agreements for principles of international law. However, aside from insights gleaned through an interview in Canberra in 2006, it seems that they draw primarily from

9 Conseil National des droits de l'Homme (CNDH) Moroccan National Human Rights Council 2013. “Foreigners and Human Rights in Morocco: for a radically new asylum and migration policy.” Accessed September 13, 2016. http://cndh.ma/sites/default/files/foreigners_and_human_rights_-_conclusions_and_recommandations_0.pdf.

10 Cassarino 2014, 130–145.

11 *Ibid.*

12 “Morocco: Abuse of Sub-Saharan Migrants.” *Human Rights Watch*. February 10, 2014. Accessed May 27, 2016. <https://www.hrw.org/news/2014/02/10/morocco-abuse-sub-saharan-migrants>.

their own research and the work of other academics, and largely make their argument without relying upon evidence of day-to-day violations of human rights.¹³ Hyndman and Mountz also offer a passionate argument about the intentionality of destination states that request and sign readmission agreements, but they do not present any specific evidence of nefarious intent. Notwithstanding the fact that documentation of nefarious government intent can be difficult to obtain, this is also not necessarily a critique or refutation of their assessment of policy intentions. Rather, I want to suggest a different focus for my line of inquiry into this agreement-shifting from the intentionality of the destination state, to the lived experiences of irregular migrants and asylum-seekers in so-called “safe” third countries. By zeroing-in on the Spanish-Moroccan readmission agreement and incorporating reports from human rights organizations, I hope to highlight the human consequences of these agreements. Transcending arguments of intentionality, I advocate for further efforts to identify and create constructive roles for members of the international community that will help ensure the protection and humane treatment of refugees in countries of destination, transit, and origin.

Arguably, Betts has already identified the key actor in terms of international cooperation on refugee protection—UNHCR:

Although tactical linkages have played some role in the refugee regime, the main determinant of cooperation has been the role of substantive linkages and the ability of UNHCR to create, change, or highlight the ideational, institutional, or material relationships between issue areas.¹⁴

Insisting that UNHCR’s role in his two “successful” case studies was crucial in influencing Northern states to contribute to refugee protection, Betts makes a compelling argument in his conclusion for further development within UNHCR to cultivate personnel with the necessary expertise and analytical skills “to effectively use cross-issue persuasion to shape the responses of states to protection...”¹⁵ Betts’s suggestions are appealing for a number of reasons. As the designated international agency for refugees, UNHCR is both a logical and intuitive choice to mediate efforts toward international cooperation on protection for refugees. As an established international agency within the United Nations, UNHCR is already perceived by many states to be an arbiter of refugee law and protection, lending further legitimacy to its role as an advocate for refugee rights in international negotiations. In the context of the four cases he examines, Betts’s recommendations for reinforcing the ability of UNHCR to effectively use cross-issue persuasion in order to overcome the North–South impasse in the international refugee regime seems to make sense on a

13 Specifically, the footnote is I am referring to from the above article is listed twice (footnotes 26 and 43) as: “Interview, Canberra, April 2006.” After a bit more research, I think that this likely refers to a project Mountz refers to in another article: Mountz, 2011, 118–128. However, I am not sure and did not feel it necessary to contact Mountz or Hyndman to clarify for the purposes of this paper.

14 Betts 2009.

15 *Ibid.*, 186.

logistical level.

As intuitive and logical as it seems, there are a number of factors that suggest Betts's model for international cross-issue persuasion might not be universally applicable. Betts's universe of case studies is rather limited, comprising four international conferences facilitated by UNHCR convened to address burden-sharing, and particular, in order to find durable solutions for protracted refugee situations in the global South. Of these four case studies, Betts considers only two to be successful examples of UNHCR engaging in cross-issue persuasion: the International Conference on Central American Refugees of 1987–1995 (CIREFCA) and the Comprehensive Plan of Action for Indo Chinese Refugees of 1988–1996 (CPA). In fact, Betts makes many of his recommendations in the concluding chapter with the explicit objective of reproducing "the success of CIREFCA and the Indochinese CPA."¹⁶ CIREFCA, Betts asserts, "represents the single most successful example of North–South cooperation in the history of the global refugee regime because it met the preconditions for successful cross–issue persuasion." However, Betts's criteria for success are not as explicit. Rather, they seem to be based on a qualitative assessment of the Northern versus Southern states' level of interest in "promoting refugee protection for its own sake" before UNHCR intervened to persuade both groups "that their wider interests could be met by cooperating in refugee protection."¹⁷ While a more quantitative or empirical approach wouldn't necessarily lead better to refugee protection, Betts's insistence on the indispensability of UNHCR's role might be more convincingly bolstered with a better than 50 % success rate and/or a larger universe of cases.

Furthermore, in the case of cooperation between Morocco and Spain regarding refugee protection, UNHCR might not be the best candidate to facilitate cross-issue persuasion. UNHCR and Morocco have long had a troubled relationship due to conflicting (to put it mildly) stances on the protracted refugee situation in Western Sahara. Complicating matters further in Betts's last case study (UNHCR's Convention Plus Initiative), he identifies the existence of readmission agreements as "one of the key obstacles" that prevented UNHCR from persuading the Northern states that enhancements in refugee protection would lead to a decrease in the arrival of asylum-seekers to the EU. Betts also notes that UNHCR was equally ineffective in convincing the Southern states of an issue linkage between refugee protection and development assistance. Considering the existence of the readmission agreement between Spain and Morocco, Betts's framework is unlikely to result in effective cross persuasion in this case. Also, given Morocco's already tense relationship with the agency, UNCHR is not necessarily the best candidate to promote cooperation on refugee protection in the state.

Drawing upon recent literature by academics in international relations (IR) and international law (like Hyndman, Mountz and Betts) I explore the Spanish-Moroccan readmission agreement as an example of how the North–South impasse is reified in international law. Focusing on readmission agreements with safe third country clauses (specifically Spain–

16 Betts 2009, 186.

17 *Ibid.*, 79.

Morocco), I supplement academic arguments with analysis by policy experts and reports from human rights organizations and argue that the international community needs to look at the specific effects these agreements have on refugees in order to achieve the ultimate goal of refugee protection: “safeguard[ing] the rights and well-being of refugees.”¹⁸

This paper is outlined as follows: In the next section, I review the basic components of readmission agreements and outline the historical context of readmission agreements. In the third section, I move to a discussion of the specific case of Spain and Morocco’s readmission agreement and its implementation process. In the fourth section, I offer evidence of human rights violations in Morocco and *refoulement* as a consequence of the 1992 agreement. I aim to build upon the existing insights and frameworks while simultaneously redirecting the conversation away from intentionality and one-size-fits-all solutions and toward identifying and specifying more effective roles for members of the international community with the ultimate goal of ensuring the rights and well-being of refugees in states of origin, destination, and transit alike.

Readmission Agreements: The Basics

Readmission agreements involve a requesting state (a destination state where irregular immigrants and refugees aspire to relocate) and a requested state (an origin state that is a source of irregular immigration to the destination state), and require the requested/origin state to re-admit its own nationals if they are found to be in the requesting/destination state illegally. According to international law, all people have a right to seek asylum, but this does not guarantee their claim will be processed in the state of their choice, nor does it ensure they will be granted refugee status. International law also provides for the *non-refoulement* or non-return of refugees to situations of persecution. Thus, implicit in readmission agreements is the assumption that the requested state is a safe state for its own nationals to be returned to (without fear of persecution).

Like the 1951 Convention, the first generation of readmission agreements in Europe was concluded in the wake of World War II and applied mostly to displacement resulting from the war. Daphné Bouteillet-Paquet traces the history of readmission agreements among EU member states:

18 UNHCR Mission Statement.

The first generation is made up of agreements signed in the 1950s and 1960s between the EC States. These agreements were necessary then since border controls within the EU had not been abolished yet and the free movement of persons was primarily restricted to workers and persons carrying out an economic activity. These agreements also contained provisions on the readmission of third country nationals, but their scope was limited to the foreigners who had already legally stayed beforehand in the requested State. Persons having merely transited illegally through the contracting States' territories were therefore not covered by the scope of these agreements.¹⁹

Bouteillet-Paquet describes a second generation of readmission agreements in the late 1980s and early 1990s concluded mostly between EU Member States and Central and Eastern European states to address immigration in the post-Berlin Wall era.²⁰ While the first generation of readmission agreements were conducted largely on a state-to-state basis, as the European Union (and its preceding incarnations) began to coalesce (in the 1980s, and especially after the Maastricht Treaty in 1993), it became more common for international actors (such as the European Union and its predecessors) to enact a readmission agreement on behalf of one or more state actors. Readmission agreements that were concluded on a state-to-state basis before the implementation of the Maastricht Treaty (including the 1992 Readmission Agreement between Spain and Morocco) also remained intact, however, leading to a rather complicated patchwork of international legal agreements.

This has led to a bit of controversy over which readmission agreements should be identified as bilateral and which should be classified as multilateral agreements. For example, is the EU's readmission agreement with Turkey bilateral or multilateral? While it is classified by the European Union Treaties Office Database as bilateral, I think one could make the argument that the EU, as a representative of multiple states is a multilateral actor and thus, the agreement is multilateral. There does not seem to be a strong consensus among scholars or the legal community on how to distinguish a bilateral versus multilateral readmission agreement.²¹ The mention of return of third-country nationals does not seem to influence this particular (bilateral vs. multilateral) debate in any way as third countries are rarely, if ever, specified in readmission agreements.

Preceded by the Schengen Agreement (signed in 1985 and implemented in 1995) and the Amsterdam Treaty (signed in 1995, entered into force 1999), the European Council's conclusions at the Tampere Summit in 1999 included laying the legal groundwork for a

19 Bouteillet-Paquet 2003, 359–77.

20 I was unable to find evidence any readmission agreements signed in the 1970s by EU Member States. While I think this gap merits further investigation, it is beyond the scope of this paper.

21 For example, I found two scholars who qualified Poland's readmission agreement with the Schengen states of 1991 who classify the agreement as "multilateral" (El-Enany 2016 and Coleman 2009) and two who classify the agreement as "bilateral" (Achermann and Gattiker 1995).

Common European Asylum System (CEAS). Subsequently, a third generation of readmission agreements arose. Based on the conclusions of the Tampere Summit in 1999, which called upon member states to develop a common policy on asylum and migration, this generation of readmission agreements emphasized partnership with countries of origin and transit. Cassarino has observed a dramatic upward trend during this latest generation of readmission agreements:

At the time of writing (June 2014), the EU member states had concluded more than 300 bilateral agreements with more than 85 non-EU member countries worldwide. When the then European Community had 12 member states (1986) around 33 bilateral agreements existed. When the European Union had 25 member states (2004), the number of agreements had skyrocketed to 250. This total number slightly declined in 2007 as a result of the EU accession of Bulgaria and Romania (with which numerous bilateral agreements on readmission had been concluded by the EU–25 member states).²²

This rapid proliferation of readmission agreements signed by the EU and/or its Member States in the 1990s and early 2000s engendered further calls for the standardization of asylum processes, particularly among EU and non-EU Schengen states. In 2005, the Council of Europe put forth “Twenty Guidelines on Forced Return.”²³ The European Parliament and Council established a “Return Directive” on common standards and procedures in Member States for returning illegally staying third-country nationals in 2008.²⁴ Both the Guidelines and the Return Directive include provisions that reference the protection of human rights, explicitly mentioning refugees and the principle of *non-refoulement*.²⁵ Readmission agreements do not provide any legal basis for rejecting a person’s asylum claim (once filed). Rather, the aim is to facilitate the effective return of non-nationals to states of origin or transit.²⁶ Given this context, it is unsurprising that both documents provide far more detail about removal and return than they do about how to best comply with the international human rights law during the implementation of these processes.

Although determinations of refugee status under the 1951 Convention are ultimately made by UNHCR, asylum procedures are usually accessed via a state apparatus. Because the access to and adequacy of asylum procedures varies from state to state, some asylum-seekers attempt to reach the territory of an EU member state (such as Greece or Spain)

22 Cassarino, Jean-Pierre. 2014. A Reappraisal of the EU’s Expanding Readmission System, *The International Spectator*, 49: (4), 130–145.

23 Council of Europe: Committee of Ministers 2005.

24 Council of the European Union 2008.

25 2005 *Guidelines*: Chapter II, Guideline 2, 1 a.–c.; 2008 *Directive*: Article 4, 4b.; Article 5a–c.

26 “Manual on Readmission for Experts and Practitioners: Selected Foreign Readmission and Return Practices.” *International Organization for Migration*, 2010. <http://publications.iom.int/books/manual-readmission-experts-and-practitioners-selected-foreign-readmission-and-return-practices>. Accessed 16 November 2016.

as opposed to a comparably "developing" nation (like Morocco or Turkey). States such as Turkey, Morocco, and Mexico, previously considered exclusively states of origin with regards to irregular migration, are increasingly being recognized as "transit" states, or states where third-country nationals and stateless persons pass through with the ultimate goal of reaching a (different) destination state.²⁷ These same "transit" states are then deemed "safe" third countries (by destination states) to which foreign (third country) nationals, stateless persons, and therefore also refugees and asylum-seekers can be returned without fear of persecution or otherwise inhumane treatment.

Unfortunately, human rights organizations have documented human rights violations against third-country nationals who have been returned to designated safe third countries. Whereas EU Member States are not without fault themselves when it comes to treatment of irregular migrants, readmission agreements further complicate international cooperation on refugee protection. Because transit states tend to be part of the global south, readmission agreements contribute to the North–South impasse identified by Betts by shifting the burden of refugee protection onto nations like Morocco and Turkey whose asylum infrastructures are undeveloped in comparison. However, the trouble is not with the text of readmission agreements, but with the implementation of these agreements and the development of informal practices of return.

Spain and Morocco's 1992 Readmission Agreement: The Specifics

Spain and Morocco concluded their readmission agreement in 1992, but it has undergone various stages of implementation. Spain is average (within the EU) in terms of the number of readmission agreements it has concluded. While each readmission agreement is negotiated under unique circumstances and no single case can represent the full universe of readmission agreements, the case of the Spanish–Morocco readmission agreement presents the opportunity to examine a specific readmission agreement over time while paying close attention to the realities of implementation.

Spain's readmission agreement with Morocco was signed in 1992 in the context of a reconciliation process regarding former Spanish colonial territory Western Sahara. Spain completed its withdrawal from its former colony (known under Spanish administration as Spanish Sahara) in 1976 as part of the Madrid Accords, which left Western Sahara to be administered by Morocco and Mauritania. Shortly thereafter, a 16 year war broke out between the Frente POLISARIO, which wants full independence for Western Sahara, and Moroccan and Mauritanian government forces, who have asserted their own territorial claims in Western Sahara. The UN intervened in 1991 establishing a ceasefire as well as the United Nations Mission for the Referendum in Western Sahara (MINURSO). Although Western Sahara is still waiting for its referendum on independence and remains a sore spot in the diplomatic relationship between Spain and Morocco, Spanish–Moroccan relations continued to develop. In 1991 Spain and Morocco signed a Treaty of Friendship,

27 See: Kimball 2007; Collyer 2010, 273–93; Baldwin–Edwards 2006, 311–324.

Good-Neighbourliness and Co-Operation. In this treaty Spain and Morocco agreed to cooperate in economic, development, defense, cultural, and legal areas of their bilateral relationship including committing them to upholding their responsibility to uphold international legal principles.²⁸

However, also in 1991, Spain began requiring visas for nationals of North African countries such as Morocco to better manage irregular migration from the Maghreb. Citing EU documents, Daniel Wunderlich explains the political climate in Spain during the early 1990s:

In response to Moroccan irregular immigration during the 1990s, the conservative Spanish government under Aznar (1996–2004) wanted to reduce migratory pressure and used EU weight to put Morocco in charge.²⁹

In April 1991, the Spanish House of Representatives approved a proposition that expressly acknowledged Spain as a country of immigration. Whether or not irregular immigration actually increased during this period, Wunderlich argues, Spanish political elites put immigration control at the top of the national agenda.

The 1992 readmission agreement (formally titled: The Agreement between the Kingdom of Spain and the Kingdom of Morocco on the movement of people, the transit and the readmission of foreigners who have entered illegally) was signed in Madrid in February 1992.³⁰ Article 1 states:

At the formal request of the border authorities of the requesting State, border authorities of the requested State shall readmit in its territory the third-country nationals who have illegally entered the territory of the requesting State from the requested State.³¹

Spain is the requesting state while Morocco is the requested state. This agreement stipulates that Morocco must readmit both Moroccan nationals and third-country nationals who are intercepted or apprehended for unauthorized entry into Spain that can be proven to have passed through Morocco on their way to Spanish territory. However, for Morocco to accept the return of third-country nationals, they must first be established as third-country nationals. Although the 1992 Spain–Morocco readmission agreement does not establish a specific criteria or process for determining the status of third-country nationals the 2005 Guidelines on Forced Return offer a useful guide:

For the purpose of establishing the identity, the nationality, or the usual

28 United Nations Treaty Series 1991.

29 Wunderlich 2010, 249–272.

30 Acuerdo entre el Reino de España y el Reino de Marruecos relativo a la circulación de personas, el tránsito y la readmisión de extranjeros entrados ilegalmente, 1992.

31 *Ibid.*

place of residence of the foreigner found to be illegally staying on the territory of the host state, the authorities of this state may have to contact the diplomatic representation of the state of origin, or have their diplomatic representation in the state of origin contact the local authorities in that state. They may transmit for such purposes any documentation relevant to the determination of the identity, the nationality, or the place of residence of the returnee, such as identity documents, documents proving the nationality, [including documents which do not prove identity or nationality by themselves, but which may help to establish it along with other documents], driving licenses, or biometric data including a facial photograph and fingerprints. In certain cases, the person may have to be presented before the diplomatic representation of the state believed to be his/her state of origin, for the sake of determining his/her identity.³²

Establishing the identity of third-country nationals is often complicated by the absence of documentation and/or lack of cooperation by states of origin. However, the determination of third-country nationals has not been the only issue delaying full implementation of the readmission agreement. Over two decades, the substance of the original 1992 readmission agreement remained the same. However, as political and economic realities shifted, so did Morocco's position on implementation. Cassarino observes:

While the conclusion of a readmission agreement is motivated by expected benefits which are unequally perceived by the contracting parties, its full implementation is based on a balance between the concrete benefits and costs attached to it.³³

Cassarino further notes that this balance of costs and benefits can change over time in accordance with domestic as well as international circumstances.

Although Morocco signed the agreement in the context of the Western Sahara peace process, Morocco also hoped to strengthen economic ties with Spain and the EU more generally.³⁴ Meanwhile, Spain leveraged development and economic incentives at every stage of the readmission negotiation process. Indeed, changes in the implementation of the 1992 readmission agreement have largely corresponded with the development and conclusion of bilateral labor agreements between Spain and Morocco. Audrey Jolivel, Project Manager for Intergovernmental Dialogue on Migration and Development (Rabat Process), traces

32 Council of Europe: Committee of Ministers 2005. On May 4 2005, at the 925th Meeting of the Ministers' Deputies, the Committee of Ministers of the Council of Europe on one hand adopted twenty Guidelines on forced return and, on the other hand, took note of the comments on these guidelines drafted by the Ad hoc Committee of Experts on Legal Aspects of Territorial Asylum, Refugees and Stateless Persons (CAHAR). The quote above is taken from the latter commentary.

33 Cassarino 2007, 179–196.

34 *Ibid.*

the history of bilateral labor agreements between Spain and Morocco³⁵: the Agreement on Residence Permits and Labour (*Acuerdo en material de permisos de residencia y trabajo*) of 1996, the Administrative Agreement on Temporary Workers (*Acuerdo Administrativo entre España y Marruecos, relativo a los trabajadores de temporada*) of 1999, and the Agreement on Labour (*Acuerdo sobre mano de obra*) of 2001.³⁶ For the purposes of examining the implementation stages of the 1992 readmission agreement between Spain and Morocco, events surrounding the 2001 labor agreement between Spain and Morocco are especially relevant. Wunderlich notes that although the 2001 labor agreement advanced cooperation between Spain and Morocco, “it did not trigger the pending implementation of the bilateral 1992 readmission agreement, nor did it overcome the lack of cooperation to tighten border controls...”³⁷ In fact, Jolivel notes that while the 2001 agreement was signed in July and came into force in August, it was suspended unilaterally by Spain a few months later, due to diplomatic strain between Spain and Morocco. The diplomatic strain in 2001 resulted when pro-Sahrawi activists in Spain held a mock referendum. Morocco recalled its ambassador to Spain and Spain pushed for sanctions against Morocco in response. Further tension mounted in 2002 when Morocco seized control of Perejil Island, a tiny and disputed island just off the Moroccan coast near Ceuta. Spain retook the island by force a week later, and it remains both uninhabited and disputed. As Wunderlich explains, the Spanish government also leveraged EU pressure:

The Aznar government, which had already asked for EU sanctions against Morocco in 2001, used its EU presidency to increase the pressure. After a Spanish-British initiative to make development aid conditional on cooperation in migration control had been rejected, the Council agreed in its Seville Conclusions that ‘any future cooperation, association or equivalent agreement which the European Union or the European Community concludes with any country should include a clause on joint management of migration flows and on compulsory readmission in the event of illegal immigration.’ Stressing the need for cooperation in border control and readmission, the Council threatened to ‘adopt measures or positions under the Common Foreign and Security Policy and other European Union policies [in the case of an] unjustified lack of cooperation.’³⁸

Despite these diplomatic threats and due to the difficulty of “proving” transit through Morocco to Spain as well as its own domestic considerations, Morocco did not fully imple-

35 Jolivel 2014.

36 ‘*Acuerdo sobre mano de obra*’, July, 25 of 2001 (BOE 20–9–2001) o ‘*Acuerdos de Regulación y Ordenación de los Flujos Migratorios Laborales*.’ *Ministerio de Asunto Exteriores y de Cooperación, 2005*. See comments in reference list.

37 Wunderlich 2010, 249–272.

38 *Ibid.*

ment the agreement until 2012.³⁹ However, after the diplomatic crises between Spain and Morocco in 2001 and 2002, Jorgen Carling of the Peace Research Institute (Oslo) reported:

Morocco made an important concession in October 2003, when the government agreed to readmit non-Moroccans who were arrested on board pateras with a Moroccan at the helm. In January 2004, the first group of Sub-Saharan Africans were returned to Layounne (Western Sahara) from Fuerteventura.⁴⁰

Diplomatic ties between Morocco and Spain were restored in early 2003. Spanish Prime Minister Jose Luis Rodriguez Zapatero visited Morocco and met with King Mohammed in April 2004. However, Zapatero enflamed diplomatic tensions later that year when he met with Polisario leader Mohammed Abdelaziz ahead of plans for Spanish-brokered trilateral peace talks among Morocco, the Polisario and Algeria.⁴¹ However, a new UN envoy was appointed in 2005, and Spain allowed the UN to take the lead in negotiations regarding Western Sahara once again. Also in 2005, Human Rights Watch condemned Spanish deportations to Morocco after migrants stormed the fences in Ceuta and Melilla.⁴² Meanwhile, Morocco continued to avoid full implementation of the 1992 readmission agreement by resisting readmission of third-country nationals.

The European Council adopted negotiating directives for free trade agreements with Morocco, Egypt, Jordan and Tunisia in 2011. The first round of negotiations for a Deep and Comprehensive Free Trade Agreement (DCFTA) between the EU and Morocco took place in 2013.⁴³ Perhaps Morocco decided to fully implement the 1992 readmission agreement in 2012 in order to gain access to economic incentives such as comprehensive free trade with the EU.⁴⁴ Thus, it is possible to see here how the negotiations of treaties and bilateral agreements alter the categories that regulate access to protections and refugeehood.

39 Cassarino, Jean-Pierre. 2012. "An Overview of North African Countries' Bilateral Cooperation on the Removal of Unauthorized Migrants: Drivers and Implications." *Middle East Institute*, May 4. Accessed March 14, 2016. <http://www.mei.edu/content/overview-north-african-countries-bilateral-cooperation-removal-unauthorized-migrants-drivers>.

40 Carling 2007, 316–343.

41 Zunes and Mundy 2010.

42 "Spain: Deportations to Morocco Put Migrants at Risk." *Human Rights Watch*. October 12, 2005. Accessed June 03, 2016. <https://www.hrw.org/news/2005/10/12/spain-deportations-morocco-put-migrants-risk>.

43 "European External Action Service." *European Union Website*. Accessed March 14, 2016. http://eeas.europa.eu/morocco/index_en.htm.

44 While I was unable to find any authors who argue this, it seems to me a fair assumption given the context of Moroccan–Spanish affairs and readmission agreements more generally. For further discussion on EC readmission agreements see: Billet 2010, 45–79. Also: Cassarino 2007, 179–196.

Neo-refoulement and Stranded Migrants: Consequences of the 1992 Readmission Agreement

In addition to immigration and refugee scholars, both the UNHCR and Human Rights Watch have criticized the “safe third country” concept, arguing that in order for this concept to work practically, the requesting state must be able to verify that the asylum seeker/refugee/migrant will have access to the proper procedures and protections.⁴⁵ This is simply not possible in Morocco, which has a questionable human rights record, especially with migrants.⁴⁶ While official statistics on illegal immigrants within Morocco are either extremely difficult to find or non-existent, media and human rights organizations have estimated that there are tens of thousands of unauthorized migrants in Morocco, some of whom will apply for and possibly receive asylum in Morocco, but many more who will not.⁴⁷ If Morocco is unable to prove the nationality of a given migrant, s/he may be stuck in a sort of transit limbo in Morocco, unable or unwilling to settle in Morocco and prevented from reaching EU territory, sometimes detained in refugee detention centers under less than humane conditions.⁴⁸

Although immigration statistics for Morocco are difficult to obtain, a few scholars and the International Organization for Migration (IOM) have documented a marked increase in migrants from Sub-Saharan Africa attempting to transit through Morocco over the last few decades.⁴⁹ In particular, Carling’s article in *International Migration* draws upon approximately 800 media reports, government statistics, various ‘grey’ literature, academic publications and detailed accounts of approximately 1,200 migrant deaths along Spanish borders over the past decade.⁵⁰

Carling finds that the flow of unauthorized migrants to and through North Africa increasingly consists of “transit migrants” from West and Central Africa. Carling defines transit migrants as “migrants who neither originate in, nor are destined to, North Africa: they

45 UN High Commissioner for Refugees 1999.

46 UN High Commissioner for Refugees 2011; Conseil National des droits de l’Homme (CNDH), Moroccan National Human Rights Council 2013.

47 Donaldson, Maggy, and Thalia Beatty. “Morocco Sets Unlikely Precedent in Hosting Sub-Saharan Migrants.” *Al-Jazeera News*, May 13, 2013. Accessed April 28, 2016. <http://america.aljazeera.com/articles/2015/5/13/morocco-sets-unlikely-precedent-in-hosting-sub-saharan-migrants.html>.

48 Collyer 2010, 273–293; U.S. Department of State. *Morocco 2014 Human Rights Report*. Accessed April 28, 2016. <http://www.state.gov/documents/organization/236826.pdf>; “Abused and Expelled.” *Human Rights Watch*. February 10, 2014. Accessed April 28, 2016. <https://www.hrw.org/report/2014/02/10/abused-and-expelled/ill-treatment-sub-saharan-african-migrants-morocco>.

49 “European Year for Development.” *Human Rights Based Migration Management for Stranded and Vulnerable Migrants in Morocco, Tanzania and Yemen*. December 2015. Accessed April 27, 2016. <https://europa.eu/eyd2015/en/iom/posts/human-rights-based-migration-management-stranded-and-vulnerable-migrants>.

50 Carling 2007, 3–37.

are passing through on their way toward Europe, but often end up staying in North Africa for an extended period.⁵¹ UNHCR has expressed concern over the number of possible refugees in Morocco who are unable or unwilling to seek asylum due to Morocco's underdeveloped asylum framework. A 2005 Human Rights Watch Report corroborates the above allegations:

There are alarming reports of human rights violations against migrants deported to Morocco from Spain or detained in Morocco as they tried to enter Ceuta or Melilla. Médecins Sans Frontières on Friday said that, in the desert near the Moroccan–Algerian border, it had discovered more than 500 people abandoned by Moroccan police without food or water. The Moroccan government has reportedly begun transporting hundreds of men, women and children in bus convoys towards the border with Algeria, claiming that the migrants passed through there before entering Morocco. Reportedly, many of the migrants have been handcuffed in pairs and have not been given food or water.⁵²

Certainly expelling migrants into the desert is not what Spain had in mind when it designated Morocco as a safe third country in 1992.

UNHCR continues to work with Morocco to improve its asylum system and treatment of refugees.⁵³ However, Wunderlich notes that the EU directed its funding for UNHCR activities away from Morocco and toward Libya in 2005.

Brussels' decision not to financially support UNHCR activities in Morocco therefore undermined EU intentions of building up a Moroccan asylum system at a time when it would have been most conducive to policy convergence...⁵⁴

As of 2015, EU funding for migration-related activities was about equal for Morocco and Libya.⁵⁵ Additionally, UNHCR Morocco reported progress in registering asylum-seekers in early 2015 when UNHCR Rabat had already registered nearly as many asylum-seekers (1,608) than during the whole 2014 (1,875).⁵⁶ However, UNHCR Morocco also noted that this increase in asylum application processing was likely "due in part" to the end of Moroccan regularization procedures, which left the asylum-seeking process as the only alternative for irregular migrants and refugees seeking to gain legal status.

Even if the asylum process in Morocco has improved, it is still underdeveloped compared

51 *Ibid.*

52 "Spain: Deportations to Morocco Put Migrants at Risk." *Human Rights Watch*. October 12, 2005. Accessed June 03, 2016. <https://www.hrw.org/news/2005/10/12/spain-deportations-morocco-put-migrants-risk>.

53 UN High Commissioner for Refugees 2011.

54 Wunderlich 2010, 249–272.

55 European Commission 2015.

56 UN High Commissioner for Refugees 2015.

to Spain. For asylum-seekers awaiting a decision on their status (and those who are ultimately rejected) the situation in Morocco remains extremely difficult. The Servicio Jesuita a Migrantes, España (Jesuit Migrants Service, Spain) has released a report drawing attention to a growing humanitarian crisis in Northern Morocco:

Migrants face now a situation in which, with a high probability, they will have to stay for long periods in a country where they have few rights and few possibilities of employment.⁵⁷

Human Rights Watch released a report in 2014 detailing violence and abuse of Sub-Saharan African migrants in Morocco.⁵⁸ The irregular migrants interviewed by Human Rights Watch were mostly from Central and West African countries "...which they have left because of poverty, family and social problems, political upheaval, civil strife, and, in some cases, fear of persecution."⁵⁹ The mention of persecution suggests that among these irregular migrants are also potential refugees and asylum-seekers. Either way, unless and until asylum is granted, irregular migrants and potential refugees face the same dire circumstances in Morocco. Unable to work legally or rent an apartment in Morocco, they set up makeshift camps, often in rural areas lacking running water, electricity, and access to basic medical treatment.⁶⁰ Furthermore, migrants interviewed by Human Rights Watch reported frequent raids on makeshift migrant camps by Moroccan police forces in which the Moroccan police would use excessive force against the migrants, arrest them without determining their migration status, and in some cases (as was reported in 2005) transport them to the Morocco–Algeria border, force them to cross into Algeria, and then leave.⁶¹ Algerian border officials then arrested migrants, eventually letting them go after beating and/or robbing them. Some fled back to Morocco, walking through the desert without food and water while others were told or forced by the Algerian guards to go back to Moroccan territory.⁶²

57 "The Moroccan Border with the Spanish Cities of Ceuta and Melilla." *Servicio Jesuita a Migrantes, España*. October 2015. <http://www.sjme.org/sjme/item/802-the-moroccan-border-with-the-spanish-cities-of-ceuta-and-melilla>.

58 "Abused and Expelled: Ill-Treatment of Sub-Saharan African Migrants in Morocco." *Human Rights Watch*. February 2014. <https://www.hrw.org/report/2014/02/10/abused-and-expelled/ill-treatment-sub-saharan-african-migrants-morocco>.

59 *Ibid.*, 15.

60 *Ibid.*, 16.

61 *Ibid.*, 18–21, 25–26, 29.

62 *Ibid.*, 31.

Conclusion—Readmission Agreements: Undermining International Protection

According to the European Parliamentary Research Service (EPSR), Spain refused entry to 172,185 foreign nationals in 2014. Over 40,000 people found to be residing in Spain illegally in 2014 were ordered to leave EU territory; 15,150 foreign nationals were successfully removed from Spanish territory.⁶³ According to UNHCR, the civil war in Syria has caused increasing numbers of Syrian refugees to seek asylum in Spain.⁶⁴ Like many other destination states in the global North, Spain has implemented a readmission agreement with its closest neighbor from the global South (Morocco). Whether or not Spain's 1992 readmission agreement with Morocco was originally intended to undermine international legal norms, the consequences of this agreement have included documented human rights violations.⁶⁵ While Hyndman and Mountz do not directly draw upon reports from international human rights organizations, Human Rights Watch joins them in insisting that Spain bears some of the responsibility for what happens to third-country nationals who are removed directly or readmitted to Morocco:

Summary removals put the migrants at risk of further violence by Moroccan security forces and at risk of being expelled into Algeria. Since numerous journalists and NGOs have reported abuses by Moroccan security forces, it is reasonable to expect that the Spanish authorities should be aware that migrants face a risk of ill-treatment at the hands of the Moroccan authorities. For this reason, as well, these summary removals may also constitute a violation of Spain's obligations under EU and human rights law.⁶⁶

Spain's intentionality aside, human rights violations, including *refoulement*, have occurred as a result of the implementation of Spain's 1992 readmission agreement with Morocco. Even migrants who make it to Spanish territory can be returned to their countries of transit or origin. Unfortunately, Morocco lacks a national asylum framework, which can lead to detention, mistreatment, and/or *refoulement* of refugees, especially those of Sub-Saharan African origin.⁶⁷

Nevertheless, Morocco's underdeveloped asylum framework relative to Spain's is not just a reflection of Morocco's normative shortcomings. Rather it is illustrative of what Betts has identified as the greatest impediment to cooperation within the international refugee regime: the North–South impasse. Betts concludes that further developing the role of UNHCR as facilitator of cross-issue persuasion is the key to overcoming this impasse.

63 European Parliamentary Research Service 2015.

64 UN High Commissioner for Refugees 2015.

65 Abell 1999, 60–83.

66 "Abused and Expelled: Ill–Treatment of Sub–Saharan African Migrants in Morocco." Human Rights Watch. February 2014, 44. <https://www.hrw.org/report/2014/02/10/abused-and-expelled/ill-treatment-sub-saharan-african-migrants-morocco>

67 UN High Commissioner for Refugees 2011.

However, even Betts's own case studies reveal that his framework is far from foolproof; particularly in the most recent case study (UNHCR's CPI) in which Betts laments the existence of readmission agreements as a major obstacle to facilitating cross-issue persuasion. Given the presence and progressive implementation of the 1992 readmission agreement, in addition to UNHCR's volatile relationship with Morocco, promoting a stronger role for UNHCR could actually be a hindrance to efforts toward cooperation on regional refugee protection in this case.

While reviewing recent work from scholars, human rights organizations, and policy experts in international cooperation on refugee protection, I noticed that these disparate sources are all advocating passionately for refugee protection in the context of what might be the greatest displacement crisis since WWII. However, they also seem to be talking past one another in different venues – meanwhile human rights violations of refugees continue. I attempt to put them in conversation here to address what I identify as a major obstacle toward overcoming the North–South impasse in the international refugee regime: readmission agreements, particularly those with safe third country clauses. Although many states in the global North espouse liberal values and human rights, the consequences of the safe third country readmission agreements they initiate (usually with states in the global South) include systematic violations of the very notions underpinning international human rights instruments that seek to protect the human rights of irregular migrants and asylum-seekers. As long as migrants and refugees continue to seek new lives and/or asylum in the EU at staggering rates not observed since the aftermath of World War II, we must continue to evaluate the compatibility of such agreements with international legal principles and norms, especially *non-refoulement* and the right to seek asylum. In the absence of a supranational authority that could outlaw and invalidate readmission agreements with safe third country clauses, it is up to the international community collectively to do a better job of monitoring these bilateral and 3rd party agreements and allocating resources to states of transit and origin in order to ensure refugee protection and the human rights of migrants generally.

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