Symposium on Reconceptualizing IEL for Migration: Framing Migration in the Post-Cotonou Agreement: Priorities and Challenges

By:

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Initiated in September 2018, the negotiations of the new Partnership Agreement between the European Union (EU) and its Member States, on the one hand, and the Organisation of African Caribbean and Pacific (OACP) States, on the other (henceforth the Post-Cotonou Agreement), ended in April 2021. This essay examines the strong focus on mobility and circular migration. It also shows that the emphasis on readmission (extensively detailed in Chapter 4 of the Post-Cotonou agreement) is tantamount to the EU's attempt to consolidate legal mechanisms aimed at ensuring the temporariness of international migration. Such developments raise, however, a host of challenges.

Delayed by the effects of the pandemic, the Post-Cotonou Agreement is expected to be signed in the second half of this year. Prior to this, the provisional application and conclusion of the agreement will be subject to approval by the Council of the European Union, based on proposals from the European Commission. To enter into force, the parties will have to complete their respective internal procedures. They will also have to overcome their internal divisions given Hungary's declared reluctance to ratify the new Partnership Agreement for reasons detailed here.

The Post-Cotonou Agreement includes common Strategic Priorities (Part II) – based on a *political* partnership supported by regular dialogues and "common interests" (Art. 1) – as well as three regional protocols covering respectively the African, Caribbean, and Pacific countries. For each of the three regional protocols, joint institutions are established (Part V).

Each region has a protocol listing the priorities identified. This regional division is a salient feature of the agreement. It raised a lot of controversies during the negotiations, as it implies much less continental integration than under the Cotonou Agreement (which will come to an end in November 2021). That being said, many areas already covered by the Cotonou Agreement have been cited in the new agreement, including, among others, economic, technical and financial cooperation among stakeholders, sustainable development, tariff and non-tariff barriers, development of ICT industries and of the private sector, the sustainability of Economic Partnership Agreements (EPAs), structural institutional political and economic reforms, human rights observance, the rule of law and the fight against corruption, to mention but a few.

What Lies Behind "Migration and Mobility"

Within the Strategic Priorities, the issue of migration has also been subject to strong discussions between European and African stakeholders. While the former insisted on security, re-admission, and the so-called "voluntary" return of irregular migrants, the latter tried to defend positions focusing on sustainable development including legal migration pathways, financial transfers, skills acquisition and transfer.

While the Cotonou Agreement contains an enabling clause to initiate negotiations on readmission (namely Art. 13.5(c)), the Post-Cotonou Agreement

includes a whole chapter (namely, Chapter 4 of Title VI "Migration and Mobility") fully dedicated to enhanced cooperation on re-admission. This Chapter reiterates the reciprocal obligations of the signatory countries regarding the re-acceptance of their own nationals in an irregular situation and specifies that "nothing [...] shall prevent the return of a person under formal or informal arrangements between the requested and the requesting State" (Art. 74.3). This explicit reference to informality is as novel as it is unusual, especially as it applies to arrangements which, although informal, set out contractual and reciprocal obligations which, if not respected, will be subject to "proportionate measures" (Art. 74.4), namely sanctions. In this connection, an annex to Chapter 4 of Title VI, entitled "return and readmission processes", details the conditions for the readmission of irregular nationals while setting a 30-day deadline for a requested state to respond to a readmission request. These details clearly show that discussions on migration matters focused extensively on the need to consolidate cooperation on readmission. They go well beyond the scope of the then provisions contained in Art. 13.5(c) in the Cotonou Agreement, which merely stated the obligations of the signatory countries, under public international law, to re-accept their nationals in an irregular situation. Rather, Art. 74 in the Post-Cotonou Agreement is far from being an enabling clause on readmission. Its rationale puts a lot of emphasis on the processes and modalities of cooperation, be it based on formal or informal arrangements.

In a similar vein, it is also interesting to underline that the term "circular" is often used together with the term migration to emphasise that legal migration is indeed promoted in the Post-Cotonou Agreement, if it is temporary or circular. The reference to “circular migration” was not yet part of the negotiators' repertoire when the Cotonou Agreement entered into force in 2000. This reference has somehow woven its way through the debates and migration talks that have taken place over the last fifteen years or so. In the minds of Western interlocutors, the notion of circularity aims to meet the demand for foreign labour in European labour markets while ensuring that legal foreign workers will not settle permanently in the territories of host countries and thus will not have access to family reunification. Family reunification is a fundamental right to which they would be entitled, had they the opportunity to extend their stay abroad. The Post-Cotonou Agreement subtly consolidates this

mechanism which has been established and practiced by many European countries. Cooperation on readmission becomes a key instrument when one realises that it facilitates the expulsion of any regular migrant worker who has overstayed his or her legal employment contract abroad. In other words, not only does it allow for the expulsion of irregular border crossers and rejected asylum seekers, readmission cooperation ensures that legal migration remains circular and therefore temporary. The Post-Cotonou Agreement follows on from this mechanism which has been established for many years. To be sure, the recurrent reference to mobility and circular migration in the Post-Cotonou Agreement paves the way for a new form of migration law where temporariness is encoded and where the reinforced cooperation on readmission acquires its own relevance in international economic law.

What do these Developments Entail?

What distinguishes the Post-Cotonou Agreement is that it favours a political over an economic partnership. Migration dialogues focus specifically on Sub-Saharan Africa, viewed as an ACP region. Indeed, it is the only region with which a regional protocol includes provisions on mobility and migration. Return and readmission are of particular importance (Art. 78).

These developments directly stem from the Valletta Summit on Migration (November 2015) and the Khartoum Process, where securitised migration measures, including reinforced cooperation on readmission, have been presented as a tool to combat irregular migration.

They also reflect the political will to consolidate a multilateral framework that *facilitates* bilateral cooperation on readmission, where formal agreements and informal arrangements coexist. More problematically, it seems that the European Commission intends to exert a stronger leverage on ACP countries if one takes into account the upcoming creation of the Neighbourhood, Development and International Cooperation Instrument (NDICI). The latter will encompass the European Development Fund which will be incorporated into the EU's general budget as of the 2021-2027 multi-annual financial framework. This process of financial rationalisation will invariably strengthen the power of the European Commission and weaken the contractuality and concertation that have traditionally characterised negotiations between the EU Member States

and ACP countries.

However, it is questionable whether this major leverage will lead to more effective cooperation on readmission. On the one hand, all decision-makers (whether African or European) are well aware that the conclusion of a bilateral agreement on readmission, whether formal or informal, does not necessarily lead to its full implementation. For its implementation is the result of complex variables that are not systematically determined by the need or duty to "combat irregular migration", but by a broader field of cooperation and interdependences driven by other strategic priorities, be they explicitly or implicitly mentioned. These factors codify the bilateral interactions between the signatory countries.

Although there are now more than 40 bilateral agreements linked to readmission concluded by African countries (mainly with France, Italy and Spain), this relatively large number of agreements is not reflective of the willingness, on the part of African countries, to cooperate on readmission. Indeed, to illustrate this paradox, one could argue that cooperation on readmission is at once peripheral and central in migration talks. It is central in policy discourses, as it clearly appears in the Post-Cotonou Agreement and in various migration talks. However, it remains peripheral to other strategic issue-areas of higher policy relevance when it comes to concrete implementation.

Experience shows that any pressure on uncooperative third countries must be assessed with caution, as this could jeopardise other highly strategic areas of cooperation in which several third countries in Africa have managed to reposition themselves. Finally, interdependence between state actors has changed radically over the last two decades. Some African actors are now able to capitalise on their strategic position vis-à-vis certain EU Member States.

The strong focus on readmission in both the Strategic Priorities and the Africa Regional Protocol of the Post-Cotonou Agreement will generate a lot of expectations that might be unmet as well as additional tensions between the EU and African countries, once it is implemented. Meanwhile, the extent to which such tensions will have implications for the wide-ranging framework of cooperation promoted by the Post-Cotonou Agreement remains an open question.

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