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Working Paper No 2012/35 | September 2012

Readmission Agreements of EU Member States: A Case for EU Subsidiarity or Dualism?

Marion Panizzon

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Keywords: Readmission Agreements, EU Mobility Partnership, EU Return Policy, Principles of Subsidiarity and Parallelism.

Research for this paper was funded by the Swiss National Science Foundation under a grant to the National Centre of Competence in Research on Trade Regulation, based at the World Trade Institute of the University of Bern, Switzerland.

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forthcoming in 31(4) Refugee Survey Quarterly (2012)

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This paper examines the extent to which the Treaty of Lisbon's new express European Union (EU) competence over readmissions under Article 79(3), may affirm the Union's exclusivity over return policy. We first trace the trajectory of Union competences over readmissions from implicit to shared. We then provide a brief overview of EU readmission agreements (EURAs), covering the target countries, as well as their scope and content in relation to human rights guarantees and the third-country nationals clause. Based on a case-study of the French agreements on joint management of immigration flows and partnership development (AJMs) we test if despite a weak human rights record, these agreements are better placed to deal with readmission of third country nationals than those of the EU. We find that the AJMs do not compare to EURAs, notably because of the broader issue linkages they propose and the conditionality between labor market access and readmission they establish. On that basis alone, there cannot be an exclusive Union competence over readmission. However, European Union mobility partnerships (EU MPs), which establish a link of conditionality to EURAs, may strengthen arguments in favor of exclusivity, based on the principles of parallelism and subsidiarity.

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1. Introduction

Readmission agreements are a critical part of external migration policy as they allow non-nationals, who are irregularly staying on a host country's territory, to be returned to their home country or to a safe third country.[1] As such they are some of "the oldest instruments employed by Member States to control migratory flows".[2] In contrast to borders, which are a traditional form of migration control, readmission agreements offer an alternative venue as they allow expatriation of migrants who have entered irregularly even before they apply for asylum. They thus often function to "bypass the range of rights which kicks in when these persons apply for asylum",[3] in particular, by neutralizing the constraining effect that the *non-refoulement* guarantee may exert on the stringency of borders.[4]

EU readmission agreements (EURAS) have been described as "essential tools" in the "fight against illegal immigration".[5] They form part of the EU strategy of working together with Schengen States, such as Norway, Switzerland and Liechtenstein, to tighten external borders in view to abolish internal borders and establishing free movement on the single market. Yet, unlike traditional border instruments, such as the Schengen Borders Code,[6] the common visa rules and the Schengen information systems (SIS),[7] which aim at establishing a "Fortress Europe" model,[8] EURAS are part of the EU "concentric circles" model, which

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1 M. Schieffer, "Readmission and Repatriation of Illegal Residents", in B. Martenczuk & S. van Thiel (eds.), *Justice, Liberty and Security: New Challenges for EU External Relations*, Brussels, VUBPRESS Brussels University Press, 2008, 89-110; N. Coleman, *European Readmission Policy: Third Country Interests and Refugee Rights*, Leiden, Martinus Nijhoff Publishers, 2009, 73-85.

2 A. Roig & T. Huddleston, "EC Readmission Agreements: A Re-evaluation of the Political Impasse", *European Journal of Migration and Law*, 9, 2007, 363-387, 366, 367.

3 C. Boswell, *Migration in Europe*, paper for the Policy Analysis and Research Programme of the Global Commission on International Migration, Hamburg, Migration Research Group Hamburg Institute of International Economics Sep. 2005, 8.

4 S. Klepp, "Italy and its Libyan Cooperation Program: Pioneer of the European Union's Refugee Policy?", in J.-P. Cassarino (ed.), *Unbalanced Reciprocities: Cooperation on Readmission in the Euro-Mediterranean Area*, Washington, Middle East Institute Special Edition Viewpoints, 2010, 77-92.

5 Council of the European Union, *Council Conclusions defining the European Union the future strategy on readmission*, doc. 11260/11 MIGR 118, 8 Jun. 2011, 2.

6 Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) OJ L 105/1 of 13.4.2006.

7 Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second-generation Schengen Information System (SIS II)

8 A. Geddes "International Migration and State Sovereignty in an Integrating Europe", *International Migration* 39 (6), 2001, 21–42; A. Geddes, *Immigration and European Integration: Towards Fortress Europe?*, Manchester and New York: Manchester University Press, 2000.

requires policy alignment from neighbouring states rather than relying on total closure.[9] The concentric circles model foresees that the countries of the first circle, being the EU and Schengen Member States abolish borders, while countries of the second circle, which are "prospective members or associated member states", are to align their migration policy to the first circle standards" of the EU and the Schengen rules. Within the second circle, EURAs were considered instrumental in bringing about such approximation.[10] Gradually, the EU extended its EURAS to third-circle countries, being the Commonwealth of Independent States (CIS states) and North African countries, which obtained financial assistance in return, and to the fourth circle, being the Middle East, China and Africa. However, the EU seemed to have been less successful at getting EURAS concluded than individual EU Member States, which have experienced less difficulties in negotiating bilateral readmission agreements.[11]

This article will discuss three pressing issues relating to EU readmission law and policy: competence, competition and conditionality. The first issue, the allocation of competency and potential Union's exclusivity over readmission relates to the comparability of EURAs with the breadth and width of bilateral readmission agreements concluded by individual EU Member States with third countries. The Treaty of Amsterdam of 1999 conferred implicit and shared competences on the Union to conclude EURAs. Whereas the Council has given out negotiating directives for 18 countries, so far, the Commission has concluded 13 EURAs and these have been more successful with the EU's Eastern than with its Southern neighbours.[12] At the same time, individual EU Member States have continued to conclude numerous bilateral migration agreements, containing readmission obligations – the so-called second-generation agreements.[13] France and Spain are at the forefront when it comes to designing and applying these multi-purpose agreements, which "justify migrant admissions on the basis of labour shortages as well as foreign policy and other reasons".[14] Like EURAs, these

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[9] T. Kostakopoulou, "The 'Protective Union'; Change and Continuity in Migration Law and Policy in Post-Amsterdam Europe" Journal of Common Market Studies, 38, 3, 2000, 497–518, 513.

[10] S. Lavenex, "Asylum, Immigration, and Central-Eastern Europe: Challenges to EU Enlargement," European Foreign Affairs Review, 3 (2), 1998, 275-294.

[11] Th. Kostakopoulou, *Citizenship, Identity, and Immigration in the European Union: Between Past,* Manchester University Press, 2001, 132.

[12] European Commission, *Communication from the Commission to the European Parliament and the Council - Evaluation of EU Readmission Agreements*, COM(2011) 76 final, 23 Feb. 2011, 4.

[13] D. Bobeva & J.-P. Garson, "Overview of Bilateral Agreements and Other Forms of Labour Recruitment", in Organization for Economic Co-operation and Development (OECD), *Migration for Employment: Bilateral Agreements at a Crossroads*, Paris, OECD, 2004, 12.

[14] P. Martin, *Bilateral Agreements to Manage Low-skilled Labour Migration: Complementarity or Overlap to Trade Agreements*, Global Forum for Migration and Development (GFMD) paper, Bern, GFMD Berne thematic meeting "Markets for Migration and Development",13-15 Sep. 2011, 5 (emphasis added).

agreements are concluded with Eastern and Central European countries, but also with Mexico, Turkey, Sri Lanka, Hong Kong and increasingly with Latin American countries. More bilateral migration agreements than EURAs have been successfully concluded with Western and Northern African countries.[15] This can be explained by the fact that countries of origin and transit prefer to shop around for the least constraining readmission obligation and human rights standards. Article 79(3) of the Treaty of Lisbon did little to clarify the issue of competence and continues to imply a shared competence over readmissions between the EU and its Member States. Similarly, the third multi-annual programme of EU migration policy, the Stockholm Programme (2010–2014), proposes a "comprehensive" rather than a "harmonized" readmission policy [16] and thus seems to propagate the contemporaneous existence of EURAs alongside the bilateral migration and readmission agreements of EU Member States. Yet, the simultaneous existence of bilateral readmission agreements and EURAS undermines the credibility of EURAs and heightens the desirability of an exclusive EU competence over readmissions.[17].

The second topic discussed in this article is the one of competition between EURAs and bilateral readmission agreements. It raises the normative question of the desirability of a Union exclusivity in light of the superior human rights protection standards of EURAs as compared to bilateral readmission agreements and points to the higher developmental impact of bilateral agreements, which unlike EURAs, offer labor market access quotas in exchange for cooperation on readmission. Here we find that migrant source countries often prefer bilateral readmission agreements over EURAs not only because there is less pressure to uphold the human rights of readmitted citizens and third-country nationals, but also because the geographical scope of the readmission obligation applies only to one, instead of to all 27 EU Member States (except Denmark, and at times the UK and Ireland). This gives rise to a situation which this article labels as "agreement dualism".[18] Agreement dualism is not only the result of shared competencies, but also reflects the *sui generis* law-making approach in the

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15 K. Koser, *Irregular migration, state security and human security*, paper for the Policy Analysis and Research Programme of the Global Commission on International Migration, Global Commission for International Migration, Sept. 2005, available at: http://iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/policy_and_research/gcim/tp/TP5.pdf, p. 24 (last visited 25 Jun. 2012).

16 European Council, *The Stockholm Programme – An Open And Secure Europe Serving And Protecting Citizens (2010/C 115/01)*, OJ C 115/1, 4 May 2010, 31.

17 European Commission, *Communication*, 4.

18 European Commission, *Communication*, 2.

area of freedom, justice and security (AFSJ) which does not follow ordinary legislative procedure as it exists for common commercial or agriculture policy.[19]

The third question of conditionality evaluates EURAs in light of the EU Global Approach to Migration and Mobility (GAMM), the latter which aspires to improve the overall coherence of EU migration policy. In contrast to shared responsibility and partnerships with countries of origin and transit, which the GAMM propagates, EURAS are one-dimensional agreements, tilted unfavorably towards the EU's interests at combating irregular migration.[20] At first sight it seems that the GAMM and its "most tangible operational substance", the so-called EU mobility partnerships (EU MPs), contradict each other in terms of migration policy direction.[21] Yet, more recently, the Commission's evaluation of readmission agreements and the Council Conclusions on readmission of February 2011 proposed that a link of conditionality should connect EURAs to EU MPs. Alternatively, the EU MPs should incorporate readmission obligations.[22] In practice, however, it is uncertain whether this situation will worsen the human rights record of the new GAMM policy.[23] Some have argued that the conditionality between EURAs and EU MPs would undermine the comprehensiveness of EU migration policy, since EU MPs and EURAS differ markedly in terms of their approach towards third countries. However, the Treaty of Lisbon strengthened the instrument of EU MPs as deal breakers to increase the chances that source countries would sign up to EURA, rather than to bilateral migration agreements.[24]

The emergence of EU MPs heightens the conflict of EURAs with the bilateral migration agreements of EU Member States, and raises even more urgently the need to clarify

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19 R.A. Wessel, L. Marin & C. Matera, "The External Dimension of the EU's Area of Freedom, Security and Justice", in C. Eckes & T. Konstadinides (eds.), *Crime within the Area of Freedom, Security and Justice: A European Public Order*, Cambridge, Cambridge University Press, 2011, 272-300, 274.

20 S. Lavenex & R. Stucky, "'Partnering' for migration in EU external relations", in R. Kunz, S. Lavenex & M. Panizzon (eds.), *Multilayered Migration Governance: the Promise of Partnership*, New York, Routledge, 2011, 125.

21 Id., 116.

22 S. Carrera, *The EU's Dialogue on Migration, Mobility and Security with the Southern Mediterranean. Filling the Gaps in the Global Approach to Migration*, CEPS Paper in Liberty and Security in Europe, Brussels, CEPS, Jun. 2011.

23 *Ibid.*

24 European Commission, *Communication from the Commission to the European, Parliament, the Council, the European Economic and Social, Committee and the Committee of the Regions, on circular migration and mobility partnerships between the European Union and third countries*, COM(2007) 248 Final, 16 May 2007, 3, 13-14.

competencies between the Union and EU Member States over readmissions.[25] Not only does a clash emerge between the concentric circles model exemplified by the EURAS and the open method of cooperation (OMC) embodied by EU MPs,[26] but with the EU MPs, an additional type of agreement containing readmission obligations has surfaced, which gives migrant source and transit countries even more opportunities for venue-shopping for the least restrictive readmission clause and the "best deal" on migration overall. Usually, and in the perspective of source and transit countries, the "deal" entails opting for the least restrictive human rights standards and to secure the broadest possible market access for their citizens. Thus, readmission agreements are often concluded with countries that cannot guarantee human rights protection and an asylum application procedure to their own nationals let alone to third-country nationals (TCN).[27] Even the EU Commission has been negotiating readmission agreements without checking on these guarantees or insisting that the country in question uphold certain minimum benchmarks, such as compliance with the *non-refoulement* principle.[28] As the human rights issues they raise show, readmission agreements are "repressive measures" of "pre-frontier" control, which engage the cooperation of a third country in securing the EU's borders.[29] They thus contrast with the preventive measures of EU migration policy, including the GAMM which links migration to development[30]

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25 S. Lavenex & R. Stucky, "Partnering", 117, 121; C. Kaunert & S. Leonard, *The European Union and Refugees: Towards More Restrictive Asylum Policies in the European Union?*, GRITIM-UPF Working Paper Series, Barcelona, GRITIM-UPF, 2011, available at: http://www.upf.edu/gritim/_pdf/WP8_Kaunert_leonard.pdf (last visited 20 May 2012).

26 A. Caviedes, "The Open Method of Co-ordination in Immigration policy: A Tool for Prying Open Fortress Europe?", *Journal of European Public Policy*, 11(2), 2004, 289-310, 303-305.

27 C. De Wenden, "Les enjeux fondamentaux du renvoi de étrangers dans une perspective européenne et internationale ", in C. Amarelle & M.S. Nguyen (eds.), *Les renvois et leur exécution. Perspectives internationale, européenne et suisse*, Berne, Stampfli Verlag, 2011, 4; C. Charles, *Accords de réadmission et respect des droits de l'homme dans les pays tiers. Bilan et perspectives pour le Parlement Européen*, Information Note EXPO/B/DROI/2007/27, Strasbourg European Parliament, Oct. 2007; G. Noll, "Readmission Agreements", in M. Gibney & H. Randall (eds.), *Immigration and Asylum: from 1900 to present*, Santa Barbara, ABC-CLIO, 2005, 495-497.

28 European Council on Refugees and Exile (ECRE), *Comments to the Commission Communication on the Global Approach to Migration and Mobility, COM (2011) 743 final*, 23 Apr. 2012, available at: http://www.ecre.org/topics/areas-of-work/protection-in-third-countries/277.html (last visited 20 Jun. 2012); European Economic and Social Committee, *Opinion of the European Economic and Social Committee on the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – the Global approach to Migration and Mobility, COM (2011) 743 final*, REX/351, 25 Apr. 2012; J.-P. Cassarino, *Readmission Policy in the European Union*, Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, Civil Liberties, Justice and Home Affairs, Brussels, European Parliament, Sep. 2010, available at:_ http://cadmus.eui.eu/bitstream/handle/1814/14957/EP_ReadmissionPolicy_en.pdf?sequence=4 (last visited 25 Jun. 2012).

29 C. Boswell, *Migration in Europe*, 13-14.

30 ECRE, *Comments*.

Studies so far have either exclusively focused on second-generation agreements, on EURAs[31] or on EU MPs, without putting the three into a comparative relationship.[32] The few studies which have contextualized bilateral migration agreements of certain EU Member States within EU migration policy have been based on fieldwork, such as the research by Chou and Gibert on the French bilateral migration agreements.[33] So far, no published study has looked at the interrelationship from the perspective of EU law, and more specifically from the viewpoint of the division of competences in the field of readmission, which is a research issue this paper will take up.

This introduction has observed that bilateral readmission agreements of EU Member States continue to co-exist, despite overlaps and duplications, alongside EURAs. It has asked whether in light of the developments described above, a shared competency over readmissions is still appropriate or whether it should be replaced by an exclusive competence.

Section 2 of this paper situates EU readmission agreements within EU migration and asylum policies and describes the trajectory of EU competences over readmissions from implicit to shared.

This is followed by a description of France's agreements on joint management of immigration flows and partnership development (AJM), which were chosen as a case-study because they expressly aspire to compatibility with EU migration policy. Yet they often fail to adhere to the EU's more stringent human rights guarantees and are inconclusive with respect to a third-country-nationals clause. On that basis and in the light of the principle of subsidiarity, we question the desirability and efficacy of having EURAs and bilateral readmission agreements of EU Member States that run in parallel, a phenomenon we term as

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31 C. Billet, "EC Readmission Agreements: A Prime Instrument of the External Dimension of the EU's Fight against Irregular Immigration. An Assessment After Ten Years of Practice", *European Journal of Migration and Law*, 12, 2010, 45-79; D. Bouteillet-Paquet, "Passing the buck: a critical analysis of the readmission policy implemented by the European Union and its Member States", *European Journal of Migration and Law*, 5, 2003, 359-377; A. Roig & T. Huddleston, "EC"; F. Trauner & I. Kruse, "EC Visa Facilitation and Readmission Agreements, Implementing a New EU Security Approach in the Neighbourhood", CEPS Working Document No. 290, Brussels, CEPS, Apr. 2008.

32 A. Adepoju, F. van Noorloos & A. Zoomers, "Europe's Migration Agreements with Migrant-Sending Countries in the Global South: A Critical Review", *International Migration*, 48(3), 2009, 42-75; N. Reslow, *The external dimension of EU Justice and Home Affairs: the role of third countries in EU migration policy*, ECPR paper, Reykjavik, the 6th ECPR General Conference, 25-27 Aug. 2011; N. Reslow, *Explaining the development of EU migration policy: the case of the MPs*, paper for the fifth Pan-European Conference on EU Politics, Porto, 23-26 Jun. 2010.

33 M.-H. Chou & M. Gibert, "The EU – Senegal mobility partnership: from launch to suspension and negotiation failure", *Journal of Contemporary European Research*, forthcoming 2012; M.-H. Chou & M. Gibert, *From Cotonou to Circular Migration: the EU, Senegal and the 'Agreement Duplicity'*, paper for "Migration: A World in Motion", Multinational Conference on Migration and Migration Policy Maastricht, 18-20 Feb. 2010.

"agreement dualism". In this sense, we ask whether EU Member States have infringed the duty of sincere cooperation by concluding readmission agreements with countries which were already negotiating EURAs.

2. Situating readmission agreements in international law and the external dimension of EU asylum and migration policy

2.1. Readmission obligations under international law

Readmission agreements concretize the customary international law obligation to take back one's own nationals. This is an obligation deriving from state sovereignty over territories and borders,[34] notably the right of a state to decide freely whom to admit and to expel from its territory.[35] Readmission agreements embody an inherent tension between the territorial sovereignty of States to decide over the entry, stay and departure of foreigners on their territory and a customary legal duty to refrain from expulsions.[36] Thus, there are two customary obligations associated with readmissions: the duty to take back one's own nationals and the customary principle of *non-refoulement*, which prohibits removing a person from a host country if, in the recipient country, that person would be subject to torture or to inhuman or degrading treatment or punishment, the latter of which acts as the legal barrier to readmissions.[37] In addition, the duty of the country of origin to take back its own nationals (and of the country of residence to readmit long-stay residents),[38]is often associated with the human right to return, which Article 13 of the Universal Declaration on Human Rights of 12 December 1948 and Article 12.4 of the UN Convention on Civil and Political Rights of 16

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34 D. Martin, "The Authority and Responsibility of States", in A. Aleinikoff & V. Chetail (eds.), *Migration and International Legal Norms*, The Hague/London/New York, T.M.C. Asser Press, 2003, 31-45.

35 K. Hailbronner, *Rückübernahme eigener und fremder Staatsangehöriger, völkerrechtliche Verpflichtungen der Staaten*, C.F. Müller Verlag, Heidelberg, 1996, 29.

36 K. Hailbronner, "Readmission Agreements and the obligations on States under Public International Law to Readmit their Own and Foreign Nationals", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 57, 1997, 1-49.

37 T. Stein, "Aufenthalt und aufenthaltsbeendende Massnahmen gegenüber Fremden", in K. Hailbronner (ed.), *Die allgemeinen Regeln des völkerrechtlichen Fremdenrechts*, Heidelberg, C.F. Müller Verlag, 2000, 59.

38 A. Roig & T. Huddleston, "EC", 364; Hailbronner, *Rückübernahme*, 36.

December 1966 concretize.[39] The duty to take back one's own nationals (and thus of readmission) is often pictured as the mirror image of the human right to leave.[40]

Insofar as readmission agreements govern a legal situation which is authoritatively and exhaustively governed by customary international law, these agreements regulate something that is self-evident.[41] Therefore, as far as a State's own citizens are concerned, readmission agreements are standardized technical agreements, which formalize the procedures, mechanisms and modalities of cooperation between the host country and the sending country (time-limits, distribution of costs and responsibilities), but which do not constitute substantive legal rights and obligations, except where third-country nationals are concerned.[42] In this context, it has been noted that the conclusion of readmission agreements could suggest erroneously that, without the agreement, no such customary duty to readmit one's own nationals would exist, a situation which has been described as the knock-off effect of readmission agreements.[43] However, the need to conclude readmission agreements has arisen because certain countries of origin have failed to implement their customary obligation.[44] Because extradition requires "the existence of a country willing to receive these people", readmission agreements are necessary in cases where the country of origin fails to recognize a customary legal foundation for the readmission principle – in such cases, the agreement "substitute[s] for the lack of a norm".[45]

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39 Universal Declaration of Human Rights, Res. 217 A (III), UNGA RES. 217A(III), U.N. Doc A/810, 10 Dec. 1948; R. Aybay, "The Right to Leave and the Right to Return: The International Aspect of Freedom of Movement", *Comparative Law Yearbook*, 1(121), 1977.

40 V. Chetail, "Freedom of Movement and Transnational Migrations: A Human Rights Perspective", in: T.A. Aleinikoff and V. Chetail (eds.) *Migration and International Legal Norms*, The Hague/London/New York, TMC Asser Press, 2003, 48-60, 57.

41 F. Maiani, "Le droit communautaire et l'éloignement des ressortissants de pays tiers – vers des procédures de retour communes ?", in A. Achermann, M. Caroni, A. Epiney, W. Kälin, M.S. Nguyen & P. Übersax (eds.), *Jahrbuch für Migrationsrecht 2006/2007*, Bern, Stämpfli, 69-96, 70.

42 IOM, "Illustration of Multilateral, Regional and Bilateral Cooperative Arrangements in the Management of Migration", in: T.A. Aleinikoff and V. Chetail (eds) *Migration and International Legal Norms*, The Hague/London/New York, TMC Asser Press, 2003, 323-324.

43 Inter-governmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia (IGC), *Report on Readmission Agreements*, Geneva, 2002, 6, 16.

44 Hailbronner, *Rückübernahme*, 31.

45 T.A. Aleinikoff, "International Legal Norms and Migration: A Report", in: T.A. Aleinikoff and V. Chetail (eds.) *Migration and International Legal Norms*, The Hague/London/New York, TMC Asser Press, 2003, 9, who argues that evidence of readmission agreements can be argued in two ways; either they demonstrate the lack of a norm (and hence the necessity for an agreement), or they demonstrate the fleshing out of a recognized extant norm"; T.G. Gammeltoft-Hansen, *Outsourcing Migration Management, EU Power, and the External Dimension of Asylum and Immigration Policy*, DIIS Working Paper No. 2006/1, Copenhagen, DIIS, 2006, 5.

2.2. Readmission agreements by the EU

Globalization, in particular the liberalization of trade in goods, services and knowledge leads to increased cross-border mobility of persons which in turn results in "porous borders" in Europe, not only towards the South, but in particular, since the fall of the Iron Curtain, towards the East.[46] This has given the EU new impetus in two, diametrically opposed venues of migration policy.

Firstly, it led to harmonization of the EU asylum system with what has been described as the "most substantial move towards concretizing transnational legal norms and practices in refugee law since the entry into force of the 1951 Convention".[47] This harmonization took the form of Council Directive 2001/55/EC on temporary protection,[48] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification,[49] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents,[50] Council Directive 2003/9/EC on reception of asylum-seekers,[51] Council Directive 2004/83/EC on the qualification of refugees and those eligible to subsidiary protection,[52] Council Directive 2005/85/EC on procedures for granting and withdrawing refugee status,[53] and Directive 2008/115/EC on return of illegally staying third-country nationals.[54]

Comment [c1]: No this is not a proposition but an adopted 2004 directive that has been recasted in 2011. See updated list in track changes above of all directives set up for the harmonization of EU asylum law and policy. OK thanks

[46] R. Byrne, "Changing Paradigms in Refugee Law", in R. Cholewinski, R. Perruchoud & E. MacDonald, *International Migration Law: Developing Paradigms and Key Challenges*, The Hague/London/New York, TMC Asser Press, 2007, 163-164.

[47] R. Byrne, "Changing", 165.

[48] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balanced efforts between Member States in receiving such persons and bearing the consequences thereof, OJ L 12, 7 Aug. 2001, 12–23.

[49] Directive 2003/86/EC of the European Parliament and of the Council of 22 September 2003 on the right to family reunification, OJ L 251, 3 Oct. 2003.

[50] Directive 2003/109/EC of the European Parliament and of the Council of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 16, 23 Jan. 2004, 44–53.

[51] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, OJ L 31, 6 Feb. 2003, 18–25.

[52] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304, 30 Sep. 2004, 12–23; replaced by the Directive 2011/95/EC of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and the content of the protection granted (recast), OJ L 337, 20 Dec. 2011, 9–26.

[53] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326, 13 Dec. 2005, 13–34.

[54] Directive 2008/115/EC of the European Parliament and of the Council of 26 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348, 24 Dec. 2008, 98–107.

Secondly, and in stark contrast to these improvements on substantial protection and fair procedures for the determination of status the EU has adopted a plethora of repressive measures, ranging from carrier sanctions, visa lists and detention, and readmission agreements also fall into this category.[55] Readmission agreements have come under criticism, because they undermine the recent improvements of substantive protection, for example, by enabling asylum seekers to be removed without an individualized review of the protection standards in the receiving state or even an explicit guarantee that the returned asylum seeker will be admitted to a determination system.[56] The attempts by the Commission and the Council to increase the conclusion of readmission agreements, in particular with transit countries at the EU's Southern and Eastern borders, without much attention being given to whether third-country asylum laws comply with the EUs standards of safety and protection, stand in contrast to the abovementioned EU policy objective of exporting standards of safety and strengthening refugee law in third countries. Measures for implementing this objective include capacity-building, as showcased by the Procedures Directive, which calls not only for ratification by third countries of the 1951 Refugee Convention, but for its actual "observance".[57] At best, EU migration and asylum policy is thus double-edged, as regards measures of removal and safe third-country practices.[58]

The abolition of domestic control over borders among EU Member States through the Schengen Agreement has triggered a need to export border control and measures to combat irregular migration to third countries. Thus, of the three types of readmission agreements that the EU currently concludes (repatriation to the country of origin, to the country through which the migrant has transited, and "readmission of irregular secondary movers to the countries of asylum they subsequently left"),[59] the second type has gained importance with the attempts by

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55 A. Hurwitz, *The Externalization of EU Policies on Migration and Asylum: Readmission Agreements and Comprehensive Approaches*, paper for the UNU-WIDER Conference "Poverty, International Migration and Asylum", Helsinki, 27-28 Sept. 2002; A. Betts, "The Refugee Regime Complex", *Refugee Survey Quarterly*, 29(1), 2010, 24.

56 R. Cholewinski, "European Union Policy on Irregular Migration: Human Rights Lost?", in B. Bogusz, R. Cholewinski, A. Cygan & E. Szyszczack (eds.), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, The Hague, Martinus Nijhoff Publishers, 2004, 159-192; General Assembly, "Note on International Protection, *Refugee Survey Quarterly*, 23(1), 2004, 107; R. Byrne, "Changing", 169.

57 S.H. Legomsky, "Addressing Secondary Refugee Movements", in R. Cholewinski, R. Perruchoud & E. MacDonald, *International Migration Law: Developing Paradigms and Key Challenges*, The Hague/London/New York, TMC Asser Press, 2007, 177-187; R. Byrne, "Changing", 169-170.

58 K. Landgren, *Deflecting International Protection by Treaty: Bilateral and Multilateral Accords on Extradtiion, Readmission and the Inadmissibility of Asylum Requests*, New Issues in Refugees Research Working Paper n. 10, Geneva, UNHCR, 1999.

59 Coleman, *European*, 24.

the EU to create a buffer zone of countries to which irregular migrants could be deported.[60] A challenge to the EU is that these transit countries often fail to respect the *non-refoulement* guarantee or do not provide efficient asylum systems. Thus, there is no assurance that if these countries perceived the need to send these migrants on to yet another country, this would be done in a manner respectful of fundamental human rights, including procedural guarantees, and without the risk that a migrant might be sent by the third state to another state "where effective protection would not be available".[61] In addition, the EU's substantive standards of protection for asylum seekers and migrants are undermined by the bilateral readmission agreements, which certain EU Member States continue to conclude with third countries without giving much consideration to the question of whether that third country has a functioning asylum system, respects human rights, including the *non-refoulement* guarantee, or otherwise assesses the country of origin's human rights situation before returning third-country-nationals. The legal insecurity caused by the often parallel existence of EURAs and bilateral migration agreements by EU Member States challenges the human rights protection of returned migrants, as the third country concluding such agreements is held to double standards. One of the causes of the inadequate human rights guarantees by migrant source and transit countries lies precisely, we maintain, in the unclear division of competencies between the EU and the Member States over readmission agreements. Thus, the following section will trace the origins and give an update on the state of affairs between the Union and its Member States over the issue of readmission.

3. The trajectory of EU readmission competencies – from implied to express

Apart from the Schengen agreement and Dublin Convention, the Treaty of Maastricht of 1992 did not foresee any harmonization of visa, asylum and immigration policies. Rather intergovernmental governance was the operational concept for the newly created pillar of

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60 C. Boswell, *Migration in Europe*.

61 K. Koser, "Irregular Migration", 24; G. Noll, "Readmission Agreements", 496; United Nations High Commissioner for Refugees (UNHCR), *Position on Readmission Agreements, "Protection Elsewhere" and Asylum Policy*, Aug. 1994, published in *European Series*, 3(2), 1997, 465, 467; Human Right Watch (HRW) stated "Countries neighboring the EU in the east or in the south across the Mediterranean are experiencing increasing numbers of migrants and asylum seekers in transit trying to reach EU territory. The EU is pursuing partnerships with countries that have yet to implement systems for handling migrants and asylum seekers that provide necessary protections. Although they are not "safe countries," it is expedient for the EU to characterize them as such. More and more migrants and failed asylum seekers are returned to these countries under "readmission agreements."", HRW, *European Union, Managing Migration Means Potential EU Complicity in Neighboring States' Abuses of Migrants and Refugees*, HRW, 17 Oct. 2006, avalaible at: http://www.unhcr.org/refworld/docid/4565dfbb4.html (last visited 3 Jul. 2012).

Justice and Home Affairs (JHA) of the Treaty on European Union (TEU).[62] It was not until the Treaty of Amsterdam of 1999, which established the Area of Justice Freedom and Security (AFSJ) in Title V and moved asylum and civil law issues from the third (intergovernmentalism) to the first (community) pillar, that Article 63(3)(b) of the Treaty Establishing the European Community empowered the EU to legislate on "illegal immigration and illegal residence, including repatriation of illegal residents".[63] Yet given the lack of an exclusive (and even express) competence for the Community to conclude readmission agreements, the question whether Member States remained competent to conclude bilateral agreements on readmission was still an open one, which neither the jurisprudence of the European Court of Justice (ECJ) nor EU policy documents could conclusively resolve.[64]

Based on the principle of parallelism introduced by the *ERTA* jurisprudence, for the EU to hold the authority to conclude readmission agreements there is no need for a treaty provision expressly conferring such competency, rather, it could be implicitly derived from the EC's internal powers,[65] such as the Article 63(3)(b) provision to "fight illegal migration". The *Kramer* jurisprudence went a step further with the doctrine of implied (external) powers by finding that there is not even a need for EU implementing legislation to establish, under the principle of effectiveness, an external Union competence. Rather, it sufficed that "treaty provisions explicitly conferred competence on the internal level in this field to the EU".[66]

In the case of readmission agreements, implementing legislation based on Article 63(3)(b), notably the adoption of the EU Return Directive[67] and the creation of a European Return Fund by 2007, already existed. Consequently, there was no question that the EU had an implied competence (based on the principle of parallelism),[68] but it remained unclear whether this power was to be exclusive or shared. Neither the two multiannual programmes of Tampere (1999–2004) and Hague (2004–2009) nor the GAMM of 2005 clarified this issue. Rather it seemed that the documents contradicted each other over the issue of EU exclusivity

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62 Peers, *EU*, 288.

63 Consolidated Version of the Treaty Establishing the European Community, OJ C 325/33, 24 Dec. 2002..

64 C. Billet, "EC", 60; M. Giuffre, "The European Union Readmission Policy After Lisbon", *Interdisciplinary Political Studies*, 1(0), 2011, 11.

65 Court of Justice of the European Communities (ECJ), Case 22/70, *Commission v. Council* (*AETR/ERTA*) [1972] ECR 263, paras. 27-30.

66 ECJ, Cases 3, 4 & 6/76, *Kramer* [1976] ECR 1279, 19-20; see also P. Craig & G. de Burca, *EU Law, Text, Cases, and Materials*, 5th edition, Oxford, Oxford University Press, 310.

67 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348/98, 24 Dec. 2008, 347 (hereinafter EU Return Directive).

68 C. Billet, "EC", 60.

over readmission. Whereas the Hague Programme established a range of initiatives to strengthen the EU return and readmission strategy, and stressed the "importance and visibility" of EURAs as the EU's main tool for use in the external dimension of EU migration policy,[69] the GAM of 2005[70] diminished the value of EURAs at the expense of a "comprehensive migration strategy" based on sharing responsibilities with source countries and diluting readmission policy in favour of two other dimensions of migration policy: legal (labour) migration and strengthening the ties between migration and development.

Only the Lisbon Treaty of 1 December 2009 established an explicit legal basis for the Union to conclude EURAs with the adoption of Article 79(3) of the Treaty on the Functioning of the European Union (TFEU).[71] The subsequent Stockholm Programme (2010–2014) declared EURAs a top priority of EU external relations,[72] but even then, the issue of exclusivity remained unresolved. Two opinions in ECJ jurisprudence could point to exclusivity for the Union over readmissions: *Opinion 1/75* establishes, for common commercial policy, the principle of effectiveness in the sense that where concurrent powers would threaten the coherence and defence of EU external policy vis-à-vis non-EU countries, the EU should have exclusive powers.[73] *Opinion 1/76*,[74] which is now codified in Article 3(2) TFEU, establishes that exclusive external powers can be based on internal powers, if the conclusion of an international agreement is necessary to achieve a treaty objective. However, *Opinion 1/76* continues to be disputed in more recent ECJ case law and doctrine, as discussed further below. It seems that there has been a move to revert to the *ERTA* principle, whereby it is necessary for the EU to have adopted internal legislation, and thus to "occupy" the field, for parallelism to be triggered and an exclusive external competence to be established.[75]

The Lisbon Treaty introduced three further innovations for EURAs. Firstly, more power of oversight was granted to the European Parliament (EUP), which in the past should have been consulted in EURA negotiations, but often found itself delivering a[76] "non-binding

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69 M. Giuffre, "The European", 8.

70 R.A. Wessel, L. Marin & C. Matera, "The External", 272.

71 Art. 79(3) TFEU provides: "The Union may conclude agreements with third countries for the readmission to their countries of origin or provenance of third country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States."

72 A. Roig & T. Huddleston, "EC", 366, 367.

73 ECJ, *Opinion 1/5 (Understanding on a Local Cost Standard)* [1975] ECR 1355.

74 ECJ, *Opinion 1/76 (European Laying-up Fund for Inland Waterway Vessels)* [1977] ECR 741.

75 Craig & de Burca, *EU Law*, 313.

76 A. Roig & T. Huddleston, "EC", 369.

opinion after both parties have already signed the agreement"[77] even when there were "serious concern[s] over human rights protection during return procedures".[78] Under the new Article 281(6)(a) TFEU the Council may only adopt the decision to conclude a EURA after obtaining the consent of the EUP. Secondly, and by virtue of the EU obtaining a single legal personality, the Commission negotiates and signs the EURA in the name of the Union.[79] Thirdly, the Treaty of Lisbon, which incorporated the EU Charter of Fundamental Rights (CFR) of 7 December 2000, protects the rights of migrants and asylum seekers under EU law and empowers the ECJ to review EU secondary legislation, including EURAs in light of the Charter.[80]

4. EU readmission agreements: scope, content, target countries

EURAs are no different than any other readmission agreement in the sense that they "impose reciprocal obligations on the contracting parties to readmit their nationals and also, under certain conditions, third country nationals (TCNs) and stateless persons. They also set out in detail the operational and technical criteria for this process."[81] Prior to obtaining, in 1999, a shared competency to negotiate and conclude EURAs, the EC had proposed two generations of specimen readmission clauses. The first was an enabling clause, which "requested the third country to negotiate, at a later stage, bilateral agreements with Member States regarding non-nationals."[82] This clause was inserted into Community (EC and a third country) agreements and into mixed agreements (EC + 15 Member States). The later clause, of 1999, was inserted into bilateral agreements "with the EC itself".[83]

EURAs do not bind all 27 EU Member States. While the UK and Ireland have the possibility to opt in or opt out, Denmark, which abstained completely from some parts of the Amsterdam Treaty, has to conclude its own readmission agreements on an intergovernmental basis with the respective third country. The same is true for the Schengen-associates, Norway and Switzerland, where a joint declaration in the EURA recommends that these countries,

77 C. Billet, "EC", 64.
78 A. Roig & T. Huddleston, "EC", 369.
79 C. Billet, "EC", 63.
80 Charter of Fundamental Rights of the European Union, [2000] OJ C 364/1, 18 Dec. 2000 (entry into force: 1 Dec. 2009).
81 European Commission, *Communication*, 2.
82 A. Roig & T. Huddleston, "EC", 368.
83 C. Billet, "EC", 48.

including Denmark, conclude a readmission agreement on the same terms as those of the EURA.[84]

With the advent of the EU Return Directive in 2008, certain minimum standards on the technicalities of the readmission process and on human rights guarantees were established, while it was not made clear to what extent the Directive's minimum standards should also be adhered to by bilateral readmission agreements concluded by EU Member States with third countries.[85] Thus, the Commission refused to take a position on whether the EU should have exclusive external competence over readmissions.

4.1. Human rights standards in EURAs

According to prevailing scholarship, readmission agreements must explicitly mention the international treaties and conventions, which codify *non-refoulement* guarantees, since a blanket reference, to "prevailing human rights standards", also known under the term "non-affection" clause, does not suffice.[86] According to recent standards, the express reference must incorporate the minimum standards of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the 1984 Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment and the 1951 Geneva Convention related to the Status of Refugees as amended by the 1967 New York Protocol.[87] Interestingly, the EU Return Directive sets out that it shall be "[i]n line with the 1989 United Nations Convention on the Rights of the Child" and the European Convention for the Protection of Human Rights and Fundamental Freedoms. Consideration 24 of the Directive then finds that the EU Return Directive respects the fundamental rights and observes the principles recognized in particular by the Charter of Fundamental Rights of the European Union. Most EURAs only contain a non-affection clause, which confirms the applicability of and respect for instruments on human rights, but does not go so far as to explicitly mention the different human rights guarantees. After the EUP and NGOs had criticized the non-affection clause of the EURAs with Hong Kong, Macao and Sri Lanka for not expressly referring to human

84 F. Trauner & I. Kruse, "EC", 10.

85 European Commission, *Communication*, 2; K. M. Zwann (ed.), *The Returns Directive: Central Themes, Problem Issues, and Implementation in Selected Member States*, Nijmegen, Wolf Legal Publishers, 2011.

86 S. Dedja, "Human Rights in the EU Return Policy: The Case of the EU-Albania relations", *European Journal of Migration and Law*, 14, 2012, 95-114; Cassarino,*Unbalanced*.

87 N.A. Abell, "The Compatibility of Readmission Agreements with the 1951 Convention relating to the Status of Refugees", *International Journal of Refugee Law*, 11(1) 1999, 60-83; C. Phuong, "Minimum Standards for Return Procedures and International Human Rights Law", *European Journal of Migration and Law*, 9(1), 2007, 120-124.

rights or refugee law,[88] the agreement with Russia included a list of international agreements on the issue.[89]

Similarly, the Commission's evaluation report has found that "safeguards under the EU acquis (such as access to asylum procedure and respect of *non-refoulement* principle) [generate] potential for deficiencies in practice" mostly because "[Member States] may choose not to apply some of the safeguards of the Return Directive to persons apprehended in the border region because the Directive merely obliges the MS to observe a certain number of key provisions, including the non-refoulement principle."[90] To remedy their weak human rights record, future EURAs will step up the oversight authority of their surveillance mechanisms, the so-called joint readmission commissions (JRC), and may include a suspension clause which could be triggered if the third country is found to "persistently violate human rights".[91] Both instruments are guarantees that EURAs will contain more up-to-date human rights clauses than the bilateral migration agreements of EU Member States, such as France, as discussed below. Also supporting an exclusive Union competence for EURAs is the fact that EURAS are more transparent and democratically legitimate than the bilateral readmission agreements of EU Member States, many of which are not publicly accessible, although exceptions do exist, such as France's AJMs discussed below.[92]

4.2. Third-country-nationals

Readmission agreements are necessary to establish the obligation to readmit TCNs, as there is yet no customary international law to compel States to admit non-nationals onto their territory. According to Hailbronner, the principle of good neighbourliness and state responsibility for impairments to other states could be interpreted as constituting a customary legal basis for an international legal obligation to take back TCNs. However, no unified state

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88 See Art. 16 of the Agreement between the European Community and the Government of the Hong Kong Special Administrative Region of the People's Republic of China on the readmission of persons residing without authorization, OJ L 17, 24 Jan. 2004, 25–39; Art. 16 of the Agreement between the European Community and the Macao Special Administrative Region of the People's Republic of China on the readmission of persons residing without authorisation, OJ L 143, 30 Apr. 2004, 99–115; and Art. 16 of the Agreement between the European Community and the Democratic Socialist Republic of Sri Lanka on the readmission of persons residing without authorisation, OJ L 124, 17 May 2005, 43–60.

89 Art. 18 of the Agreement between the European Community and the Russian Federation on readmission, OJ L 129, 17 May 2007, 40–60. See also F. Trauner & I. Kruse, *EC*, 26.

90 European Commission, *Communication*, 12.

91 *Ibid*., 12.

92 Migreurop, *European Commission evaluation of EU readmission agreements. Some comments and questions*, Paris, 7 Apr. 2011, available at: http://www.statewatch.org/news/2011/apr/eu-migreurop-readmission-en.pdf (last visited 20 May 2012).

practice on the readmission of TCNs has yet materialized, because the interests of countries of origin, transit and residence are too divergent.[93] Therefore, it is not possible to send back TCNs who have transited through the State that has been requested to admit the TCN, unless that State agrees to their readmission by signing a readmission agreement.

With the democratic transitions in Eastern Europe in the 1990s, it became standard EU policy to include TCN-clauses in the EURAs, so as to "shift […] the burden of asylum processing and migration control to third states" and thus to realize the so-called "'safe third country' and 'safe country of origin'" policies in these countries, which allow for "reject[ing] asylum seekers without examining their claim on the basis that protection is or should be possible in either their country or a country en route."[94] The clause was thus included in all EURAs, although in some cases its applicability has been deferred (2 years for Albania and Ukraine, 3 years for the Russian Federation).[95]

More recently, the EU has started to abstain from including the TCN clause further for four reasons. The first is because the "capacities of the transit countries are exhausted". [96] The second is that the "basic interest in economic, social and political stability in neighbouring regions" took primacy over safe third country-of-origin policies.[97] Thirdly, TCN-practice had been criticized by the United Nations High Commissioner for Refugees (UNHCR) and others as implying a "lowering of asylum standards below internationally accepted standards."[98] Fourthly, it turned out that transit countries lacked the diplomatic bargaining power to incentivize their neighbours to take back non-nationals, particularly their neighbour country's citizens, a fact which "aggravate[s] the tenuous relationships of these [transit] countries with their neighbours[99] and lead[s] to secondary movements and circular return back to the EU, an effect known as the 'revolving door'".[100]

As TCN-clauses would potentially render the EU an "accomplice" in forced returns, human rights violations and human tragedies, in 2011, the Commission suggested that the TCN clause should no longer be "so widely used".[101] Instead it recommended increasing the

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93 Hailbronner, *Rückübernahme*, 61, 71ff.
94 T.G. Gammeltoft-Hansen, *Outsourcing*, 6.
95 European Commission, *Communication*, 5.
96 F. Trauner & I. Kruse, "EC",30.
97. *Ibid., 30.*
98 *Ibid.*, 30.
99 A. Roig & T. Huddleston, "EC", 381-382.
100 *Ibid.*, 384.
101 *Ibid.*, 381-382.

"effectiveness" of EURA negotiations, which, in the past, had often dragged on (such as those with Morocco or Turkey) precisely because the EU demanded a TCN clause, but could not offer "appropriate incentives" in return, because it lacked competencies over issues such as labour market access.[102] To avoid "losing time until the third country finally accepts the principle of TCN clause", it was suggested that "future negotiating directives should not cover TCNs", so that "there would not be a need for important incentives".[103] Rather, the EU should negotiate "more readmission clauses covering nationals with a wider range of countries of origin" [104] and "focus its readmission policy much more towards important countries of origin, instead of transit, of irregular migration."[105] When opting for TCN-clauses, they would have to be inserted in wider packages, such as in the negotiations of Association, Cooperation or other forms of bilateral or regional agreements.[106] The new EU MPs may also form part of such an incentive package, which EURAs alone cannot offer and which would stimulate countries of origin or transit to take back TCNs.

4.3. Target countries

EURAs are signed with countries that fulfil criteria regarding the size of migratory flows, their geographical position with regard to the EU, the perceived chance of successful implementation, the need for capacity building concerning migration management, the existing framework for cooperation and attitude towards cooperation on migration issues.[107] As of 2011, the Council had issued 18 negotiating mandates. Thirteen EURAs have entered into force so far: with Hong Kong and Macao,[108] Sri Lanka,[109] Albania ,[110] Russia ,[111] Ukraine,[112] the former Yugoslav Republic of Macedonia,[113] Bosnia and Herzegovina,[114] Montenegro,[115] Serbia,[116] Moldova,[117] Pakistan,[118] and Georgia.[119] All were signed under the

102 European Commission, *Communication*, 9.
103 *Ibid.*, 9.
104 A. Roig & T. Huddleston, "EC", 384-385.
105 European Commission, *Communication*, 9.
106 A. Roig & T. Huddleston, "EC", 384-385.
107 F. Trauner & I. Kruse, *EC*, 7; T.G. Gammeltoft-Hansen, *Outsourcing*, 5.
108 See above footnote 89.
109 *Ibid.*
110 OJ L 124, 17 May 2005, 22–35.
111 See above footnote 90.
112 OJ L 332, 18 Dec. 2007, 48–65.
113 OJ L 334, 19 Dec. 2007, 7–24.
114 OJ L 334, 19 Dec. 2007, 66–83.
115 OJ L 334, 19 Dec. 2007, 26–44.
116 OJ L 334, 19 Dec. 2007, 46–64.

"old" mandate of Article 67(3)(b) ECT.[120] In February 2011, the Council agreed on a EURA with Turkey and a concomitant "visa dialogue" without engaging the EU to grant visa facilitation.[121] Negotiating mandates have been received for Morocco (2003), Cape Verde (2009), China (2002) and Algeria (2002), but of these, only the agreement with Cape Verde is linked to visa facilitation.[122] Despite having Partnership and Cooperation Agreements in place with most South Caucasian countries, Central Asian countries and new eastern neighbours of the EU, only Uzbekistan, Armenia, Georgia, Azerbaijan and Tajikistan include the 1995 standard clause in the preamble and only three fully-fledged readmission agreements have been concluded (Russia, Ukraine and Moldova).[123] Negotiations with these three countries only got up to speed once the EU committed to visa facilitation agreements.[124] With the southern neighbours, only the Euro-Mediterranean agreements with Lebanon, Algeria and Egypt contain the 1999 standard clauses, while the provisions of the agreements with Tunisia, Israel and Jordan only state that a dialogue or cooperation on readmission shall take place. With Morocco (2001) and Algeria (2002), negotiating mandates for EURAs exist, but negotiations with Morocco have been dragging on, and the EU has not been able to start negotiations (Algeria) because it lacked incentives to offer to this countries in exchange for concluding an EURA.[125] Morocco and Algeria both have a readmission agreement with France (respectively 2001 and 2003). Of the African, Caribbean and Pacific Group of States (ACP) only Cape Verde is discussing the conclusion of a EURA. It is unclear whether the EU should strive to conclude EURAs with all 79 ACP countries as a whole or with individual ones.[126]

With regard to Latin American and Asian countries, the EU has inserted the 1999 standard clause in the Association Agreement with Chile and concluded a readmission agreement with Sri Lanka (entered into force in 2005) and Pakistan. The readmission

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117 OJ L 334, 19 Dec. 2007, 149–167.
118 OJ L 287, 4 Nov. 2010, 52–67.
119 OJ L 52, 25 Feb. 2011, 47–65.
120 European Commission, *Communication*, 6.
121 European Council, *Conclusions on EU-Turkey Readmission Agreement and related issues, 1st Justice and Home Affairs Council meeting*, EUCO 307, 24 and 25 Feb. 2011.
122 European Commission, *Communication*.
123 C. Billet, "EC", 55.
124 European Commission, *Communication*, 6.
125 C. Billet, "EC", 56.
126 *Ibid*., 58.

agreement with Pakistan states the need to readmit TCNs only under limited circumstances.[127] With China a Memorandum of Understanding (MoU) on "visa and related issues concerning tourist groups", basically applies to groups of tourists overstaying their visas, but does not provide for a genuine readmission mechanism for these people.[128]

Most countries "have attempted to delay each step of the negotiation process from the launch to the signature and the entry into force", so that "an average of two years passed without even a formal response to the invitation to open negotiations."[129] Such delays reflect the "lack of incentives", which could motivate countries of origin and transit to enter into negotiations of an EURA, which is a consequence of the absence of full Union competencies in the field of immigration.[130] The Commission's response has been to suggest that the EU "should develop four main incentives at its dispoasl (various visa related policy tools, financial assistance, elements of the GAM and legal migration) into a coherent package", […].[131] However, we argue that as long as the EU does not have the competence to decide over labour market access volumes (Article 79(5) TFEU), as the following case-study of the French bilateral migration agreements will show, the parallel existence of EURAs and bilateral readmission agreements by EU Member States, the "agreement dualism" phenomenon, will prevail.

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5. French bilateral migration agreements

Designed under the guidance of Nicolas Sarkozy, then Minister of the Interior, France's agreements on joint management of immigration flows and partnership development (AJMs) propose a one-size-fits-all template applicable to any source country – whether in Africa, Asia, or the Americas – composed of three "distinct", but "complementary" prongs, which are said to emulate the GAM.[132] Therefore, they have often met with resistance by the former

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127 See above footnote 118, Art. 3. See also Council Decision of 7 October 2010 on the conclusion of the Agreement between the European Community and the Islamic Republic of Pakistan on the readmission of persons residing without authorization; OJ L287, 04 Nov. 2010, 50.

128 OJ L 83, 20 Mar. 2004, 14–59. See also C. Billet, "EC", 58.

129 A. Roig & T. Huddleston, "EC", 372.

130 European Commission, *Communication*, 7.

131 *Ibid.*, 8.

132 M. Terrot, *Report. No 1417 concerning the adoption by the French Senate of draft laws authorising the ratification of agreements on concerted migration management and co-development between France and the governments of Benin, Congo and Senegal ('Terrot 2009 Report')*, 2009, available at: http://www.assemblee-nationale.fr/13/rapports/r1471.asp, last visited, 13 July 2012.

colonies, which stood to lose their individually negotiated, preferential terms of entry to France.

Between 2006 and 2010 France concluded 15 such agreements. The nine AJMs, concluded with Benin, Burkina Faso, Cameroon, Cape Verde, Congo, Gabon, Senegal, Tunisia and Mauritius, which qualify as "classic" versions, are built around three elements. These elements are: 1) securitization (readmission of undocumented nationals, police cooperation for border control, dismantling of trafficking networks, and the fight against false documents); 2) legal migration (circulation, visas, work immigration, reception and residency of students); and 3) solidarity development.[133] The remaining four agreements are "light" versions because they leave out the readmission clause and other obligations to combat irregular migration. France signed such "light" AJMs, which only liberalise labour market access and grant solidarity development aid, with countries that have concluded EURAs, such as Macedonia, Montenegro and Serbia. The two remaining AJMS, which were signed with Russia and Brazil, qualify as "super-light" versions because they contain only one of the three components. In the case of Russia, this is labour migration, while in the case of Brazil the agreement sets up a mechanism to exchange information on migration. Both Brazil and Russia are emerging economies, rather than developing or least developed countries, and thus do not fall within the French Priority Solidarity Zone (PSZ), which is the precondition for obtaining development aid.[134] Both these AJMs lack a readmission clause, because Russia signed a EURA in 2007,[135] while Brazil has had an agreement with the EU on partnership and cooperation with a special focus on irregular migration management since 1997, and which entered into force on 1 September 2007. In these two cases, combating irregular migration has been delegated upwards on to the EU level. Currently, France is negotiating further AJMs

Comment [c3]: Could you please provide in footnote the reference using this expression of « French Priority Solidarity Zone » ?

133 Ministry of Immigration, Integration, National Identity and Solidarity Development, *Political Report 2009*, 46, available at: http://www.immigration.gouv.fr/IMG/pdf/EMNAnnPolReport2009.pdf (last visited 20 Jun. 2012).

134 Priority solidarity zone (zone de solidarité prioritaire, ZSP) has been defined by the French government in February 1998. It encompasses least developed countries which have no access to capital markets and with which France wants to engage in a partnership in a perspective of solidarity and sustainable development and where it believes that development aid will have a significant effect on the development of democratic institutions, the rule of law, economic growth, stability and regional integration, access to essential services, participative development, sustainable use of land, resources and the environment. The scope of PSZ countries is determined on a on-going basis by the Interministerial Committee on International Cooperation and Development Comité interministériel de la coopération internationale et du développement (CICID). The last definition dates of 14 February 2002, available at: http://www.diplomatie.gouv.fr/fr/enjeux-internationaux/aide-au-developpement-et/article/zone-de-solidarite-prioritaire.

135 Council Decision of 19 April 2007 on the conclusion of the Agreement between the European Community and the Russian Federation on readmission, OJ L129 of 17/05/2007, 38, (entry into force: 1 Jun. 2007).

with Egypt, Equatorial Guinea, Georgia and Mali.[136] In principle, France is targeting the 28 countries of its PSZ, giving precedence to those with a representative number of citizens residing temporarily or permanently in France, thus primarily Western and Northern Africa.[137]

The function of these agreements is to "redirect French immigration policy towards encouraging economic migration and matching it better to the needs of the French economy".[138] In this sense the agreements reinforce four key goals of France's immigration law reform of 2006-2007, namely: 1) to quantitatively limit immigration flows; 2) to reverse the *ratio* between family reunification migration and labour migration; 3) to encourage more international student mobility,; and 4) to control irregular migration more strictly.[139] The agreements moreover strive achieving a better balance between the interests of France and those of the source country on a reciprocal and symmetrical basis. To this end the templates for the agreements were conceived as multifunctional ones, composed of the abovementioned trilateral issue-linkage, which broadens the bargaining for trade-offs with the source country. In practice, the importance of the second pillar, i.e., security issues, outweighs the attention given to labour migration and development cooperation.[140] Another important goal is to complement EU-level agreements on migration. As the political report for 2009 by France's Ministry of Immigration states, the agreements are aligned to the GAM and, in addition, implement point V of the European Pact on Immigration and Asylum of 2008.[141]

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136 Ministry of Immigration, Integration, National Identity and Solidarity Development, *Political Report 2009*, 47.

137 The Priority Solidarity Zone (*Zone de Solidarité Prioritaire*, ZSP) was established in 1998 by the French government to encompass least developed countries, which have no access to capital markets and with which France wants to engage in a partnership because it believes that development aid will have a significant effect on the development of democratic institutions, the rule of law, economic growth, stability and regional integration, access to essential services, participative development, sustainable use of land, resources and the environment. The scope of PSZ countries is determined on an on-going basis by the Interministerial Committee on International Cooperation and Development (CICID). The last definition dates from 14 February 2002, available at: http://www.diplomatie.gouv.fr/fr/enjeux-internationaux/aide-au-developpement-et/article/zone-de-solidarite-prioritaire (last visited 20 May 2012).

138 European Migration Network (EMN) & Ministry of Immigration, Integration, National Identity and Solidarity Development (MIIINDS), *Satisfying Labour Demand through Migration*, 2010, available at: http://emn.intrasoftintl.com/Downloads/prepareShowFiles.do;jsessionid=7B00751FE900C46782A2DD33A1D7A2A0?entryTitle=0 3_Satisfying LABOUR DEMAND through migration, 3 (last visited 20 May 2012).

139 M.H. Chou & N. Baygert, *The 2006 French Immigration and Integration Law: Europeanization or Nicolas Sarkozy's Presidential Keystone?*, Centre on Migration Policy and Society Working Paper 45, Oxford, Oxford University, 2007.

140 Comité Inter-Mouvements Auprès Des Evacués (CIMADE), *French Agreements Concerning the Concerted Management of Migration Flows and Co-Development*, Briefing Paper, Paris, CIMADE, 10 May 2009, 2.

141 Ministry of Immigration, Integration, National Identity and Solidarity Development, *Political Report 2009*, p. 47, 46.

5.1. Third-country nationals clause

The readmission obligation in the French AJM does not always extend to TCNs and stateless persons. The agreements with Cameroon of May 2009 (own citizens, Article 3) and (TCNs, Article 4) with Burkina Faso of January 2009 (Article 10, readmission of nationals; Article 11, readmission of third country citizens), with Benin of 2008 (Article 16, own nationals; Article 17, third county nationals), with Congo of 2007 (Article 3(1), own nationals; and 3.2, TCNs) and Gabon of 2007 (Article 4(2), own nationals and Article 4(3), TCNs) do nonetheless also cover TCNs. Concerning Cap Verde, as it is currently negotiating an EURA which may contain a TCN-clause, its AJM of 2008 only contains a readmission clause for its own nationals (Article 4).[142] In principle, Article 13 of the ACP Cotonou Agreement envisions the possibility for ACP countries to take back TCNs.[143] The AJM with Senegal does nonetheless not contain such a clause, nor does the one with Tunisia. Senegal and Tunisia being powerful migrant transit countries with respect to the EU, they apparently had the leverage to oppose the inclusion of a TCN clause in their agreements with France. France succeeded in including a TCN-clause mainly with countries belonging to the Economic Community of West African States (ECOWAS), which foresees free movement within its borders.[144]

Comment [c4]: The Agreement does not provide for an obligation on ACP countries to take back TCNs but provides that « …negotiations shall be initiated with ACP States aiming at concluding in good faith and with due regard for the relevant rules of international law, bilateral agreements governing specific obligations for the readmission and return of their nationals. **These agreements shall also cover, if deemed necessary by any of the Parties, arrangements for the readmission of third country nationals or stateless persons**…." Ok thanks!

For example, a TCN readmitted from the EU to Benin or Burkina Faso is, because of the free movement clause in ECOWAS, less likely to remain in Benin or Burkina Faso and more likely to find his or her way home or to move to another ECOWAS country than for countries which do not belong to a regional integration unit that supports free movement. In the cases of Gabon, Cameroon or Congo, which are not ECOWAS Members, the TCN-clause in the AJM concretize the EU-ACP Cotonou agreement's "recommendation". It was easier for France to get a TCN clause accepted in this case, since these three countries are not important transit countries, unlike Senegal and Tunisia. With the exception of those with Cape Verde, Senegal and Tunisia, France's AJMs engage in "subcontracting of migratory control," *in lieu*

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142 Migreurop, *European borders, controls, detention and deportations*, Migreurop Report 2009/2010, Paris, Migreurop, 2010, avalailable at: http://www.migreurop.org/IMG/pdf/rapport-migreurop-2010-en_-_2-121110.pdf (last visited 20 Jun. 2012).

143 Art. 13 of the Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States of the other part, Consolidated version, signed in Cotonou on 23 Jun. 2000, revised in Luxembourg on 25 Jun. 2005 and in Ouagadougou on 22 Jun. 2010,

144 Migreurop, *Accords de réadmission ou chantage a l'expulsion, Rencontre internationale sur les accords de readmission*, Paris, Migreurop, 27 Nov. 2009, 18, available at: http://ojiv.org/rapport271109-fr.pdf (last visited 20 Jun. 2012).

of and for the EU.[145] This is the result of France having more leverage than the EU Commission to offer a broader array of cross-concessions in return for acceptance by the country of origin or transit, of the TCN-clause. As the Commission has said, third countries, which "have a deep aversion to the TCN clause" need to be offered more "important incentives" than when readmitting their own nationals.[146] As long as the EU lacks the competence to offer labour market access volumes, it will be more difficult and time-consuming for EURAs to include a TCN-clause than for bilateral migration agreements to do so. For this reason, agreement dualism between EURAs and bilateral migration agreements may be a more effective EU readmission policy than establishing an exclusive EU competence over readmissions.

Comment [c5]: Could you please indicate the exact page of this quotation in footnote ?

5.2. Human rights standards

As several commentators have noted, the French AJMs generate "important risks that migrants' human rights are violated,"[147] because these showcase "insufficient human rights guarantees", in particular regarding the living conditions of TCNs, and fail to mention the modalities foreseen for establishing the nationality of the person to be readmitted, or the modalities for transit or readmission to the "safe" third country for those nationals.[148]

Human rights protection plays a crucial role in readmission processes. Readmission obligations trigger situations which may be human rights-sensitive in terms of the *non-refoulement* guarantee. *Non-refoulement*, which has the status of international customary law, sets limits to readmissions because it prohibits sending migrants back to their country of origin or to any third country if their life and health are threatened there.[149] Most bilateral agreements simply contain a blanket reference to human rights. They thus fail to expressly list human rights treaties to which the contracting parties of the bilateral agreement are signatories. Without a clear reference to a specific human rights treaty, an affected migrant is unable to raise a claim against the violation of his/her *non-refoulement* guarantee or another

145 Migreurop, *European*, 33.

146 European Commission, *Communication*, 9.

147 Migreurop, *Accords*, 18; A. Adepoju, F. van Noorloos, & A. Zoomers, "Europe's Migration" , 42-75.

148 Migreurop, *Accords*, 15.

149 European Court of Human Rights (ECtHR), *Chahal v. The United Kingdom* (Judgment), (1996), Application No. 22414/93; ECtHR, *Saadi v. Italy* (Judgment), (2008), Application No. 37201/06; for a discussion of the case, B. Rudolf, , "Chahal v. United Kingdom No. 70/1995/576/662", *American Journal of International Law*, 92(1), 1998, 70-74.

human right.[150] Of France's new bilateral migration agreements, so far only the one with Senegal (2006) expressly lists human rights instruments. It refers, in Article 3 of the agreement as amended by the subsequent avenant to the Geneva Convention on the Status of Refugees of 28 July 1951; the New York Convention of 31 January 1967 on the status of stateless persons, and specifically for France, to the European Convention on Human Rights of 4 November 1950, and for Senegal, to the African Charter of Human Rights of 27 June 1981.[151]

Comment [c6]: It is article 3 of the agreement as amended by the subsequent avenant. Ok, thanks.

Also in terms of freedom of movement, France's AJMs may be infringing some basic tenets. Most of France's agreements refer in their Preambles to Article 13 of the EU–ACP Cotonou Partnership Agreement (CPA), which calls on ACP countries to join France in border patrol operations to securitize EU borders. Insofar as such cooperation might require migrant-sending countries to close their borders to their own citizens who might want to leave for Europe, the agreements are violating the right of any person to leave any country including one's own, enshrined in Article 13 of the Universal Declaration on Human Rights.[152]

On the upside, one should note that, unlike many bilateral readmission agreements, such as the one between Italy and Libya, France's AJMs are publicly accessible and democratically legitimate. They require ratification by the French Senate and General Assembly. In addition, there is a process for monitoring their implementation, including the human rights situation, through the so-called "*comités de suivi*", which, however, have failed to convene regularly.

Yet, to the extent that France's AJMs fail to stipulate post-admission human rights with sufficient clarity (*non-refoulement*) and may potentially be infringing freedom of movement as well, we find that an agreement dualism is undesirable and that competence over readmissions should lie exclusively with the Union.[153] On the other hand, EU Member States are compelled by virtue of the EU Return Directive to uphold certain minimum human rights standards in readmission procedures, so that this is most stringently an issue of the correct

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150 N. Albuquerque Abell, "The Compatibility of Readmission Agreements with the 1951 Convention relating to the Status of Refugees", *International Journal of Refugee Law*, 11, 1991, 60.

151 *Accord entre le Gouvernement de la République français et le Gouvernement de la République du Sénégal relatif à la gestion concertée des flux migratoires* [Agreement between the Government of the French Republic and the Government of the Republic of Senegal with regard to the Concerted Management of Migration Flows], signed 23 September 2006, JO 8707, 2009 (entered into force: 1 Aug. 2009).

152 M. Panizzon, "Migration and Trade: Prospects for Bilateralism in the Face of Skill-selective Mobility Laws", *Melbourne Journal of International Law*, 11(2), 2011,136.

153 R. Cholewinski, "The Human and Labor Rights of Migrants: Visions of Equality", *Georgetown Immigration Law Journal*, 22(2), 2008, 177–219; see also S. Martin & R. Abimourched, "Migrant Rights: International Law and National Action", *International Migration*, 47(5), 2010, 115–138.

implementation of the Directive rather than a topic related to a potential exclusive Union competency. It should also be noted that France respects the *ERTA* principle associated with the EU's shared competencies in the sense that it only concludes AJMs if the EU has not exercised its competency to conclude EURAs. Conversely, France will leave out a readmission clause from its agreements if the country concerned has concluded an EURA, as is the case for Serbia, Macedonia, and Montenegro.

6. EU Readmission agreements and bilateral readmission agreements of Member States: subsidiarity or duality?

The relationship between EURAs and bilateral readmission agreements is a matter of division of power between the EU and its Member States. Whereas Article 79(3) TFEU has offered the first express legal basis for the Commission to conclude EURAs, this new provision has not resolved the dispute over the type of Union competence in this matter.

As described above, there is evidence that the principle of parallelism could establish an exclusive Union competence over readmissions. Moreover, some argue that the principle of subsidiarity (Article 5 TFEU) points to exclusivity for the Union on the basis that readmissions are more effectively carried out at the Union level than by Member States –an argument that the following section will call into question. Regardless of whether the competence over EURAs is exclusive or shared, however, the duty of sincere cooperation (Article 4(3) TEU) applies.

While Billet's analysis of case law would support an exclusive competency,[154] EU Member States argued the contrary and criticised the Commission for the slow progress in negotiating EURAs, which in their view calls into question the Union's competence in the first place.[155] Whereas the EU Commission has repeatedly argued that competency in the field of readmissions is an exclusive one, in 1999, the Justice and Home Affairs Council advocated a shared one, by setting out five rules, which basically all derive, as noted by Coleman, from the principle of sincere cooperation (Article 4(3) TEU):[156] firstly, Member States may not collectively conclude readmission agreements with third countries; secondly, a Member State must notify the Council of its intention to negotiate a readmission agreement with a third

154 C. Billet, "EC", 62.
155 J.-P. Cassarino, *Readmission*, 33.
156 Coleman, *European*, 84.

country;[157] thirdly, a Member State may negotiate or conclude a readmission agreement with a third country only insofar as the Council has not (yet) adopted a negotiating directive for a Community agreement concerning that country; fourthly the agreement must not be detrimental to the implementation of a Community agreement or to readmission negotiations conducted at the EC level; and, fifthly, regarding countries for which the Council has adopted a negotiating directive for a Community readmission agreement, a Member State may exceptionally conclude an agreement containing more detailed arrangements.

Below we put forward one contextual argument favouring shared competence, thus justifying a duality between EURAs and bilateral migration agreements. This is followed by two contextual arguments as to why competence should be exclusive (broad interpretation of subsidiarity and broad interpretation of parallelism). A third, teleological argument in favour of exclusivity comes next, and finally we present an argument in favour of shared competence.

Firstly some find that Article 4(2)(j) TFEU establishes shared competencies in all domains of the AFSJ, including over readmissions.[158] Secondly, others have argued that post-Lisbon, the balance of shared competence proposed by Article 4(2)(j) TFEU has slightly tilted in favour of the EU. This is because Article 79 TFEU, in contrast to the earlier Article 63 ECT, sets out specific objectives and because the "final words of Article 63 ECT have been removed", which suggests that it is now "easier to justify more intensive EU action pursuant to the principles of proportionality and subsidiarity, and harder to argue in favour of any particular restriction on competence […]".[159]

Comment [c7]: Please consider merging and revising these two paragraphs as : 1) the plan you announce is not clear ; 2) the two paragraphs somehow seem to overlap.

6.1. Subsidiarity

Coleman similarly derives exclusivity from the principle of subsidiarity. Rather than interpreting Article 79(3) TFEU in the light of the AFSJ competence under Article 4(2)(j) TFEU, he focuses on the context of Article 79(1) whereby the Union establishes a "common readmission policy", which he reads it in the light of a broad analysis of the principle of

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157 This proposal goes back to one made by Elspeth Guild in 1996; E. Guild & J. Nissen (eds.), *The Developing Immigration and Asylum Policies of the European Union*, The Hague, Kluwer Law International, 1996, 222.

158 A. Achermann,"Rückübernahmeabkommen: Die Praxis der Schweiz", in A. Achermann, C. Amarelle, M. Caroni, A. Epiney, W. Kälin & P. Übersax, *Jahrbuch für Migrationsrecht 2010/2011*, Bern, Stämpfli Verlag, 2011, 97.

159 Peers, *EU*, 393; while Peers may have written this paragraph with respect to legal migration, in our view it applies equally if not more so to readmission policy, where the EU became active with the returns directive having been adopted just prior to the entry into force of the Lisbon Treaty, i.e. in December 2008 and thus having already fulfilled one of the objectives of Art. 79(1).

subsidiarity of Article 5 TFEU as implying exclusivity.[160] This first contextual interpretation in favour of exclusivity, leaves little room for Member States to conclude readmission agreements of their own. The EU Return Directive's Consideration 20 supports the argument that exclusivity shall be based on arguments of subsidiarity and efficiency: the "objective of this Directive, namely to establish common rules concerning return, removal, use of coercive measures, detention and entry bans, […]*cannot be sufficiently achieved by the Member States* and can therefore, by reason of its scale and effects, be *better achieved at Community level*."[161]

6.2 Parallelism and efficiency

The Union's exclusivity over readmission agreements also flows from a second contextual interpretation, one which analyses Article 79(3) TFEU in light of Article 3(2) TFEU, the latter being the general legal basis establishing an exclusive EU competence for treaty-making based on the principle of efficiency. According to Article 3(2) TFEU, exclusivity is given if it is "provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope". For example, the EU Return Directive,[162] which achieves an internal harmonization of EU law on readmissions, qualifies as a "legislative act of the Union", which, according to Article 3(2) TFEU, could establish an exclusive external EU competence to conclude EURAs.[163] However, and in contrast to the fuller harmonization on readmissions it promotes, Article 3(3) of the Directive notes that "return", which is "the process of a third-country national going back [...] to his or her country of origin, or a country of transit [,can be] in accordance with Community *or bilateral readmission agreements* or other arrangements, or another third country, to which the third-country national concerned voluntary decides to return and in which he or she will be accepted".[164] The EU Return Directive, as Billet points out, is thus "double-edged" on the issue of exclusivity. Her finding is strengthened by Recital 7 of the Directive's Preamble, which similarly emphasises a "need

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160 Coleman, *European*, 83, 85.

161 EU Return Directive (emphasis added).

162 EU Return Directive, required transposition by EU Member States by 20 December 2010. As of 29 September 2011, eight MS, Austria, Belgium, Cyprus, Germany, Lithuania, Poland, Sweden and The Netherlands had not notified the Commission of national measures implementing the 2008 "Return" Directive, while 15 had implemented it in national law.

163 C. Billet, "EC", 62.

164 EU Return Directive; A. Baldaccini, "The Return and Removal of Irregular Migrants under EU Law: An Analysis of the Returns Directive", *European Journal of Migration and Law*, 11(1), 2009, 1-17, 3ff (emphasis added).

for *bilateral* readmission agreements" to facilitate the return process.[165] However, there are others who find that despite the EU Return Directive, internal harmonization of EU migration law is not yet so complete as to trigger the principle of parallelism, upon which an implied exclusive competence for the EU could be established.[166] Instead, such voices deem that EU migration policy shows a "high degree of fragmentation" and a "dispersed focus".[167]

Deriving exclusivity from Article 79(3) read in light of the EU Return Directive is based on a narrow interpretation of the principle of parallelism in *ERTA* jurisprudence, which is now codified in Article 3(2) TFEU. It finds that the Union's exclusivity over treaty-making is limited to cases where the Union has legislated through directives or regulations, such as the EU Return Directive. However, since the EU Return Directive is ambiguous on the question of exclusivity, the Directive fails to clarify the issue. A broader view, such as is shared by Eeckhout, interprets Article 3(2) TFEU as meaning that such exclusivity needs not to be limited to "areas where the EU has already legislated",[168] but can also be derived from treaty-making by the Union.[169] This broad view of parallelism finds that to the extent that the EU concludes an international agreement that is necessary to fulfil a treaty objective, Member States lose their competency according to Article 216 TFEU.[170] Applied to Article 79(3), the mere fact that the EU has concluded EURAs amounts to an act of "communitarization" of the field, which has eliminated any competence for EU Member States to conclude bilateral readmission agreements.

The Council sides with the broader reading of Article 79(3) TFEU, but also finds that EU Member States are under the duty of sincere cooperation of Article 4(3) TEU and must hold back from negotiating readmission agreements, or must cease ongoing negotiations, from the moment the Council adopts a specific negotiating directive. This duty has not always been respected by Member States, who "appear not satisfied with that division of

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165 C. Billet, "EC", 63.

166 S. Peers, *EU Justice and Home Affairs Law*, Third edition, Oxford, Oxford University Press, 2011, 389.

167 A. Weinar, *Improving EU and US Immigration Systems' Capacity for Responding to Global Challenges: Learning from experiences*, Background paper, EU-US Immigration Systems 2011/02, San Domenico di Fiesole (FI), Robert Schuman Centre for Advanced Studies, European University Institute, 2011, 2; B. Martenczuk, "Variable Geometry and the External Relations of the EU: The Experiences of Justice and Home Affairs", in B. Martenczuk & S. van Thiel (eds.), *Justice, Liberty and Security: New Challenges for EU external relations*, Brussels, VUBPRESS Brussels University Press, 2008, 493-523; J. Monar, "The Area of Freedom, Security and Justice", in A. von Bogdandy & J. Bast (eds.), *Principles of European Constitutional Law*, Oxford/Munchen/Baden-Baden, Hart Publishing, Verlang C.H. Beck, Nomos, 2010, 551-585, 556.

168 P. Eeckhout, *EU External Relations Law*, 2nd edition, Oxford EU Law Library, Oxford University Press, 2011, 118.

169 *Ibid.*,118.

170 R.A. Wessel, L. Marin & C. Matera , "The External", 296.

competencies", but the Council has not enforced this duty so far, because its legal "underpinning is unclear".[171] For example, when Spain signed a readmission agreement with Morocco (in 1992),[172] the Commission had not yet been authorized to take up negotiations with Morocco (Commission mandate for Morocco dates from September 2000). The Commission however, refrained from instigating Treaty infringement procedures under Article 258 TFEU on the basis that the principle of sincere cooperation in good faith was violated,[173] even though it was clear that the countries concerned were no longer ready to sign on to a EURA.[174] With Cape Verde, the EU obtained a negotiating mandate in June 2009, while France concluded a bilateral migration agreement with that country including a readmission clause on 24 November 2008, which entered into force on 1 April 2011. In that case too, France may have infringed the principle of sincere cooperation codified since 2009 under Article 4(3) TFEU, and good faith, unless it had notified the Council earlier of its intentions and the Council had agreed to France pursuing its course. Speaking in favour of France is the fact that France had started negotiations before the Commission obtained the negotiating mandate. Possibly, Cape Verde will nonetheless conclude the readmission agreement with the EU, despite already having one in place with France, because unlike in the cases of Algeria and Morocco, it will obtain visa facilitation from the EU.

Yet, in 1999, the Council found that Member States may continue "exceptionally" to hold the competence over readmissions, if they conclude "more detailed arrangements", which would include, for example, the French AJMs, because these arrangements offer labour market access quotas.[175] However, in its conclusions on the EU strategy on readmission of 8 June 2011, the Council adopted a much stricter stance, which basically establishes the Union's exclusivity:

> Existing bilateral agreements or arrangements may only be applied so far as they are compatible with the EU readmission agreements or they are foreseen by the EU readmission agreements since it is of great importance to ensure the effectiveness and credibility of EU readmission policy towards the third countries.[176]

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171 Coleman, *European*, 82.
172 J.-P.Cassarino, *Readmission*, 24, 26.
173 Billet, "EC", p. 61.
174 European Commission, *Evaluation*, 4.
175 Coleman, *European*, 82.
176 European Council, *Council Conclusions defining the European Union strategy on readmission*, 8 Jun. 2011, 4.

The Commission, predictably has always insisted on the strict view that even when the EU has not yet adopted a negotiating mandate or concluded an EURA, Member States should be barred from concluding bilateral readmission agreements.[177] This strict view follows the broad interpretation of the principles of subsidiarity (Article 5 TFEU) and parallelism (Article 2(2) TFEU) and finds that the EU is in a better position to manage readmissions than individual EU Member States, notably because only the Commission can ensure that the AFSJ is maintained without the risk of distortions through secondary movements of illegal migrants between EU Member States.[178]

Doctrine is divided and holds, on the one hand, that Article 79(3) should be broadly interpreted in light of the new objectives of Article 79(1) TFEU, with a view to establishing the Union's exclusivity[179] and, on the other hand, that Article 79(3) should be narrowly interpreted, because it is "an exception from the EU's competence to establish a 'common policy'".[180]

6.3. Preventing a race-to-the-bottom over human rights

Thirdly, and from a teleological viewpoint, exclusivity can be justified because bilateral migration agreements often undermine the attainment of a "common immigration policy", as prescribed by Article 79(1) TFEU. In cases where migrant source countries are left with the choice between an EURA and a bilateral readmission agreement, they will opt for the bilateral readmission agreement because it is less constraining in terms of human rights standards and because of the scope of the readmission obligations, which are limited to a single EU Member State rather than to 25 EU Member States. Such "agreement dualism" provokes a race-to-the-bottom over human rights and other standards of readmission procedures, which in turn hampers the objective of "an efficient migration management" as called for by Article 79(1) TFEU. This fact speaks in favour of the Union's exclusive power over readmissions under the principle of subsidiarity (Article 5 TFEU) and effectiveness (Article 3(2) TFEU).

An alternative teleological interpretation of Article 79(1), which is supported by Cassarino and Peers, leans towards shared competence, because the bilateral migration agreements of certain EU Member States cover much more ground than EURAs – a view

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177 M. Giuffre, "The European", 11.

178 EU Return Directive, consideration 20.

179 Coleman, *European*, 84-85, who describes the status quo of the competence being "shared" but tending towards exclusivity; similarly, Kuijper, 2004, 617-619 as cited in Coleman, *European*, 79.

180 Peers, *EU*, 395.

which the JHA Council held in 1999, but rejected in 2011, as discussed above.[181] This view supports the fact that source countries prefer a bilateral migration agreement over a EURA because such agreements offer labour market access quotas as a reward for cooperation on readmissions. It finds that as along as labour market access remains within national authority (Article 79(5) TFEU) and is not on offer in EURAs, there is no Union exclusivity over readmissions.

Wessel et al. too find that "notably cooperation agreements with readmission clauses concluded by EU MS", which "attain AFSJ objectives by not solely covering matters in that area and revealing a link between trade policy, CFSP and AFSJ matters" "escape the criticism that the EU had already legislated in that area or that there is a concurrent competence which the EU already exercised so that EU MS no longer hold treaty-making power in that field".[182]

One could even argue that that a duality between bilateral agreements and EURAs, is in fact necessary to achieve a "common immigration policy" as prescribed by Article 79(1) TFEU so that shared competence makes good sense.

7. EU Mobility Partnerships as evidence of an exclusive implied external EU competence over readmissions?

Article 3(2) TFEU, as mentioned above, codifies the doctrine of legislative pre-emption, whereby the Union obtains an exclusive implied external competence to engage in treaty-making, if there are "legislative act[s] of the Union". Under a stricter view these acts must be secondary EU legislation, but, under a broader view, exclusivity under the doctrine of pre-emption can even be triggered if the EU engages in treaty-making.[183] In the previous sections we showed that constituting legislative acts of the Union establishing such exclusivity in the field of readmissions could be the conclusion of EURAs themselves, and secondly, the EU Return Directive. In this section we ask whether the joint declarations putting in place EU mobility partnerships (EU MPs) qualify as "legislative acts" under the meaning of Article 3(2) TFEU, which would preclude EU Member States from negotiating bilateral readmission agreements. EU MPs often contain readmission obligations or are concluded on the basis of the condition that the partner country will sign a EURA concomitantly with or subsequently

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181 Coleman, 83; J.-P.Cassarino, *Readmission*, 24ff ; S. Peers & N. Rogers (eds.), *EU immigration and asylum law: text and commentary*, Leiden, Martinus Nijhoff Publishers, 2006.

182 R.A. Wessel, L. Marin & C. Matera, "The External", 289.

183 Eeckhout, *EU*, 119.

to the EU MP.[184] However, speaking against EU MPs constituting the type of activity which establishes exclusivity in the domain of readmissions, one should bear in mind that EU MPs are, firstly, legally non-binding political declarations and, second, that they fail to be representative of the entire EU Membership since they are concluded only by a handful of interested EU Member States. This would lead to the following conclusion: the existence of an EU MP taken on its own, even if including a readmission clause, cannot preclude EU Member States from continuing to negotiate and conclude bilateral migration agreements including readmission clauses with third countries, since the *ERTA* jurisprudence criteria for an exclusive implied external competence, which have been codified in Article 3(2) TFEU, are not fulfilled.

Yet, where both a EURA and an EU MP are in place, as in the cases of Armenia, Georgia and Moldova (but not Cape Verde), an exclusive EU competence has been established by virtue of the *ERTA* doctrine applied to Article 79(1) and 3 TFEU and EU Member States no longer have the right to conclude bilateral migration agreements with the concerned country. The significance of EU MPs as some sort of surrogate for the comprehensive migration agreements concluded by EU Member States with third countries has also been identified by Cassarino, who notes that the Commission wanted to learn from the bilateral experiences of Member States how to facilitate the conclusion of readmission agreements. Mobility partnerships, in Cassarino's words, thus mark a "watershed" in negotiations on readmissions as they testify to the Commission's intention to "broker a deal", to offer something in return.[185]

9. Conclusion: unmaking a triadic relationship?

This article has discussed EURAs and the bilateral migration agreements of France in light of the principles of parallelism (Article 2(2) TFEU), subsidiarity (Article 5 TFEU) and sincere cooperation (Article 4(3) TEU). A narrow interpretation of the principle of parallelism would require the adoption of internal legislation to establish an exclusive external competence. Such internal legislation exists in the form of the EU Return Directive, but the fact that the Return Directive is ambiguous about the Union's exclusivity over readmission does not resolve the issue of competencies over readmissions. Rather, a broad interpretation of the

184 European Commission, *The Global Approach to Migration and Mobility*, COM(2011) 743 final, 18 Nov. 2011. In 2011, the Commission explicitly conditioned the conclusion of an EU MP upon the negotiation of an EU readmission agreement.

185 J.-P.Cassarino, *Readmission*, 32.

principle of parallelism finds that the EURAs qualify according to Article 3(2) TFEU as a "legislative act of the Union", which establish exclusivity over readmissions. Thus, the adoption of EURAs precludes Member States from concluding bilateral migration agreements.

However, despite the Commission's view that EURAs count as "legislative acts of the Union", we found that even the broadest interpretation of the principle of parallelism is not broad enough to trigger exclusivity of the Union over readmission policy, because the treaty objective of Article 79(1) TFEU is "common migration policy" and not readmission policy.[186] Based on a description of the French AJMs, we demonstrated how these agreements are much wider in scope than EURAs. Even if the EURA is linked to an EU visa relaxation or elimination agreement, French AJMs encompass issues such as legal migration, development and police cooperation or energy policy, which so far have not come under Union competence. As long as EURAs fail to be linked to policy areas where the Union lacks competence, notably on labour market access, EURAs differ so considerably from the comprehensive bilateral migration agreements of EU Member States that treaty-making by the EU cannot be taken as evidence of an exclusive EU competence. Because EURAs do not compare well to bilateral migration agreements, it would be erroneous to take away a competence from EU Member States, which the Union itself is not yet competent to exercise. We also find that the principle of subsidiarity (Article 5 TFEU) is not triggered. Rather, and quite the opposite, we argue that Member States are in a better position than the Union to negotiate readmission agreements, which will be implemented and enforced. Therefore, we have argued in line with some voices in doctrine, and the AFSJ's Stockholm Programme (2010-2014), that shared competences over readmission and as a result, "agreement dualism", should, in principle, remain unencumbered.[187]

Importantly, however, we have shown how shared competence triggers a race to the bottom over human rights standards. We also found that human rights guarantees in bilateral migration agreements are an issue of the correct implementation of the EU Return Directive, but not necessarily an issue of division of competences. Thus, in the final analysis we concur with scholars, the Commission and, most recently, the Council's view, that EURAs are a better tool, in terms of human rights protection, than bilateral migration agreements for the following two reasons.

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186 European Commission, *Communication*, 6-8.

187 J.-P. Cassarino, *Readmission*, 22-29; A. Achermann, "Rückübernahmeabkommen", 97.

Firstly, as of 2011, EURAs will possibly renounce TCN clauses. This will improve their human rights record, because the risk that migrants will be expelled from the EU to a country that will in turn deport them to another, unsafe, country has been eliminated. Conversely, countries like France – in cases, where they have at their disposal enough leverage towards a transit country – will insert TCN clauses into their readmission agreements, at least as long as there is no obligation from EU law for Member States to abstain from such a practice.

Secondly, EURAs will demonstrate a better human rights record than bilateral migration agreements – a fact favouring an exclusive Union competence – because as of 2011 these will contain a safeguards clause, which will suspend their application if the partner country does not respect human rights.[188] Such a clause is missing from the French migration agreements.

Yet, as long as the EU cannot provide better incentives for source countries to sign on to EURAs, such as by offering labour market access, one cannot argue that an exclusive Union competence is the one and only tool for attaining the treaty objective of fighting illegal migration under Article 79(1) TFEU. Instead, one will have to look for alternatives to the Union's exclusivity, and we propose two: firstly, the EU Return Directive has to be reformed with a view to requiring EU Member States to adopt and implement, in their bilateral readmission agreements, the human rights standards as they now exist for EURAs. Notably, bilateral migration agreements concluded by EU Member States should incorporate a suspension clause, and possibly abstain from TCN clauses. So far, the EU Return Directive does not prohibit the use of TCN clauses for countries that fail to respect the *non-refoulement* guarantee or other human rights standards. Given this lacuna, EU Member States remain free to insert such a clause into their bilateral readmission agreements. Under a reformed EU Return Directive, however, Member States which fail to respect these obligations in their bilateral migration agreements can be held responsible on the basis of state liability. Secondly, the EU should come up with a comprehensive EU migration agreement, which would include labour market access quotas, to replace its EURAs and MPs. Without a comprehensive EU migration agreement to replace the broader and more detailed second-generation migration agreements, even the broadest possible interpretation of the principle of parallelism fails to establish the type of exclusivity necessary for a true "common migration policy." However, and in the meantime, the triad of EU MPs, EURAs and bilateral readmission agreements will remain in place, despite the overlaps and duplications it may generate.

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188 European Commission, *Communication.*

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Word Count: 11148(footnotes included)