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Readmission and the European Union’s Founding Values

by

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A thesis submitted in fulfilment of the requirements for the degree of Doctor of Philosophy in Law

University of Warwick, School of Law

March 2020
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Declaration

I hereby declare that this thesis submitted for fulfilment of the requirements of a Doctor of Philosophy in Law at the University of Warwick is my own work except where references have been made to outside sources. It has not been submitted in whole, or in part, for a degree at another university nor for publication.
Abstract

In the context of growing threats to its external borders and adherence to its founding values under Art. 2 TEU, this thesis examines the extent to which the EU’s readmission policy is congruent with its founding values of respect for the rule of law, human dignity, democracy and human rights. Structured in the theoretical framework of Levinasian ethics, it will be argued that the EU’s readmission policy does not adhere to its founding values.

This thesis first examines the historical development of EU readmission policy, demonstrating its reactive rather than proactive nature as well as how the EU’s growing readmission competence was in recognition that common Member State issues are most effectively tackled at the Union level. It also examines the institutional dynamics at play in the creation of readmission policy, highlighting the tensions between the institutions. It will be argued that readmission policy does not adhere to the common interpretation of separation of competence and subsidiarity. The third chapter examines instances where readmission obligations have been included in mixed agreements.

Turning to the values, this thesis examines the EU’s own understanding of human dignity, human rights, the rule of law and democracy, drawing on a range of international and regional legal sources and literature in order to assess the scope of these values. These values are applied as a lens to aspects of EU readmission policy, from the use of political arrangements interfering with respect for the rule of law and democracy to the possibility of chain-refoulement through the ‘Readmission Network’ violating respect for human rights. In response, this thesis proposes several policy initiatives to remedy these violations.
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Meaning</th>
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<tbody>
<tr>
<td>ACP</td>
<td>African, Caribbean and Pacific.</td>
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<tr>
<td>AG</td>
<td>Advocate General.</td>
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<td>AFSJ</td>
<td>Area of Freedom, Security and Justice.</td>
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<tr>
<td>CAT</td>
<td>Convention Against Torture.</td>
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<tr>
<td>CSDP</td>
<td>Common Security and Defence Policy.</td>
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<tr>
<td>CFR</td>
<td>Charter of Fundamental Rights of the European Union.</td>
</tr>
<tr>
<td>CFSP</td>
<td>Common Foreign and Security Policy.</td>
</tr>
<tr>
<td>CJEU</td>
<td>Court of Justice of the European Union.</td>
</tr>
<tr>
<td>CoFE</td>
<td>Council of Europe.</td>
</tr>
<tr>
<td>DG</td>
<td>Directorates-General.</td>
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<tr>
<td>EASO</td>
<td>European Asylum Support Office.</td>
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<td>EC</td>
<td>European Community.</td>
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<td>ECHR</td>
<td>European Court of Human Rights.</td>
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<tr>
<td>EEAS</td>
<td>European External Action Service.</td>
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<tr>
<td>EEC</td>
<td>European Economic Community.</td>
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<tr>
<td>EU</td>
<td>European Union.</td>
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<tr>
<td>EURA</td>
<td>European Union Readmission Agreement.</td>
</tr>
<tr>
<td>FCA</td>
<td>Framework Cooperation Agreement.</td>
</tr>
<tr>
<td>JHA</td>
<td>Justice and Home Affairs.</td>
</tr>
<tr>
<td>Acronym</td>
<td>Full Name</td>
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<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights.</td>
</tr>
<tr>
<td>ICERD</td>
<td>International Convention on the Elimination of All Forms of Racial Discrimination.</td>
</tr>
<tr>
<td>PCA</td>
<td>Partnership Cooperation Agreement</td>
</tr>
<tr>
<td>TEU</td>
<td>Treaty on European Union.</td>
</tr>
<tr>
<td>TFEU</td>
<td>Treaty on the Functioning of the European Union.</td>
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<tr>
<td>UDHR</td>
<td>Universal Declaration of Human Right.</td>
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Chapter 1: Introduction

This thesis takes place in the context of an EU which has faced numerous challenges over the past decade. These challenges have been physical and theoretical, with significant consequences for the functioning of the Union. At the physical level, the EU has faced unprecedented migration pressure at its external borders, fuelled by conflict, famine and human rights abuses. Primarily taking place in the Mediterranean, these migration movements and the images they created in the minds of the European public focused the attention of policy makers on the issue of return and readmission. Readmission, the act of returning a third country national to their country of origin or transit, has been the primary policy response to irregular migration. With customary international law providing the first level of legal basis - that a state must accept the return of their own nationals - the EU and Member States have negotiated numerous RAs which expand the scope of these obligations to include third country nationals and stateless persons.

Art.2 TEU sets out the founding values of the EU:

‘The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail’.

At the theoretical level, the EU has faced persistent threats to adherence to its founding values. These threats to adherence stem in the first instance from Member States. A violation of a founding value by a Member State cannot be contained from spreading; it influences the functioning of Union structures and procedures, and damages mutual trust between members. Second, the EU institutions themselves may encroach on the founding values, whether by institutional design or policy. Finally, the Union may face limitations on its ability to export its founding values and, influenced by external actors and events, EU adherence to Art.2 TEU may also be affected.

The catalyst for the examination undertaken in this thesis is the ‘migration crisis’, which necessitated added focus on concluding EURAs and political arrangements. However, such arrangements may be time sensitive, responding to public concerns and political pressure placed on national and EU actors.

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The situational and time sensitivity, alongside the objective of increasing the number of effective returns, has arguably driven EU readmission policy in certain directions, often at the expense of adherence to its founding values.

1.1 The Founding Values

The Union’s founding values shape its internal and external policy actions. Internally, under Art.3(2) TEU, it is an EU objective to promote its values. Externally, Art.3(5) commits the Union to promoting its founding values in its external relations. Therefore, these values permeate every aspect of EU decision-making. However, the content of the values is not defined in the Treaties; instead, elements of them are scattered throughout the Treaties, documents produced by the EU institutions and CJEU rulings. As Kochenov has argued, ‘the EU is powerless to define their content. Consequently, the case law of the ECJ seems to be pointing towards Art.2 TEU not having acquired any self-standing value’. The issue of content and definition feeds into the prospect of enforceability, with Kochenov arguing that they are not legally enforceable. For Bogdandy and Bast, Art.2 TEU is to be interpreted as containing principles and legal norms, with Art.2 blurring the distinction between values and principles, with values defined as ‘fundamental ethical convictions’. This thesis contributes to this discussion through the application of the values as a lens to readmission policy, through the identification of elements of each value, and consideration of legal rights and obligations. It will be argued that, although there is contention as to whether Art.2 TEU values are actionable, there are numerous elements contained within which are.

Recognising the difficulty in defining these values, this thesis will focus on four: human dignity, human rights, democracy and the rule of law. The exclusion of freedom and equality from the thesis is argued on two grounds. First, these concepts already form elements of the other four values, meaning there are significant areas of overlap, which would lead to duplication. Second, the meaning of freedom and liberty operates to a greater extent at the theoretical level, and, consequently, these values are not conducive to application to a policy area such as readmission. Due to these factors, this thesis does not aim to create all-encompassing definitions of the meanings of these values; rather, relying on

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3 Ibid, 305.
5 Ibid, 22.
identifiable primary and secondary sources, this thesis will propose elements of each value which will then be applied to readmission.

Here, this thesis contributes to the body of literature by further informing the discussion of the content of the values, drawing together the existing literature, identifying and recognising areas of contention in order to accommodate these into my own approaches. In addition, this thesis will demonstrate how those values can be applied to a policy area. For example, while there is a body of books and articles which examine rule of law adherence and human rights issues, there is little on human dignity or the democratic considerations.

1.2 Readmission

Readmission, the ability of a state to return a third country national to his or her country of origin and for that country to accept the return, has been a key tenet of migration management and the role of the state for many years prior to the creation of the EU. As customary international law, state practice has been relatively consistent on this. However, the process itself is not necessarily straightforward, particularly where there are issues of identity or conditions which may prevent return to a country of origin. Therefore, states and the EU have sought to conclude RAs which address these issues by establishing agreed procedures and methods. Furthermore, these agreements may provide for the return of third country nationals and stateless persons to a country of transit, meaning a state through which they passed before reaching the Union. Here, readmission is more controversial, from the EU and third country perspectives.

Numerous books and articles have been written identifying issues such as determining identity, negotiation costs and human rights compatibility. Coleman provides one of the most detailed

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6 See K. Hailbronner, ‘Readmission Agreements and the Obligation and the Obligation of States under Public International Law to Readmit their Own and Foreign Internationals’ (1997) 57 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 2-5.


examinations of readmission policy in *European Readmission Policy: Third Country Interests and Refugee Rights*. However, written in 2009, this book does not address the increasing informalisation of this policy area nor any of the EURAs or policy initiatives following the Treaty of Lisbon. Therefore, this thesis aims to address these shortcomings by encompassing legal and political instruments of readmission and examining recent developments in this policy area. It will be shown how earlier policy initiatives have significantly impacted the EU’s current approach, tracing the use of language and proposing reforms for its future development. Furthermore, this thesis contributes to the literature in the application of the values as a lens, and the use of readmission policy to inform the content of those values. Due to the expanding nature of the literature on readmission, this thesis considers the literature up to February 2020.

1.3 Hypothesis and Research Questions

The primary research question of this thesis is: to what extent is the EU’s readmission policy congruent with its Art.2 TEU founding values of respect for human dignity, human rights, democracy and the rule of law? In order to address this primary research question, there are several secondary questions. First, there is the secondary question of content: what is the EU’s understanding of each value? Only having established the EU’s own conception of the values can they be applied. Second, to what extent is the EU committed to its founding values? Here, readmission policy acts in a similar manner to a case study, providing one example where the EU’s commitment to the values may be tested. Third, what does readmission tell us about the meaning of the founding values? To address this, I will investigate how readmission may inform our understanding of the founding values and consider whether the EU applies a specific element of a value in the context of readmission, which it applies differently elsewhere.

In order to answer these research questions, this thesis adopts a doctrinal approach with elements of a case study methodology to the gathering of qualitative information. First, this thesis will identify the relevant sources of law, which range from international conventions, Member State constitutions and EU Treaties to the case law of the ECtHR and CJEU. This places readmission in its wider EU and
migration contexts. From identifying and interpreting these primary and secondary sources, I establish the elements of the values to be applied. In order to establish and delineate readmission from other policy areas, this thesis relies on the documents produced by the EU institutions as well as associated academic materials. While recognising the inherently political subject of readmission and the management of migration, this thesis pursues a legalistic approach, while accepting the potential political drivers and theories such as international relations and migration management approaches behind the development of the policy.

This thesis seeks to confirm my hypothesis that the EU’s readmission policy is not congruent with its founding values. Although the Treaties obligate the Union’s internal and external policies to be guided by the Art.2 values, it is my hypothesis that the nature of readmission and how it has developed, primarily reactively rather than proactively, as well as national political considerations, have created the conditions for which the values have been compromised in pursuit of an effective readmission policy. These values are compromised to varying degrees. It is my hypothesis that democracy is interfered with to a lesser extent than the other three values, with human rights and human dignity being at the same level followed by the rule of law to a lesser extent.

1.4 Theoretical Framework

The theoretical framework underpinning this thesis is Levinasian ethics developed by Levinas in works such as *Humanism of the Other*¹² and *Ethics and Infinity*.¹³ This ethical system centres on the idea of the ‘Other’, for whom, through interaction, you become responsible for: ‘it is responsibility which goes beyond what I do’.¹⁴ Furthermore, ‘the tie with the Other is knotted only as responsibility, this moreover, whether accepted or refused, whether knowing or no knowing how to assume it, whether able or unable to do something concrete for the Other. To say: here I am’.¹⁵ Levinas also discusses the idea of an order being created through this interaction with the Other.¹⁶

Although for Levinas the Other and the interaction is akin to a religious experience, it is my argument that this ethical system, the idea of engaging with the ‘Other’ and the resultant creation of ‘orders’ or responsibilities in many respects mirrors a legal process. For this reason, Levinasian ethics provides a better-suited theoretical framework than alternatives such as a rights-based approach. This thesis

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¹² E. Levinas, *Humanism of the Other* (Translated by N. Poller, University of Illinois 2006).
¹⁴ Ibid, 96.
¹⁵ Ibid, 97.
¹⁶ Ibid, 98.
instead interprets the ‘Other’ as an irregular migrant. Rather than the individual-Other interaction, we have instead the State/EU-irregular migrant interaction. Through the requirements of jurisdiction, territorial or control-based, the state has moral and legal obligations towards the irregular migrant. Those obligations are asymmetrical. The irregular migrant does not have to be aware of them; the State does not necessarily have to be always aware of its obligations; they exist regardless.

It is my proposition that the nature of those obligations is defined by law, created by the EU, State or internationally. Here, I argue, the founding values under Art.2 TEU are engaged; for example, society interprets those obligations through a system of democracy, with enforcement provided by the rule of law. The content of those obligations takes the form of human rights and respect for human dignity. This emphasises the interlinked nature of the founding values, that a deficiency in one area leads to a deficiency in another. Most pertinent for readmission policy is that those obligations - legal and moral - are not extinguished by the end of interaction, or the readmission of the irregular migrant. I argue this corresponds to the requirement of non-refoulement: account must be taken of the conditions which the individual may face on return and, an assessment to be made as to whether return is safe or suitable.

1.5 Chapter Outline

This thesis will proceed as follows: in Chapter Two, it will examine the historical development of EU readmission policy. It will be shown that only in the late 1970s did the Member States begin to cooperate on an intergovernmental level on issues of migration, primarily through working groups. Gradually, the Commission began to act as a coordinator. This chapter is structured according to each Treaty revisions. Under Maastricht we will observe how this early cooperation was developed to encompass a greater degree of EU institutional participation, with the production of standard bilateral agreements in the absence of EU readmission competence. It will be argued the development of readmission policy centres around the recognition of common issues which could be better remedied by acting at the EU level. This recognition also required enhanced EU readmission competence as seen in the later Treaty revisions. Furthermore, this chapter will highlight how numerous areas such as development, trade and security policy have been drawn into readmission, acting as areas of leverage against third countries.

The third chapter will examine the institutional dynamics and key tenets of EU law engaged by readmission policy. It will be shown that relations between the institutions have been uneasy, with each institution having its own separate role within the process but clashing on issues such as the correct legal basis for the inclusion of readmission obligations in an international agreement. As well as the institutions, this chapter will consider the enhanced roles fulfilled by EU bodies and agencies
such as the EEAS, EASO and Frontex, and will show how their enhanced roles further impact on institutional dynamics. Turning to key principles of EU law, it be will be argued that separation of competence and subsidiarity\textsuperscript{17} are not engaged in readmission policy in the same manner as they are in other policy areas, readmission does not adhere to the requirements of the Treaties nor early conclusions of the Council.\textsuperscript{18} The final aspect considered here is conditionality, which involves attaching positive or negative incentives for third countries to engage with the Union on readmission.

Chapter Four studies the inclusion of readmission obligations in what are termed mixed agreements; these are not specifically RAs, but instead combine cooperation across a wide range of policy areas. The primary example in this thesis is the Cotonou Agreement between the EU and ACP States.\textsuperscript{19} First concluded in 2000, this Agreement provides the legal architecture for relations between the Union and ACP States, including cooperation on migration. It will be argued that Art.13(5) Cotonou on readmission is fully operational based on an interpretation of the meaning of ‘without further formalities’ as to whether further arrangements are requirements. This chapter will also consider a range of other international agreements such as Association Agreements and Partnership and Cooperation Agreements in order to assess the depth and nature of readmission obligations found in such agreements. Briefly examining political commitments, this chapter will take account of Mobility Partnerships concluded by the Union, their nature and objectives.

Chapter Five is the first chapter to engage with the founding values and focuses on human dignity and readmission. This chapter proceeds by interrogating the meaning of the EU’s conception of human dignity as a constitutional value, with reference to the use of human dignity in the UN system, CofE and Member State constitutions. It will establish the role of human dignity as a constitutional right, primarily stemming from the EU CFR,\textsuperscript{20} with reference to CJEU jurisprudence. This chapter will propose a negative conception of the EU’s understanding of respect for human dignity and apply it to an aspect of readmission policy; namely, the treatment of returnees in Turkey.

\textsuperscript{17} Ibid, art.5(3).


Chapter Six introduces the EU’s understanding of respect for human rights, with a focus on those rights most pertinent to readmission policy. Commencing with customary international law, this chapter advances through the layers of applicable rights, moving on to relevant international conventions such as the Refugee Convention.\(^{21}\) It will be shown that the CofE and the ECHR have a substantial influence on the EU’s interpretation of human rights, facilitated by the CFR. With reference to ECtHR and CJEU jurisprudence, this chapter will identify the key rights and apply them to readmission, particularly the process of chain-refoulement and the creation of the ‘Readmission Network’.

The values of respect for the rule of law and democracy are combined in Chapter Seven, where it is proposed they act as facilitating values for the fulfilment of respect for human rights and human dignity. Here, this thesis focuses on identifying elements of the two values, rather than seeking a definition. In identifying these elements, attention is given to the CoE and the Venice Commission,\(^{22}\) the CoE’s primary body responsible for monitoring rule of law and democracy adherence, as well as the ECHR and its interpretation. It will be argued the EU’s understanding of the rule of law relies heavily on the Venice Commission, with alterations to take account the nature of the EU as a supranational organisation. In establishing an understanding of democracy, this chapter identifies applicable ECHR and Charter rights and combines them with EU Treaty provisions to identify elements of democracy at the EU level. Both values are applied to readmission policy, focusing on the increasing use of political arrangements and the implications of EURAs and arrangements on the domestic and international politics of third countries.

The conclusion will summarise the arguments presented in this thesis and address the primary and secondary research questions set out in Section 1.3. It will also identify areas for future research, not only on readmission policy but on the replacement for the Cotonou Agreement and the EU’s ability to export its founding values in its external relations.


\(^{22}\) Otherwise known as the European Commission for Democracy Through Law.
Chapter 2: A History of European Union Readmission Law and Policy

This chapter will provide a historical account of the development of the Union’s readmission policy. It will proceed first from the intergovernmental era, in which the EU lacked competence in the area of readmission, yet Member States began to cooperate on issues around irregular migration. This took place primarily through intergovernmental fora. It will be demonstrated this era may be considered as the germ of the later securitisation of migration policy. The structure of this chapter will then mirror the treaty revisions: Maastricht, Amsterdam, Nice and Lisbon. This structure allows us to track the implications of each treaty change for the development of readmission policy. It will be shown that the trajectory of the policy has been guided by outside developments in human rights, external relations, trade and development policies.

This chapter will show how Member States have cooperated on readmission and the rationale behind the creation of an EU readmission policy. Throughout the process, Member States have been a driving force, identifying appropriate states for negotiation and sharing information on good return practices. However, as it will be shown in Chapter Three on the EU institutions as well as this chapter, the role and competence of the institutions has grown alongside their involvement in the readmission process, with the Commission and Council taking on prominent roles. The increase in EU competence, as shown in this chapter, also draws in EU concepts such as subsidiarity and conditionality, which will be addressed in Chapter Three.

The founding values under Art.2 TEU guide the Union’s readmission policy, particularly respect for human dignity, human rights, the rule of law and democracy. This chapter will demonstrate some of the ways in which these values have shaped the development of EU readmission policy, with in-depth discussions of the values in Chapters Five, Six and Seven.

2.1. The Intergovernmental Era

Prior to the EU, Member States had already been negotiating readmission agreements,\(^1\) described as one of the oldest instruments used to control migration.\(^2\) The origins of the EU’s readmission policy may be observed in the intergovernmental working groups of the 1970s and 1980s. One of the most

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prominent was the TREVI Group, composed of five different sub-groups, established in 1976 to combat terrorism, and comprised of Member State Interior and Justice Ministers. TREVI was followed in 1978 by the Vienna Club, with the objective of migration policy coordination. In parallel, the Commission sought to coordinate extradition and expulsion policy.

The London TREVI meeting of 1986 resulted in the creation of the Ad Hoc Group on Immigration, with a remit of examining external border control and asylum. The remit of the Ad Hoc Group was further defined by the Belgian Presidency of 1987, which referred to the need for the full implementation of Member State return procedures, assisted by RAs between members. With the conclusion of the Schengen Agreement in 1985, the Schengen Group sought to remove all internal borders between them, relying on their existing RAs to expel irregular residents. The creation of these various groups is a critical moment in the development of an EU policy. First, we may observe the tentative creation of a link between migration and security in the TREVI Group. Second, Member States were already seeking to remove all internal borders, which required a degree of collective cooperation and third, the conclusion of RAs between Member States would eventually lead to the management of intra-EU irregular migratory movements.

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4 Austria, France, Germany, Italy and Switzerland.


8 Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of German and the French Republic on the gradual abolition of controls at the common frontiers (1985) (Schengen Agreement).

9 Belgium, France, Germany, Luxembourg and the Netherlands.

The Single European Act\(^{11}\) created the obligation to abolish internal borders before December 1992.\(^{12}\) In conjunction with the migratory flows of the 1980s,\(^{13}\) removing internal borders placed Member State expulsion policies on the agenda. The Presidency of the Council established the Group of Coordinators in 1988,\(^{14}\) with representatives from each Member State.\(^{15}\) This brought together the TREVI Group and the Ad Hoc Group on Immigration, thereby combining expulsion policy\(^{16}\) with security policy. Despite this, Member States chose to continue to act outside of the EU with the TREVI 1992 Group of December 1988.\(^{17}\) Its remit ranged from border surveillance to asylum policy harmonisation,\(^{18}\) further demonstrating the close ties between the two areas.

An area free from internal borders required action at both the institutional and Member State levels, with the Commission considering a proposed Directive on the easing of internal border controls.\(^{19}\) However, this could not be achieved in isolation from an effective readmission policy. Ultimately, the Directive was negotiated down.\(^{20}\) However, what can be observed is the beginning of enhanced Member State cooperation, with the various groups being combined or working closer in tandem. This closeness between groups also enhanced the links between policy areas, particularly between security and migration, an influence which is very much present in current EU migration policy. The non-adopted Directive is significant as it represents a moment at which the link between internal and external management of migration was recognised.

\(^{12}\) Ibid, art.13.
\(^{15}\) Ibid, 4.
\(^{16}\) A. Cruz, ‘Schengen, Ad Hoc Immigration Group, and other European Intergovernmental Bodies’ \textit{Churches’ Commission for Migrants in Europe} (1993) Briefing Paper No.12, 14.
\(^{17}\) A. Cruz, ‘An Insight into Schengen, Trevi and other European Intergovernmental Bodies’ \textit{Churches’ Commission for Migrants in Europe} (1990) Briefing Paper No.1, 9-10.
\(^{18}\) Ibid, 10.
\(^{20}\) Ibid, 16-17.
However, a key moment in the development of an EU readmission policy is the production of the ‘Palma Document’ by the Group of Coordinators in June 1989.\(^{21}\) Its significance lies in the differentiation between essential and desirable measures for the management of internal and external frontiers. In reference to internal frontiers, harmonisation of immigration policy was considered to be desirable, not essential, before the end of 1992.\(^{22}\) At the external frontiers, an essential element was the conclusion of RAs before the end of 1990.\(^{23}\) The differing timescales are telling, with the recognition that harmonisation of migration policy at the internal borders was less essential than Member States’ concluding RAs.

In the early 1990s, despite the beginnings of EU involvement, Member States continued to operate outside the Union structures, with membership of the Vienna Group expanding to the 12 Member States and non-members in Central and Eastern Europe.\(^{24}\) In March 1991 the Schengen Group concluded a readmission agreement with Poland,\(^{25}\) allowing for the return of irregular Polish nationals.\(^{26}\) However, this was not adopted. The importance of the Schengen-Poland RA lies in its construction and diction. The language used in Art.1 refers to ‘without filling in any forms’, which is not far removed from the term ‘without further formalities’ of the Cotonou Agreement\(^{27}\) over a decade later. Furthermore, the Schengen-Poland Agreement included the potential for the return of third country nationals through a decision of an immigration minister or the executive committee.\(^{28}\)


\(^{22}\) Ibid, 14.

\(^{23}\) Ibid.


\(^{26}\) Ibid, art.1 (1).

\(^{27}\) Agreement amending for the second time 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, signed in Cotonou on 23 June 2000, as first amended in Luxembourg on 25 June 2005 [2010] OJ L287/1 (Cotonou Agreement) art.13 (5).

The Ministerial Conference of 31 October 1991,29 held as part of the Budapest Process,30 provided a further forum for Member States to engage with third countries on the issue of return and readmission. States such as Albania, Latvia, Lithuania and Ukraine came under scrutiny.31 The Budapest Process was a continuation of the Vienna Group, which itself transitioned to the Berlin Group in 1991.32

In a report to the European Council at Maastricht,33 Member States proposed three areas of action relevant to the development of an EU readmission policy. First, it was proposed an examination of the rights of third-country nationals within the Union should be carried out, referring to freedom of movement and labour rights.34 Second, a common approach to irregular immigration, including readmission policies.35 Third, harmonisation on asylum at every stage of the process, from reception to expulsion.36 This report is considered to be the basis of future Union actions within the fields of asylum and immigration.37

This period can be characterised as one in which Member States began to operate in multilateral terms, at least at the level of enhanced cooperation. Previously isolated groups such as TREVI and Schengen grew closer together, bringing different actors and agendas with them. It was the objective of removing all internal frontiers between Member States which placed readmission policy on the map at the EU level as it required the strengthening of external borders. It is also in this area the association between security and migration became clearer in the minds of policy makers. The labelling of the conclusion of RAs as essential is recognition of its rise in the policy agenda. This rise, in conjunction

33 Report from the Ministers Responsible for Immigration to the European Council meeting in Maastricht on Immigration and Asylum Policy (3 December 1991) 4038/91 (WGI 930).
34 Ibid, 3.
35 Ibid.
36 Ibid, 2-5.
with wider migration and asylum policy culminated at the European Council of December 1991 in Maastricht. The intergovernmental policy era also saw an increase in engagement with third countries in respect of readmission and return, some of which would become EU members. The usefulness of these intergovernmental groups is evidenced by the fact several are still active, having expanded their membership and remit.\textsuperscript{38}

2.2. Readmission in the Maastricht Era

The Treaty of Maastricht\textsuperscript{39} consolidated and formalised the intergovernmental group structure within the three pillar structure.\textsuperscript{40} Such groups have since been characterised as intergovernmental ‘laboratories’ for JHA policy.\textsuperscript{41} Under Article B, an objective was to facilitate and enhance cooperation in JHA, encompassing migration, policing and security. Such cooperation, under Art.K.1, included asylum;\textsuperscript{42} third country national immigration policy;\textsuperscript{43} external border control\textsuperscript{44} and measures addressing illegal migration.\textsuperscript{45} Despite this, these areas were still be governed at the multilateral level through a process of consultation and collaboration.\textsuperscript{46} At the initiative of a Member State or Commission under Article K.3, the Council could adopt joint positions;\textsuperscript{47} establish conventions by a two-thirds majority\textsuperscript{48} or take joint action by a qualified majority\textsuperscript{49} in asylum and migration matters, including readmission. Such intergovernmental cooperation was to be coordinated using Article K.4 by the Coordinating Committee (known as the K.4 Committee), described as a re-labelled

\begin{itemize}
\item \textsuperscript{38} E.g. The Budapest Process now includes 50 countries, Budapest Process, ‘About’ <https://www.budapestprocess.org/about> accessed 2 January 2016.
\item \textsuperscript{40} I. Boccardi, Europe and Refugees: Towards an EU Asylum Policy (Kluwer Law International, The Hague 2002) 61
\item \textsuperscript{42} Treaty of Maastricht (n 39) art.K.1(1).
\item \textsuperscript{43} Ibid, art.K.1(3).
\item \textsuperscript{44} Ibid, art.K.1(2).
\item \textsuperscript{45} Ibid, art.K.1(3)(c).
\item \textsuperscript{46} Ibid, art.K.3(1).
\item \textsuperscript{47} Ibid, art.K.3(2)(a).
\item \textsuperscript{48} Ibid, art.K.3(2)(c).
\item \textsuperscript{49} Ibid, art.K.3(2)(b).
\end{itemize}
Coordinator’s Group. This was split into judicial cooperation, immigration and asylum; and police and security, overseen by separate steering groups. However, this was criticised as being slow and suffered from a lack of experienced Member State officials. Further criticism pointed to the lack of scrutiny and democratic accountability. The Committee reported to Coreper II, who in turn reported to the JHA Council. It was emphasised all JHA measures were to comply with the Refugee Convention and the ECHR. Niessen has argued express mention of the Refugee Convention and ECHR gave them precedence over other applicable instruments. Although not referenced in the Treaty, following documents acknowledged other applicable instruments must also be taken into account, which refutes the suggestion of a hierarchical system.

In November 1992, the Working Group on Immigration proposed recommendations for the expulsion policies of Member States. These recommendations are the sources for various elements of current EU readmission policy. It proposed a standard RA format, citing the Schengen RA. Second,
multilateral agreements should be pursued, with bilateral agreements agreed in their absence. In conjunction with this, the European Council proposed several principles to guide the approaches of Member States. There was a focus on the conclusion of RAs as an exercise of good-neighbourliness. Furthermore, it was identified in order to reduce migration, the EU and Member States would focus on the ‘restoration of peace, the full respect for human rights and the rule of law’, thereby employing a root causes of migration approach. Following this, the Parliament passed a resolution on European immigration policy which called for harmonisation rather than intergovernmentalism. Significantly, this included the conclusion of EURAs.

The Budapest Conference of 1993 saw Member States and countries such as Russia and Turkey, examining readmission. The attending states agreed multilateral RAs were preferable to bilateral agreements. These would be based on an agreed standardised format, taking a similar form to the Schengen-Poland Agreement. The usefulness of these multilateral political meetings is demonstrated by the fact the EU has agreed EURAs with all of the third country attendees. Towards the end of the year, the Council considered the use of readmission clauses in Association Agreements, drawing mixed agreements into the orbit of readmission policy but met with initial opposition from Portugal and Germany, with Germany arguing for the parallel negotiation of standalone RAs rather than including readmission clauses. Germany’s stance was a continuation of the

63 Ibid.
66 Ibid, para.xvi (6).
67 Ibid, para.xvi (1).
69 Ibid, para.1.
70 Ibid, para.20.
72 Ibid, 12.
73 Ibid.
74 Albania, Belarus, Moldova, Russia, Turkey and Ukraine.
76 Ibid, para.3.
approach taken during a meeting of the K.4 Committee in November,\textsuperscript{77} which proposed readmission and association agreements would be linked by sharing the same date of entry into force.\textsuperscript{78} The Council’s rationale was one of maximising leverage, to ‘take advantage of a general or existing agreement, beneficial primarily for the third country’.\textsuperscript{79} It is here where we may find the root of what would evolve into the ‘more for more’ approach to migration cooperation. These clauses were to be targeted at countries of origin or uncooperative states.\textsuperscript{80} However, the scope of these clauses was to be limited, applying to own nationals only.\textsuperscript{81} In December 1993, the JHA Council produced its Action Plan,\textsuperscript{82} again raising the issue of increased harmonisation in migration matters.

In February 1994,\textsuperscript{83} the Commission argued expulsion of irregular migrants was necessary to ‘make it clear that illegal immigration will not be tolerated’,\textsuperscript{84} with RAs being the primary instrument.\textsuperscript{85} However, the Commission also recognised readmission may cause difficulties for the receiving state and called for ‘sensitivity’ to issues such as strain on the labour market.\textsuperscript{86} In response to the proposed set of principles contained in the Action Plan of 1993, the Council presented a set of guiding principles to be followed in RAs in March 1994.\textsuperscript{87} RAs were also to include third country nationals,\textsuperscript{88} but not stateless persons. These guiding principles also governed the time limits for a response to a readmission request;\textsuperscript{89} the respective competent authorities\textsuperscript{90} and the criteria to establish

\textsuperscript{77} Council of the European Union, ‘Conclusions of Meeting of K.4 Committee on 17 and 18 November 1993’ (Brussels, 3 December 1993) 10532/93.

\textsuperscript{78} Ibid, para.6.


\textsuperscript{80} Ibid, 4.

\textsuperscript{81} Ibid, 3.


\textsuperscript{84} Ibid, para.112.

\textsuperscript{85} Ibid, para.114.

\textsuperscript{86} Ibid, para.116.

\textsuperscript{87} Council of the European Union, ‘Principles Concerning the Conclusion of Readmission Agreements with Third Countries’ (Brussels, 24 March 1994) 5913/94 ASIM 67.

\textsuperscript{88} Ibid, Annex para. ii.

\textsuperscript{89} Ibid, para. v.

\textsuperscript{90} Ibid, para. llii.
nationality. Respect for the relevant international agreements such as the Refugee Convention were also to be included as a guiding principle. By including third country nationals, the Commission sought to rectify the absence of any obligation under international law to accept their return.

Steering Group I was tasked with designing the practical arrangements needed to operationalise the agreements. These would then be included in a model RA, with a specific concern being the procedures on border crossings. These solutions developed into the ‘Gorlitz Protocol’, including articles on police escorts and the necessary paper documents. The latter half of 1994 saw the Council produce a number of standard text bilateral RAs, with Member States ultimately agreeing on the third draft and later adopting it. The Member State-EU institution dynamics in the production of the standard bilateral text is enlightening, particularly as the EU did not have competence on readmission, yet, the Member States chose to cooperate within the Union framework. This emphasises the importance of the Council, and by extension the EU, as a forum for cooperation.

The model bilateral RA reveals an evolution from the terminology used in the Schengen-Poland Agreement. Most notably, the reference to formalities developed from ‘without filling in any forms’ to ‘without any formality’. Such a change may be explained by the strict application of the ‘Gorlitz

91 Ibid, para. iv.
92 Ibid, para. i.
95 Ibid.
97 Ibid, art.10.
98 Ibid, art.1.
99 For example, Council of the European Union, ‘Draft Standard Bilateral Readmission Agreement Between a Member State and a Third Country’ (Brussels, 19 September 1994) 8036/2/94 ASIM 131 REV 2.
102 Ibid, art.1(1) and art.2(1).
Protocol ‘as a rule’ rather than as guidance, and therefore the practical arrangements are specified in the agreements themselves. It is also interesting to observe the absence of any reference to the issuing of travel documents by the Requested State, particularly as such clauses are contained within later RAs.

The standard bilateral RA was available for use from 1 January 1995, however, its adoption was not without controversy; Parliament arguing they had not been adequately consulted, violating Article K.6. Parliament repeated its ambition for an EU readmission policy, which would simplify the structure of EU-Member State cooperation. Alongside this, the Parliament expressly criticised the levels of human rights protection in the agreements, arguing references to the ECHR and Refugee Convention were not sufficient to protect individuals. As a result, it called for the rejection of the standard bilateral agreement. Furthermore, the Committee on Legal Affairs and Citizens’ Rights described the text of the agreement as ‘turgid and difficult to understand’. The previously produced guiding principles for the implementation of RAs were available from 1 July 1995, now including simplified and normal procedures. The simplified procedure allowed for readmission of an irregularly resident national to the Requested State within 48 hours, but such time limits were to be determined by the parties.

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107 Ibid, 6.

108 Ibid, 10.


111 Ibid.

112 Ibid.
In September 1995, Finland argued for the inclusion of stateless persons alongside third country nationals in mixed agreements.\footnote{Council of the European Union, ‘Readmission Clauses in Mixed Agreements – Note from the Finnish Delegation’ (Brussels, 27 September 1995) 10140/95 ASIM 256.} Furthering this, Germany called for all EU agreements to include readmission obligations as the issue affected all Member States.\footnote{Council of the European Union, ‘Readmission Clauses in Mixed Agreements – Note from the German Delegation’ (Brussels, 27 September 1995) 10146/95 ASIM 257.} Towards the end of 1995 it may be observed the EU was beginning to aim towards fostering JHA relations with states such as China\footnote{Council of the European Union, ‘Note from Presidency of the K.4 Committee to Steering Group I, II and III on Cooperation with China in the Field of Justice and Home Affairs’ (Brussels, 18 December 1995) 12918/95 JAI 60, 1.} and Russia.\footnote{Council of the European Union, ‘Note from Chairmanship of the K.4 Committee to Steering Group I, II and III on Cooperation with Russia in the Field of Justice and Home Affairs’ (Brussels, 18 December 1995) 12916/95 JAI 59, 2.} It was determined in January 1996 that a standard set of readmission clauses would be included in EU mixed agreements.\footnote{Council of the European Union, ‘Council Conclusions on Clauses to be Inserted in Future Mixed Agreements’ (Brussels, 22 January 1996) 4272/96 ASIM 6.} First, reference would be made to the management of immigration in the preamble of the agreement.\footnote{Ibid, 2.} Second, an article would be included in which the contracting parties agreed to readmit their own nationals, with the parties also providing individuals with the necessary identity documents.\footnote{Ibid, art.X.} A further article allowed for the third country to conclude bilateral RAs with Member States to include third country nationals and stateless persons.\footnote{Ibid, art.Y.} Member States\footnote{Austria, Belgium, Denmark, Germany, Greece and the Netherlands.} proposed these standard clauses should be included in the EU’s existing negotiating directives as well as future directives.\footnote{Council of the European Union, ‘Council Conclusions on Clauses to be Inserted in Future Mixed Agreements’ (Brussels, 29 February 1996) 5457/96 ASIM 37 Annex, 2.} It was also confirmed that stand-alone RAs were exclusively a Member State competence.\footnote{Ibid.} In September 1996, France requested readmission clauses be included in EU commercial agreements,\footnote{Council of the European Union, ‘Outcome of Proceedings of K.4 Committee on 9-10 September 1996’ (Brussels, 19 September 1996) 9953/96 CK4 24, 3.} however this was rejected. The Netherlands and Germany
further proposed a Member State experiencing problems in readmitting individuals should request that the EU includes a readmission clause in any mixed agreements with that State.\textsuperscript{125} It is argued this proposal represents a change in rationale from Member States. Despite intergovernmental cooperation and the status of the EU’s readmission competence, in this instance, Member States proposed cooperation at the EU level in order to resolve the problems of a Member State. When observed in conjunction with Parliament’s request for EU readmission competence towards the end of 1996, a shift in attitudes was beginning to take place.

In a move towards addressing Member State issues, the Council observed the same readmission problems were being suffered by a number of Member States.\textsuperscript{126} The Council agreed to focus on India and China, as well as Mediterranean states\textsuperscript{127} (at the behest of Spain and Italy)\textsuperscript{128} on the basis these states were identified by the Member States themselves. Furthermore, the UK argued closer cooperation on readmission would be beneficial in the future.\textsuperscript{129} A follow-up meeting in April 1997 added Vietnam alongside India and China\textsuperscript{130} alongside the requirement for closer readmission cooperation.\textsuperscript{131}

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\textsuperscript{125} Ibid.
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\textsuperscript{126} Council of the European Union, ‘Proposal to examine, in a joint meeting with the relevant working parties from the other pillars, what measures can be taken in respect of countries with which there are problems regarding return’ (Brussels, 22 November 1996) 11904/96 ASIM 163, 2.
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\textsuperscript{127} Council of the European Union, ‘Proposal to examine, in a joint meeting with the relevant working parties from the other Pillars, what measures can be taken in respect of countries with which there are problems regarding return’ (Brussels, 6 February 1997) 5735/97 ASIM 26, 1-2.
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\textsuperscript{129} Ibid.
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\textsuperscript{130} Council of the European Union, ‘Results of the Joint Meeting between the Working Group Asia/Oceania and members of the Migration Working Party concerning readmission of nationals of China, India and Vietnam illegally resident on the territory of Member States’ (Brussels, 11 April 1997) 7338/97 ASIM 71.
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\textsuperscript{131} Ibid, 2.
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2.3. Readmission in the Amsterdam Era

The Treaty of Amsterdam (1997),\(^{132}\) described as ‘the greatest innovation in the EU approach to asylum’,\(^{133}\) saw the EU further acknowledge the intertwined nature of the aim of achieving an area free from internal borders and the need for robust return procedures. As under Articles 61-63, the necessary measures were to be introduced within a period of five years since the agreement of the Treaty. Under Art.62(1), the Council was to introduce measures to remove all controls on the internal borders within five years. In conjunction, the Council was committed to introduce measures on immigration including the return of illegal residents in the Union.

At the Budapest Process meeting in Prague on 14-15 October 1997,\(^{134}\) the Ministers of the attending states reached several conclusions regarding readmission and state obligations to readmit their own nationals. These included the use of a standard form of bilateral RA and to use the fastest and most flexible readmission procedures available.\(^{135}\) It was within the Budapest Process that we can observe the creation of a link between the conclusion of an RA and the negotiation of a visa liberalisation agreement with the same state under Recommendation 36.\(^{136}\) In December 1997, the Belgian Presidency outlined its priorities for the first half of 1998.\(^{137}\) It is argued the Belgian Presidency represents a key moment in the development of an EU readmission policy. First, it built upon the recommendations of the Budapest Process meeting of October 1997 and recognised the importance of ‘concrete measures in order to put pressure on certain countries of origin, particularly visa policy’.\(^{138}\) Thereby, confirming the link between readmission and regular migration. Second, it raised the issue of concluding RAs with countries of origin and transit states.

In January 1998, the Schengen Group drafted a new RA to be concluded between Schengen States and third countries.\(^{139}\) Although this agreement was only applicable to Schengen States, it is argued the

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\(^{135}\) Ibid, 9.

\(^{136}\) Ibid.

\(^{137}\) Working Program of the Belgian Presidency for the First Half of 1998 (Brussels, 2 December 1997) SCH/C (98)1

\(^{138}\) Ibid, 2.

\(^{139}\) Draft Uniform Readmission Agreement Between Schengen States and Third States – New Version Adopted Further to the Meeting of 22 April 1998 (1 January 1998) SCH/11 – Read (98) 8.
language which was used in reference to the readmission of a states’ own nationals permeated into the later EU approach. Under Art.2, the precise wording was ‘without any formality’. As it will be shown in Chapter Four, this is a continuing policy choice for the EU. Following this, the Council revisited third states which presented problems when attempting to return their nationals. Further to this, the Council met in June 1998 to discuss further measures which could be taken to deal with problem states. One such measure was the development of a long-term cooperation package, highlighting the importance of international aid.

In July 1998, the Austrian Presidency submitted a strategy paper on immigration and asylum policy. Interestingly for the development of EU readmission policy, the paper proposed ‘the European Union’s migration policy must obviously cover the following areas...agreements with states of origin and transit states in the field of prevention, and with regard to effective repatriation’. The use of the term ‘obviously’ at this point in the EU’s development may be contested. It was only in March 1998 Member States accepted joint action to apply pressure to non-compliant countries was a viable option. Furthermore, in dealing with problem states, the EU should ‘use its international political and economic muscle to persuade such states to adopt such an agreement’, thereby cementing the previous intergovernmental strategy of applying pressure which emerged in March 1998 to the EU approach. Key to the EU’s developing competence is the statement within the strategy paper ‘the objective is to see Europe increasingly as a single, common migration area’. Such a common migration area would then require a single, common readmission policy. It is argued the strategy paper was the moment at which the development of an EU readmission policy began to quicken in pace. Indeed, two weeks after the Council introduced a draft RA between Member States and third

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142 Ibid, 3.
144 Ibid, para.41.
145 Ibid, para.108.
146 Ibid, para.110.
countries.\(^{147}\) This borrowed language from the draft Schengen RA, using the term ‘without any formality’\(^{148}\) regarding the readmission of a state’s own nationals.

The developments of 1998 culminated in the Vienna Action Plan,\(^{149}\) which called for the creation of a true EU policy in the areas of asylum and immigration to be achieved within two years.\(^{150}\) Within five years, the EU was to improve coordination and the use of readmission clauses.\(^{151}\) The Vienna Action Plan may be considered as the starting point of the creation of the CEAS, with measures being introduced to ensure the creation of the AFSJ. Specifically, the Action Plan recognised the importance of solidarity and subsidiarity for the creation of this new area, further stating previous measures were soft law based and lacked monitoring procedures.\(^{152}\) Therefore, an EU asylum and immigration policy would correct these issues and, importantly, brought elements of the JHA measures within CJEU jurisdiction.\(^{153}\) The final report of the High Level Working Group on Asylum and Migration\(^{154}\) described the Vienna Action Plan as a ‘first attempt’ at an EU immigration and asylum policy.\(^{155}\)

In April 1999, the Nordic Joint Advisory Group on Refugee Policy published a report on the use of readmission agreements and potential alternatives,\(^{156}\) recognising there is no obligation under international law for a state to accept the readmission of third-country nationals\(^{157}\) and concluded RAs were primarily needed to avoid situations where a third country will not accept the return of own


\(^{148}\) Ibid, art.2(1).


\(^{150}\) Ibid, para.36(c)(ii).

\(^{151}\) Ibid, para.38(c)(ii).

\(^{152}\) Ibid, para.8.


\(^{155}\) Ibid, para.10.

\(^{156}\) Council of the European Union, ‘Nordic Joint Advisory Group on Refugee Policy: Analysis of the Institute Concerning Readmission Agreements - including an assessment of whether it is expedient to conclude such agreements, or whether there are other possibilities of influencing a country of origin to readmit third country nationals and own nationals’ (Brussels, 27 April 1999) 7707/99 MIGR 31.

\(^{157}\) Ibid, 8.
citizens or third-country nationals.\textsuperscript{158} Significantly, it was recognised the conclusion of an RA may lead to the third country concluding its own RAs.\textsuperscript{159} Although primarily focused on bilateral agreements, which are outside the scope of this research, it is interesting for the development of an EU policy that the Member States were split on whether EU or bilateral RAs were preferable going forward.\textsuperscript{160} The Member States highlighted the need for RAs with Somalia, Sri Lanka, Morocco, Pakistan, Afghanistan and Albania.\textsuperscript{161} The Council further proposed a one-year time limit on the submission of a readmission request and a 10 day limit on the response.\textsuperscript{162}

Parliament expressed concern regarding readmission policy developments, particularly the growing link between readmission and development policy,\textsuperscript{163} highlighting the applicable obligations under the Refugee Convention.\textsuperscript{164} In September 1999 the Presidency of the Council recognised that the previously drafted standard RAs could not apply to the EU,\textsuperscript{165} and instead proposed the Council draft the basis of an EURA, to be followed up by the Commission, who would then be able to negotiate agreements based on those base procedures/ clauses.\textsuperscript{166} This proposal was later considered by the Expulsion Working Party, which recommended the previous Schengen-Poland and the standard bilateral agreements should be used as the basis for EURAs.\textsuperscript{167} This then solidified the language used in these previous agreements within the EU policy field.

\begin{footnotes}
\footnote{\textsuperscript{158} Ibid, 9.}
\footnote{\textsuperscript{159} Ibid, 10.}
\footnote{\textsuperscript{160} Ibid, 4.}
\footnote{\textsuperscript{161} Ibid.}
\footnote{\textsuperscript{164} Ibid, para.12.}
\footnote{\textsuperscript{165} Council of the European Union, ‘The Mandate Concerning Readmission Agreements between the European Community and a Third Country’ (Brussels, 9 September 1999) 10795/99 MIGR 54, 2}
\footnote{\textsuperscript{166} Ibid.}
\footnote{\textsuperscript{167} Council of the European Union, ‘Expulsion Working Party, Readmission’ (Brussels, 23 September 1999) 11042/99 MIGR 57, 2.}
\end{footnotes}
A key milestone was the Tampere European Council, following the conclusions made numerous references to the return of third country nationals and invited the Council to conclude EURAs. Following from Tampere, the Council requested Member States provide a list of states with which negotiations should commence.

The Council in May 2000 recognised the need for a proactive, not reactive, JHA policy congruent with overarching external policy. In September 2000, the Commission received a mandate from the Council to begin negotiations with Morocco, Sri Lanka, Russia and Pakistan. Such an approach was confirmed by the Commission as it outlined a common immigration policy in November 2000. The Commission described RAs as ‘the most valuable instrument’ for returns and called for the development of common policies on deportation, qualification and detention, which would later form other elements of the CEAS. The need for a congruent external policy including readmission obligations was further cemented by the High Level Working Group on Asylum and Migration which recognised that such a common policy would need to take into account the root causes and consequences of migration. Such a policy would take into account development policy, the

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170 Ibid, para.27.
171 Ibid, para.27.
175 Ibid, 12.
176 Ibid.
177 Council of the European Union, ‘High-Level Working Group on Asylum and Migration – Adoption of the Report to the European Council in Nice’ (Brussels, 29 November 2000) 13993/00 JAI 152, para.47.
promotion of human rights, rule of law and democracy.\textsuperscript{178} This new policy direction has been described as the ‘fourth generation’ of RAs.\textsuperscript{179}

2.4. Readmission in the Nice Era

Although the Treaty of Nice\textsuperscript{180} contained many wide-reaching amendments to the Treaty on European Union, none of these affected the direction of travel of the EU’s readmission policy. April 2001 saw the EU building on the EU-Russia Partnership and Cooperation Agreement\textsuperscript{181} and approached Russia to begin negotiating an RA,\textsuperscript{182} followed by a negotiation mandate for Macao and Hong Kong.\textsuperscript{183} Negotiations with Hong Kong concluded in October 2001 and signed in November 2001.\textsuperscript{184} In November 2001, the Commission revisited the idea of a common policy on illegal immigration.\textsuperscript{185} Importantly for the development of a common readmission policy, the Commission acknowledged it needed to consider the domestic situation in states with which it intended to begin negotiating a readmission agreement\textsuperscript{186} as well as monitoring the agreement’s effects.\textsuperscript{187} This may in part have been in response to the introduction of the CFR.\textsuperscript{188}

\begin{flushleft}
\textsuperscript{178} Ibid, para.49.


\textsuperscript{180} Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed at Nice, 26 February 2001 [2001] OJ C80/01 (Treaty of Nice).

\textsuperscript{181} Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part [1997] OJ L327/3, art.84.


\textsuperscript{183} European Commission, ‘Readmission Agreements’ (Brussels, 5 October 2005) MEMO/05/351, 1.


\textsuperscript{186} Ibid, 25.

\textsuperscript{187} Ibid.

\end{flushleft}
At the Laeken European Council,\textsuperscript{189} it called for the development of a number of action plans for the conclusion of readmission agreements.\textsuperscript{190} In April 2002, the Commission responded with its Green Paper on a Community Return Policy,\textsuperscript{191} based on the premise individuals should receive a similar level of treatment regardless of the Member State.\textsuperscript{192} The Green Paper recognised the Requested State requires assistance to accept returns.\textsuperscript{193} The Commission went further, noting the effect a large number of returns may have on receiving states.\textsuperscript{194} One of the key developments of the Green Paper was the introduction of a set of criteria which would be used to determine with which states an agreement should be negotiated with, these are: geographical location; immigration pressure on the EU and regional coherence.\textsuperscript{195} Such an approach can be contrasted with the three states which were previously highlighted by Member States as priorities: China, India and Vietnam. Therefore, it may be argued the criteria caused the EU to undertake a geographical pivot, observable in the order of and with which countries the EU has concluded RAs. Reinforcing the link between RAs and visa facilitation/liberalisation agreements, the Commission argued this should be limited to ‘exceptional cases’.\textsuperscript{196} Turning to readmission clauses in mixed agreements, it was argued these may require operationalising in follow-up agreements.\textsuperscript{197} However, as it will be shown in Chapter Four, such an approach is open to wide interpretation and may rely on the distinction between own nationals and third country and stateless persons.

After the Green Paper, the Council added two further criteria for determining which states to pursue the negotiation of a RA.\textsuperscript{198} The first Council criteria follows the Commission’s criteria of migratory pressure, taking into account the number of individuals awaiting return and the obstacles to effective

\textsuperscript{190} Ibid, para.40.
\textsuperscript{192} Ibid, 8.
\textsuperscript{193} Ibid, 10.
\textsuperscript{194} Ibid, 11.
\textsuperscript{195} Ibid, 22-23.
\textsuperscript{196} Ibid, 23.
\textsuperscript{197} Ibid, 24.
\textsuperscript{198} Council of the European Union, ‘Criteria for the Identification of Third Countries with which New Readmission Agreements need to be negotiated - Draft Conclusions’ (Brussels, 16 April 2002) 7990/02 COR 1.
return. Second, the existing relationship with the third country, with excluding accession states, rather those with Association Agreements should be considered for formal RAs. Third, geographical location including patterns of migration flow. Fourth, the extent of added value of an EU agreement over Member State agreements. The final criterion was the need to strike a geographical balance between origin and transit states. Such states were to be identified on a case-by-case basis, thereby precluding the EU from attempting to negotiate agreements with a whole geographical area. Cassarino has argued an element of colonial relations is present in these criteria, particularly the second, as the former colonial power – former colony readmission relationship may be more flexible as to allow for a continuing effective overall relationship.

The Seville European Council called for the ‘speeding-up’ of the Tampere Programme and an increase in the number of negotiation mandates for new RAs. June 2002 saw the Commission receive a mandate to begin negotiating with Ukraine. The Commission built upon the Seville European Council and called for greater Member State support for the effective implementation of the Council’s conclusions. The Council also reaffirmed the EU’s approach to the relationship between multilateral and bilateral RAs as being preferably multilateral where possible.

November 2002 saw several advancements in readmission policy. First, Member States proposed several states to pursue RAs, with Sub-Saharan states being of particular interest. Italy highlighted

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199 Ibid, para.2.
200 Ibid.
201 Ibid, para.3.
205 Ibid, para.30.
Tunisia and Libya,\textsuperscript{210} and Spain urged the Council to consider Gambia, Ghana and Mali.\textsuperscript{211} Following this, the Council proposed a return action programme which called for intensified cooperation on readmission.\textsuperscript{212} Of particular interest is the introduction of transit arrangements into RAs,\textsuperscript{213} with transit defined as ‘the passage of a third country national or stateless person through the territory of the Requested State while travelling from the Requesting State to the country of destination’.\textsuperscript{214} The developments of November 2002 culminated in the 2469\textsuperscript{th} JHA Council meeting,\textsuperscript{215} where Mali, Ghana, Nigeria and Gambia were again highlighted for future negotiations,\textsuperscript{216} facilitated under the Cotonou Agreement.\textsuperscript{217} Furthermore, Turkey, Tunisia, Ukraine, China, Morocco, Albania, Russia and Yugoslavia were highlighted for intensified cooperation.\textsuperscript{218} Coleman draws particular attention to the inclusion of China and Russia on this list, describing the inclusion of China as ‘long overdue’\textsuperscript{219} and both states being ‘archetypal’ of the kind of states which the EU needs to deal with.\textsuperscript{220} In the same month, the Commission received mandates to negotiate with Algeria, Turkey, China and Albania.\textsuperscript{221} The Commission then considered migration and external relations in a Communication of December

\textsuperscript{210} Ibid, 4.
\textsuperscript{211} Ibid, 5.
\textsuperscript{213} Ibid, para.66.
\textsuperscript{214} Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation [2014] OJ L134/3, art.1 (m).
\textsuperscript{216} Ibid, 8.
\textsuperscript{220} Ibid, 146.
\textsuperscript{221} Council of the European Union, ‘Adoption of Council Decisions authorising the Commission to negotiate readmission agreements between the European Community and the Republic of Albania, the People’s Democratic Republic of Algeria, the People’s Republic of China and the Republic of Turkey’ (Brussels, 26 November 2002) 14835/02 MiGR 129.
The readmission element was the potential negotiation of agreements with ACP states under Art.13 Cotonou Agreement to counteract the problem of the identification and subsequent acceptance of irregularly-resident individuals back in their country of origin.\textsuperscript{223} The readmission obligations under Art.13 were described as ‘a model for migration clauses’\textsuperscript{224} but on the other hand the EU needed to recognise the implications for Requested States and thus provide mitigation assistance.\textsuperscript{225} It may be noted the Commission considered it inappropriate to offer supplementary financial incentives to ACP states.\textsuperscript{226} It may be argued, therefore, the recognition of the financial effect on receiving states only reaches the point as to which an RA has been concluded. This infers supplementary financial assistance is simply another tool with which to convince states to conclude agreements, rather than a means of effective support which would evolve alongside the overall relationship. Such an interpretation is supported by the intention of the Commission to include dialogue on migration in discussions concerning economic and social issues including root causes of migration; preventing illegal migration; effective integration and ‘brain circulation’.\textsuperscript{227} These are not static issues, but rather ebb and flow over time and are often affected by the wider geopolitical environment in the particular region.

In March 2003, the Commission presented the initial beginnings\textsuperscript{228} of the European Neighbourhood Policy, which envisaged the conclusion of Partnership and Cooperation or Association Agreements with the Eastern and Southern neighbouring states, which could then progress to RAs.\textsuperscript{229} It was argued agreements with Moldova, Morocco, Belarus, Russia, Ukraine and Algeria were to be the starting point for this approach.\textsuperscript{230} In the lead up to the European Council in Thessaloniki in June 2003, the

\begin{footnotesize}
\bibitem{223} Ibid, 25.
\bibitem{224} Ibid, 24.
\bibitem{225} Ibid, 26.
\bibitem{226} Ibid.
\bibitem{227} Ibid, 23.
\bibitem{229} Ibid, 8.
\bibitem{230} Ibid, 11.
\end{footnotesize}
Commission outlined several aspects of the negotiation process for readmission agreements. The Commission highlighted the importance of dialogue with third countries facilitated by association/cooperation agreements, with readmission being an area of discussion. Financially, the Commission called for a legal basis for financial assistance for third countries to ‘provide a specific and complementary response to the needs of third countries’ to support the implementation of RAs. This would evolve into the Aeneas Regulation. Turning to the time required to negotiate an EURA, it was acknowledged these agreements are more for the benefit of the EU and this may have an effect on the time it takes to negotiate them, therefore, the negotiation should take place in a wider context. The focus at Thessaloniki was on combating irregular migration but side-lined the issue of readmission. The chief development was the proposal for an evaluation mechanism to monitor non-cooperation on readmission. The European Council of October 2003 saw the EU and Member States commit to using all available external relations instruments in order to combat irregular migration into the EU, including RAs.

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233 Ibid.
237 Ibid, para.19.
On 1 March 2004, the agreement with Hong Kong entered into force, followed by EU-Macao on 1 June. In May 2004 the Commission built upon the European Neighbourhood Policy, producing a strategy paper which advocated an action plan approach to neighbouring countries, including EURAs.

The Commission highlighted the need for flexible incentives for third countries and for a truly cooperative approach, with both parties gaining advantages. Although it had previously acknowledged the burdensome effects on the receiving state and the need for incentives, the tone of the language used was one of needing to entice the third country to the negotiating table by offering various incentives. However, here the Commission called for a truly cooperative approach, whereby both parties gain advantages, therefore approaching equality between them. However, the return of individuals is more likely to be from the EU back to the third country, rather than the reverse. In response to the Brussels European Council of October 2003, in July 2004 the Commission produced a report examining the priorities for an effective readmission policy and began by acknowledging the mixed progress of negotiations and the differences between each state based on the five selection criteria. However, the Commission stated there were now six criteria including whether an


242 Ibid.

243 Ibid, 19.


248 Ibid, 3.
association/cooperation agreement containing a readmission clause had been concluded.\textsuperscript{249} Furthermore, the Commission argued these criteria may not be ‘sufficiently coherent’, citing a lack of hierarchy.\textsuperscript{250} In order to rectify this, the Commission proposed prioritising migratory pressure and geographical location and relegating the existence of an association/cooperation agreement to an accessory concern.\textsuperscript{251} This emphasis on geographical location logically led the Commission to propose EURAs with all third countries around the Union.\textsuperscript{252}

The Commission identified three different categories of difficulties present in the negotiation process, with the first being the negative effects of the EURAs on the third country.\textsuperscript{253} Second, the inclusion of third country nationals, which the Commission sought to negate by building on the individual state approach and offering tailored incentives.\textsuperscript{254} Third, the need for Member State diplomatic support.\textsuperscript{255} In order to ease these, the Commission proposed negotiating EURAs alongside an association/cooperation agreement in order to maximise leverage.\textsuperscript{256} One interesting consideration from the Commission was incentives such as visa facilitation/liberalisation agreements may be perceived as standard offers, thereby lowering their effectiveness.\textsuperscript{257} On the other hand, it has been argued such incentives were necessary to counter-balance the EU’s wish to include third country nationals and stateless persons.\textsuperscript{258} The Commission proposed a form of ‘slimmed-down’ EURA encompassing own nationals but not third country or stateless persons, with these aimed at Sub-Saharan ACP States.\textsuperscript{259} A key proposal was to encourage third countries to conclude their own RAs,\textsuperscript{260} thereby creating the ‘Readmission Network’, which may be of value to transit states, who may then

\textsuperscript{249} Ibid, 4.
\textsuperscript{250} Ibid.
\textsuperscript{251} Ibid.
\textsuperscript{252} Ibid, 5.
\textsuperscript{253} Ibid, 6.
\textsuperscript{254} Ibid.
\textsuperscript{255} Ibid.
\textsuperscript{256} Ibid, 8.
\textsuperscript{257} Ibid, 9.
\textsuperscript{260} Ibid, 10.
return individuals to their country of origin. A July 2004 Communication drew attention to a reduction in remittances; the effect on the domestic labour market and the general public's concerns or priorities as three areas where readmission may have a substantial effect on the receiving state.\footnote{Ibid, 17.}

In October 2004, the Council presented its draft conclusions\footnote{Council of the European Union, ‘Draft Council Conclusions on the priorities for the successful development of a common readmission policy’ (Brussels, 27 October 2004) 13758/04 JAI 389.} based upon the preceding Commission report, adopted in November 2004.\footnote{261 \textsuperscript{4} Council Meeting: General Affairs and External Relations (Brussels, 2 November 2004) 13588/1/04 REV1 (Press 295) 16.} In its conclusions, the Council elevated effective migration management to a ‘major policy priority’\footnote{Council of the European Union, ‘Draft Council Conclusions on the priorities for the successful development of a common readmission policy’ (Brussels, 27 October 2004) 13758/04 JAI 389, 4.} and actively encouraged third countries to conclude their own RAs with other states,\footnote{Ibid.} thereby supporting the argument the EU sought to encourage the creation of a wider ‘Readmission Network’. The Council added another criteria for identifying third countries of whether the state offered to enter into an EURA.\footnote{Ibid.} Significantly for future development it called for a direct link between RAs and cooperation/association agreements and the coherence of the EU’s overall external relations policy, including the management of migration.\footnote{Ibid, 5.} On a procedural level, the Council decided future negotiation mandates would be given on a case-by-case basis, which would require the Commission to provide an overall strategy including time-frames and measures in order to successfully negotiate the particular readmission agreement.\footnote{Ibid.} These Council Conclusions represent the concretisation of many of the readmission policy developments of the early 2000s.

The adoption of The Hague Programme\footnote{The Hague Programme: Strengthening Freedom, Security and Justice in the European Union (2005) OJ C 53/1 \textsuperscript{270} European Council, ‘Brussels European Council 4/5 November 2004: Presidency Conclusions’ (Brussels, 8 December 2004) 14292/1/04 REV 1.} in November 2004\footnote{European Council, ‘Brussels European Council 4/5 November 2004: Presidency Conclusions’ (Brussels, 8 December 2004) 14292/1/04 REV 1.} set out the second phase of the AFSJ and CEAS. Although the starting point for many aspects of the CEAS, for readmission policy it was more of a re-assertion of previous developments than an evolution. Indeed, the Council reiterated the need
for readmission policy to respect human dignity and human rights.\textsuperscript{271} The Council did, however, propose the creation of specific return programmes, for either specific states or wider regions.\textsuperscript{272} In order to develop the coherence of its external relations policy, the Hague Programme allows for the facilitation of the issuance of short-stay visas for third country nationals alongside the creation of RAs with particular third countries,\textsuperscript{273} implemented through a later Action Plan.\textsuperscript{274}

The beginning of 2006 saw the introduction of the thematic programme for cooperation with third countries on migration and asylum,\textsuperscript{275} including several elements where the EU was to provide support to the third country, including the negotiation and implementing of their own RAs.\textsuperscript{276} However, it is unclear what form this negotiation assistance was to take. Other assistance was to include pre-return accommodation conditions, reintegration and voluntary returns to the country of origin.\textsuperscript{277} The thematic programme was followed in May 2006 by the entry into force of the EU-Albania RA.\textsuperscript{278} As part of the Hague Programme, the Commission recognised the importance of concluding RAs with key third countries and the need to continue concluding agreements.\textsuperscript{279} The prioritisation of formal RAs was confirmed in in July,\textsuperscript{280} with a focus on the Western Balkans.\textsuperscript{281}

\textsuperscript{271} European Council, ‘Brussels European Council 4/5 November 2004: Presidency Conclusions’ (Brussels, 8 December 2004) 14292/1/04 REV 1, 22.
\textsuperscript{272} Ibid, 23.
\textsuperscript{276} Ibid, 11.
\textsuperscript{277} Ibid.
\textsuperscript{281} Ibid, para.43.
At the intergovernmental level, the EU and Member States met with states from North, Central and Western Africa for the creation of the Rabat Process in July 2006. The adopted Action Plan includes measures to aid sustainable development, legal migration management and cooperation to combat illegal immigration. The language used in the readmission section includes references to respect for human dignity and fundamental rights, language which had previously largely been absent. The Rabat Process uses Art.13 Cotonou Agreement as its legal basis and foresees the negotiation of EURAs alongside RAs between African states.

In November 2006, the Commission received four negotiation mandates encompassing most of the Western Balkan migration route. In evaluating the Global Approach to Migration, the Commission stated: ‘establishing readmission agreements...can all be prerequisites for visa facilitation’. The use of the term ‘prerequisite’ implies a closer, causal relationship. Indeed, a visa facilitation agreement may be no more than a ‘sweetener’ for an EURA. With the inclusion of Moldova, 2006 may be considered a year in which the EU encompassed its Eastern and South-Eastern borders in a readmission ‘buffer-zone’.

284 Ibid, 4.
287 Ibid, 7.
In May 2007, the Council evaluated the progress of negotiations for EURAs, recommending the extension of the standard agreements to include obligations to provide assistance in identifying an nationality and issuing travel documents. Its implementation would have resolved one of the main obstacles faced by Member States making returns. This evaluation was followed in June with the entry into force of the EU-Russia RA. In September, Parliament’s report on the EU’s policy priorities to tackle illegal immigration confirmed the EU’s focus on immigration from African states in particular by calling for an emphasis on the successful implementation of Art.13 Cotonou and notably ‘points out that every ACP State is required to agree to the return and readmission of its own nationals illegally present on the territory of a European Union Member State’. This report is emblematic of the responsive nature in the EU’s readmission priorities, with the EU responding to shifts in migration flows.

The start of 2008 marked the entry into force of six EURAs bringing the number of agreements in force to ten. In June, the Commission presented ‘A Common Immigration Policy for Europe’, setting

290 Ibid, 6.
294 Ibid, para.32.
out ten common principles upon which the future EU migration policy was to be based.\(^{297}\) In this, readmission appeared under Security and Immigration which, on a prima facie reading immediately links issues of return with the security of the EU. It is argued this is emblematic of the gradual securitisation of EU migration policy during the 2000s.\(^{298}\) The Commission described return measures as an ‘indispensable component’ of the EU’s irregular immigration policy and in order to be effective they require the effective implementation of readmission obligations contained in agreements and to draw any lessons from the implementation and negotiations for future agreements.\(^{299}\) This developed into the European Pact on Immigration and Asylum,\(^{300}\) adopted in October 2008.\(^{301}\) It proposed five commitments to base future policy on,\(^{302}\) with two commitments relevant to readmission policy. First, ‘to control immigration by ensuring that illegal immigrants return to their countries of origin or to a country of transit’,\(^{303}\) separated into a further three principles including a re-declaration of the principle that all States must readmit their own citizens.\(^{304}\) The Council then set out four methods through which this would be achieved, first, the conclusion of EURAs or in the absence of these, bilateral Member State agreements. Second, evaluating EURAs already in force. Third, reviewing

\(^{297}\) Ibid, 5-14 (1. Clear rules and a level playing field; 2. Matching skills and needs; 3. Integration is the key to successful immigration; 4. Transparency, trust and cooperation; 5. Efficient and coherent use of available means; 6. Partnership with third countries; 7. A visa policy which serves the interests of Europe and its partners; 8. Integrated border management; 9. Stepping up the fight against illegal immigration and zero tolerance for trafficking in human beings; 10. Effective and sustainable return policies).


\(^{303}\) Ibid.

\(^{304}\) Ibid, 7.
readmission mandates which had not yet been fulfilled and finally, closer cooperation between the Commission and Member States.\textsuperscript{305}

The second commitment relevant to readmission was ‘to create a comprehensive partnership with the countries of origin and transit in order to encourage the synergy between migration and development’.\textsuperscript{306} Although it did not expressly refer to readmission, its aim of cooperating with third countries under the Global Approach to Migration in order to control irregular immigration\textsuperscript{307} suggests readmission was part of this process. In November 2008, the Commission received a mandate to negotiate an EURA with Georgia.\textsuperscript{308}

In June 2009, the Commission received a mandate for Cape Verde,\textsuperscript{309} marking the first ACP State for an EURA. In response to the escalating migration situation in the Mediterranean, in September the French delegation proposed several advances for the Union’s readmission policy.\textsuperscript{310} First, they called for the conclusion of negotiations with Turkey and the implementation of the Greece-Turkey Readmission Protocol.\textsuperscript{311} Second, France argued for an increase in the prominence of RAs in the EU’s external relations.\textsuperscript{312} France’s push for the conclusion of an RA as part of the response to the situation demonstrates how these agreements may react to increases or decreases in migration movements, it may be argued the urgency for an EU-Turkey Agreement demonstrates the prioritisation of migratory pressure and geographical location.

\textsuperscript{305} Ibid, 7.
\textsuperscript{306} Ibid, 4.
\textsuperscript{307} Ibid, 8.
\textsuperscript{308} Council of the European Union, ‘Adoption of a Council Decision authorising the Commission to negotiate with Georgia a readmission agreement between the European Community and Georgia’ (Brussels, 6 November 2008) 15221/08.
\textsuperscript{311} Ibid, 3.
\textsuperscript{312} Ibid.
2.5. Readmission and the Lisbon Era

With the entry into force of the Lisbon Treaty\textsuperscript{313} (December 2009), the treaty structure separated into the TEU\textsuperscript{314} and TFEU.\textsuperscript{315} The EU gained shared competence in the AFSJ,\textsuperscript{316} including the competence to conclude EURAs under Art.79(3) TEU.

In March 2010, the Stockholm Programme\textsuperscript{317} replaced the Hague Programme for the period 2010-2014. As part of this, readmission was included within ‘a Europe of responsibility, solidarity and partnership in migration and asylum matters’,\textsuperscript{318} representing markedly different language to the security-focused 2008 proposal for a Common Immigration Policy for Europe from the Commission. The Council called for a ‘comprehensive approach on return and readmission’, with dialogue with third countries taking place under the Global Approach to Migration and the European Pact on Immigration and Asylum,\textsuperscript{319} including the conclusion of further RAs, either at the Member State or Union level, and to ensure that these agreements actually increase the effectiveness of the return process as a whole.\textsuperscript{320} The Action Plan for the implementation of the Stockholm Programme\textsuperscript{321} typifies the EU’s new approach to readmission focusing not only expanding the number of agreements but rather the effectiveness of those in force or being negotiated.\textsuperscript{322} Therefore, the Stockholm Programme was an


\textsuperscript{316} Ibid, art.4(2)(j).

\textsuperscript{317} The Stockholm Programme – An open and secure Europe serving and protecting citizens [2010] OJ C115/01.

\textsuperscript{318} Ibid, 27.

\textsuperscript{319} Ibid, 31.

\textsuperscript{320} Ibid.


evolutionary, rather than revolutionary, advancement in readmission policy. The start of December 2010 saw the EU-Pakistan RA enter into force.\textsuperscript{323}

With the entry into force of the EU-Georgia RA\textsuperscript{324} in March 2011, the EU now had 13 EURAs. In June, the Council defined the EU’s readmission strategy\textsuperscript{325} by first reaffirming its call for Member States to effectively implement existing RAs, and further defining the Member State-EU readmission relationship by setting out bilateral arrangements/agreements may only be enforced to the extent they are compatible with EURAs.\textsuperscript{326} The rationale being Member State RAs had the potential to undermine the credibility of EU readmission policy.\textsuperscript{327} Furthermore, the EU’s readmission strategy pivoted towards an emphasis on states of origin, rather than transit.\textsuperscript{328} However, the elevation of geographical location to a priority criteria\textsuperscript{329} had the counter-effect of favouring states of transit, as individuals travelling by land or sea would eventually have to travel through a bordering third country to the EU. The rationale behind the pivot may in part be explained by the second revision of the Cotonou Agreement of June 2010,\textsuperscript{330} which inserted obligations to readmit own nationals for ACP States who are more likely to be states of origin. On rights protection, the Commission attempted to improve adherence, particularly through reference to the CFR.\textsuperscript{331}


\textsuperscript{324} Agreement between the European Union and Georgia on the readmission of persons residing without authorisation [2011] OJ L52/45.

\textsuperscript{325} Council of the European Union, ‘Council Conclusions Defining the European Union Strategy on Readmission’ (Brussels, 8 June 2011) 11260/11 MIGR 118.

\textsuperscript{326} Ibid, 4.

\textsuperscript{327} Ibid.

\textsuperscript{328} Ibid, 5.


In the context of increasing migration pressure on Member States, the Commission proposed the creation of a dialogue on migration, mobility and security with Southern Mediterranean states.\textsuperscript{332} Within this new dialogue, the conclusion of RAs, alongside cooperation on the identification of individuals to be returned, were two of the measures to be implemented.\textsuperscript{333} Longer term, the EU would consider visa facilitation and visa liberalisation agreements with Southern Mediterranean states who effectively implemented EURAs.\textsuperscript{334}

One of the key developments in the wider area of EU migration policy was the Global Approach to Migration and Mobility of November 2011,\textsuperscript{335} replacing the Global Approach to Migration, defined as ‘the overarching framework of EU external migration policy, complementary to other, broader, objectives that are served by EU foreign policy and development cooperation’.\textsuperscript{336} It is interesting to note the Commission called for the Union to promote ‘global responsibility-sharing based on the Geneva Convention’,\textsuperscript{337} which suggests encouraging other states to grant refugee protection. The Global Approach was separated into four pillars: international protection and asylum policy; legal migration and mobility; the development impact of migration and mobility; and irregular migration and trafficking.\textsuperscript{338} The new approach called for the creation of Mobility Partnerships, political declarations rather than legally-binding agreements to manage migration and mobility including the political agreement to readmit own nationals\textsuperscript{339} and potentially conclude an EURA. It also included cooperation on international protection and reception capabilities in the third countries.\textsuperscript{340} Improvements in these areas would allow Member States to increase the implementation of return decisions.

\textsuperscript{332} European Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A dialogue for migration, mobility and security with the southern Mediterranean countries’ (Brussels, 24 May 2011) COM (2011) 292 Final.
\textsuperscript{333} Ibid, 11.
\textsuperscript{334} Ibid, 12.
\textsuperscript{335} European Commission, ‘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’ (Brussels, 18 November 2011) COM (2011) 743 Final.
\textsuperscript{336} Ibid, 4.
\textsuperscript{337} Ibid, 5.
\textsuperscript{338} Ibid, 6.
\textsuperscript{339} Ibid, 10-11.
\textsuperscript{340} Ibid, 17.
In December 2011 the Council published the EU’s response to the increasing migration pressure\textsuperscript{341} and recognised the importance of cooperating with third countries in order to reduce flows. The Council called for increased cooperation with Mediterranean states\textsuperscript{342} and the conclusion of Mobility Partnerships.\textsuperscript{343} Furthermore, it was now essential to effectively implement Art.13 Cotonou and to enter a dialogue on migration management with Turkey and conclude the EU-Turkey EURA.\textsuperscript{344} Shortly afterwards the Commission received a mandate to begin negotiations with Armenia and Azerbaijan for an EURA.\textsuperscript{345}

In May 2012 the Council revisited its response to the increasing migratory pressures,\textsuperscript{346} with the intention of creating a ‘living document’.\textsuperscript{347} The challenge identified by the Council on readmission was the need to prevent and combat irregular migration and ensure respect for the customary international law obligation for a state to readmit its own nationals.\textsuperscript{348} It is intriguing to note the EU still faced many of the problems identified by Member States in the 1980/90s. In order to combat these, the Council proposed four measures which ranged from the identification of new third countries to begin negotiations with to incentives which could be offered to such third countries.\textsuperscript{349} The second objective regarding readmission was to ensure the full implementation of EURAs by both parties and also to ensure the effective implementation of Art.13 Cotonou.\textsuperscript{350} Under this, the Council called for the full use of Joint Readmission Committees and diplomatic pressure to ensure third countries implement their obligations.\textsuperscript{351} Other measures included the use of bilateral agreements

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\textsuperscript{341} Council of the European Union, ‘EU Responses to Increased Migration Pressures’ (Brussels, 9 December 2011) 18302/11.

\textsuperscript{342} Particularly Egypt, Libya, Morocco and Tunisia.

\textsuperscript{343} Ibid, 5.

\textsuperscript{344} Ibid, 6.


\textsuperscript{346} Council of the European Union, ‘EU Action on Migratory Pressures – A Strategic Response’ (Brussels, 10 May 2012) 9650/12.

\textsuperscript{347} Ibid, 3.

\textsuperscript{348} Ibid, 6.

\textsuperscript{349} Ibid.

\textsuperscript{350} Ibid, 7.

\textsuperscript{351} Ibid.
and arrangements wherever compatible, and targeted dialogues with ACP States. The third area was the need to combat irregular migration from Turkey, achieved primarily through the conclusion of the EURA as well as increased cooperation between the Turkish, Greek and Bulgarian authorities. Further measures included cooperation between the Turkish border authorities, Frontex and Europol to combat illegal trafficking and the creation of trilateral common contact centre involving the border, police and customs authorities of Greece, Bulgaria and Turkey for cooperative purposes.

The following two years saw few developments in readmission policy, with the entry into force of the EU-Armenia RA in 2014. The European Council of June 2014 called for the intensification of cooperation with third countries, the enforcement of readmission obligations and a common EU return policy. This was followed in September by the EU-Azerbaijan Agreement and the EU-Turkey Agreement in November. The entry into force of the EU-Turkey RA was a critical moment in the EU’s attempt to lessen the impact of the ‘migration crisis’, with 50,830 illegal border crossings alone recorded by Frontex for the Eastern Mediterranean route through Turkey in 2014. During this period, the EU and Member States continued their focus on African States through the Khartoum Process, operating at the inter-governmental level with the governments of: Eritrea, South Sudan,

352 Ibid.
353 Ibid, 15.
354 Ibid.
355 Ibid, 16.
358 Ibid, para.8.
Tunisia, Egypt, Somalia, Sudan, Kenya, Ethiopia and Djibouti. This involves cooperation in both migration and development matters to reduce the root causes of migration. The resulting dialogue will develop into cooperation on tackling irregular migration, including cooperation on readmission.

In conjunction with the Rabat Process, the EU and Member States had established dialogues with states which form the migration routes from both sides of the African continent to the EU. The year concluded with the entry into force of the Cape Verde EURA.

In 2015, the Commission presented the European Agenda on Migration with readmission under reducing the incentives for irregular migration. The rationale employed is interesting, the Commission argued an incentive to irregularly migrate to the EU is individuals are aware the EU’s return system is not fully effective. In order to combat this, the Commission argued for greater focus on states of origin. This strategy was affirmed by the European Council in June 2015 where they identified readmission, relocation and cooperation with countries of origin as areas requiring improvement. There are three measures here relevant to the development of readmission policy. First, the Council and Commission were to prepare packages to aid the negotiation of EURAs with the main countries of origin. Second, the effective implementation of the readmission obligations contained in Cotonou and new negotiation mandates. The last measure is the development of the ‘more-for-more’ principle, meaning the Union grants greater incentives depending on the obligations third countries are agreeing to. In this context, the European Council mentioned the use

363 Ibid, 1.
364 Ibid, 3.
365 Ibid, 4-5.
368 Ibid, 7.
369 Ibid, 9.
371 Ibid, para.3.
372 Ibid, para.5.
373 Ibid.
of trade agreements facilitating the temporary presence of individuals in the Union to provide services as an incentive for states to agree an EURA.\textsuperscript{374}

In September 2015 the EU unveiled the Action Plan on Return\textsuperscript{375} in order to rectify the low rate of effective returns, and thereby, according to the EU’s rationale, reduce the incentives for irregular migrants.\textsuperscript{376} The Commission identified different Member State practices were hampering the return process,\textsuperscript{377} with readmission policy being essential to improve this.\textsuperscript{378} Less than 30 percent of returns to African states were effective and it was hoped the Valletta Summit would help to rectify this.\textsuperscript{379} Apart from the reliance on Art.13 Cotonou and customary international law, it was recognised everything available should be used to conclude EURAs and begin new negotiations.\textsuperscript{380} This should include political dialogues to enhance operational cooperation on returns.\textsuperscript{381} Such meetings were to be targeted for: Senegal, Guinea, Ethiopia, The Gambia, Nigeria, Mali, The Democratic Republic of Congo and The Ivory Coast.\textsuperscript{382} Offering an insight into the rationale of the Commission, the Action Plan on Return states ‘while the EU’s Eastern flank is now well covered through readmission agreements, its Southern side, which is currently subject to strong migratory pressure, is not’.\textsuperscript{383} However, the absence of EURAs with Southern states may not solely be attributed to negotiation difficulties, but rather the human rights situations and the principle of non-refoulement, which may prevent returns.

There were four key further developments in readmission policy which laid the foundations for the Valletta Summit in November 2015. First, the Council’s Conclusions on the future of the EU return policy,\textsuperscript{384} which began by referring to the need to fully respect the fundamental rights, human dignity and protection from refoulement of all individuals in the return process.\textsuperscript{385} It may be argued since the

\textsuperscript{374} Ibid.


\textsuperscript{376} Ibid, 2.

\textsuperscript{377} Ibid, 5.

\textsuperscript{378} Ibid, 10.

\textsuperscript{379} Ibid.

\textsuperscript{380} Ibid.

\textsuperscript{381} Ibid.

\textsuperscript{382} Ibid, 11.

\textsuperscript{383} Ibid.


\textsuperscript{385} Ibid, 2.
entry into force of the Treaty of Lisbon, fundamental rights and freedoms have moved further to the
fore in the Union’s readmission policy. This may be attributed to three developments which occurred
in the wider area of EU law after Lisbon. The first was the elevation of the EU CFR to the same status
as the Treaties. Second, the EU was now obligated to become a signatory to the ECHR which
would bring the actions and policies of the EU into the jurisdiction of the ECtHR. Third, ECHR rights
and those contained in the constitutional traditions of the Member States were now general principles
of EU law.

The Council stated Member States, EEAS and Commission should prioritise readmission in political
discussions and agreements with third countries. This is the first time the EEAS has been referred
to as part of readmission policy and reflects the growing role of other EU institutions in the process.
Up until this point, readmission policy had been driven almost solely by the Council and Commission,
with Member States continuing with bilateral cooperation. The inclusion of the EEAS, the EU’s
diplomatic service, is an indication of the importance placed on establishing an effective
readmission system. The Council foresaw the role of the EEAS as enabling cooperation on the
identification of irregular migrants and supplying them with the appropriate travel documents.
Furthermore, the Commission and EEAS were to begin bilateral dialogues with third countries to
enhance practical cooperation.

On 15 October, the EU and Turkey agreed the Joint Action Plan in order to tackle the numbers of
predominantly Syrian protection seekers making the journey to the EU through Turkey. Among the
obligations, the Action Plan is based upon the readmission obligations contained in the EU-Turkey
Agreement and Greece-Turkey Readmission Protocol with additional cooperation on the practical

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386 TEU (n 314) art.6 (1).
387 TEU (n 314) art.6 (2).
388 TEU (n 314) art.6 (3).
389 Council of the European Union, ‘Draft Council Conclusions on the Future of the EU Return Policy’ (Brussels, 2
391 Council of the European Union, ‘Draft Council Conclusions on the Future of the EU Return Policy’ (Brussels, 2
392 Ibid, 7.
394 Ibid, 3.
elements of border control and returns. At the same time, the European Council\textsuperscript{395} called for all readmission obligations to be implemented, with the inclusion of ‘other arrangements’.\textsuperscript{396} This reference to other arrangements is telling of the level of overall harmonisation of readmission policy in 2015. Although readmission is a shared competence, and despite the number of EURAs, the EU strategy was still reliant on Member States filling in the gaps where possible. This may be an indication EURAs did not contain the ‘right’ kind of obligations, those which are of most practical worth. On the other hand, it could instead point to the EU’s aim of a flexible readmission policy, combining legal and political agreements. However, this flexibility comes at the expense of enforceability, an issue readmission policy has faced since its inception.

Later in October 2015, the EU produced the EU–Horn of Africa Regional Action Plan.\textsuperscript{397} While addressing many of the problems which were occurring in the region such as a lack of peace, sustainable growth and accountable government,\textsuperscript{398} this was with the overall aim of reducing migration to the EU. The Council stated ‘the countries of the Horn of Africa are both a source of, and a transit route for, unprecedented migration flows, into Europe, Gulf countries, Middle East and Southern Africa’.\textsuperscript{399} In light of this, the EU targeted cooperation on readmission, to be achieved through ‘both incentives and pressure’.\textsuperscript{400} In particular, the EU wanted international cooperation to ensure Somalia was suitable to accept the return of its own nationals.\textsuperscript{401}

The Valletta Summit on Migration of November 2015 brought together the EU, Member States and African States. Hailed as a ‘crucial step in reinforcing our cooperation’ by then President of the European Council, Donald Tusk\textsuperscript{402} and resulted in a Political Declaration\textsuperscript{403} and an Action Plan.\textsuperscript{404} The

\begin{footnotesize}
\begin{enumerate}
\item European Council, ‘Conclusions of 15 October 2015’ (Brussels, 16 October 2015) EUCO 26/15.
\item Ibid, para.2(p).
\item Ibid, 11.
\item Ibid, 9.
\item Ibid, 18.
\item Ibid.
\item Council of the European Union, ‘Valletta Summit on Migration – Political Declaration’ (Brussels, 17 November 2015) 14145/15.
\end{enumerate}
\end{footnotesize}
Action Plan introduced new readmission initiatives, first, return pilot projects, through which the EU would provide support for reintegration, visa facilitation and improving the ability of third countries to respond to readmission requests in exchange for cooperation on identifying irregular migrants and providing travel documentation.\textsuperscript{405} The Parties committed to improve third countries capacity to respond to readmission applications, to be achieved before the end of 2016 in part by immigration officials from African States travelling to Member States to identify irregular migrants.\textsuperscript{406} Further measures included projects to support civil society organisations who have a stake in the readmission process, particularly in the reintegration of returnees.\textsuperscript{407} On 29 November, the previously agreed EU-Turkey Joint Action Plan entered into force.\textsuperscript{408} Furthermore, the EU and Turkey unveiled the EU-Turkey Statement,\textsuperscript{409} the key element being the full entry into force of the EU-Turkey RA from June 2016,\textsuperscript{410} rather than the third country nationals and stateless persons obligation entering into force in 2017.

The December European Council\textsuperscript{411} called for urgent action to ensure effective readmission applications as well as the implementation of the Valletta Summit Action Plan and EU-Turkey Action Plan.\textsuperscript{412} As with many measures in the late 2000s, policy developments were being driven primarily as a reaction to migration movements.

In February 2016, the Commission produced a state of play report on the priority actions of the European Agenda on Migration.\textsuperscript{413} In this, the Commission recognised many of the problems besetting the return systems of the individual Member States such as the lack of reception capacity.\textsuperscript{414} However, ‘returning irregular migrants not in need of international protection is a key component of EU

\textsuperscript{405} Ibid, 21.

\textsuperscript{406} Ibid, 22.

\textsuperscript{407} Ibid.


\textsuperscript{409} Meeting of Heads of State or Government with Turkey-EU Statement, 29/11/2015 (Brussels, 29 November 2015) PRESS 870/15.

\textsuperscript{410} Ibid, para.5.

\textsuperscript{411} European Council, ‘Conclusions of 17 and 18 December 2015’ (Brussels, 18 December 2015) EUCO 28/15.

\textsuperscript{412} Ibid, para.1.


\textsuperscript{414} Ibid, 16.
migration policy’, with readmission now a top priority.\textsuperscript{415} Interestingly, when discussing incentives, the Commission mentions both positive and negative ones, with a link with trade preferences.\textsuperscript{416} The Commission emphasised cooperation with third countries with a low return rate, with references to Pakistan and the state of negotiations with Morocco and Algeria.\textsuperscript{417} Furthermore, attention was drawn to the numbers of irregular migrants originating from Afghanistan and Bangladesh. Following this, the February European Council\textsuperscript{418} called for the full support of incentive packages for third countries to ensure the implementation of readmission obligations. Both the EU and Member States were also to address root causes of the migration movements.\textsuperscript{419}

As part of its ‘Back to Schengen – a Roadmap’,\textsuperscript{420} which was a response to several Member States introducing temporary border controls due to the large numbers of migrants moving across the EU,\textsuperscript{421} the Commission proposed an acceleration in the number of returns from Greece to Turkey.\textsuperscript{422} Continuing the expansion in the number of EURAs, on 1 April the Commission received a mandate for negotiations with Jordan.\textsuperscript{423}

In June 2016, the Commission announced the creation of new Partnership Frameworks under the European Agenda on Migration,\textsuperscript{424} describing the migration pressure as the ‘new normal’.\textsuperscript{425} In this context, Partnership Frameworks were ‘a coherent and tailored engagement where the Union and its Member States act in a coordinated manner putting together instruments, tools and leverage to reach

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\textsuperscript{415} Ibid, 17.
\textsuperscript{416} Ibid.
\textsuperscript{417} Ibid.
\textsuperscript{418} European Council, ‘European Council Meeting (18 and 19 February 2016) – Conclusions’ (Brussels, 19 February 2016) EUCO 1/16.
\textsuperscript{419} Ibid, para.8.
\textsuperscript{421} Ibid, 2.
\textsuperscript{422} Ibid, 9.
\textsuperscript{423} Council of the European Union, ‘Council Decision authorising the opening of negotiations with the Hashemite Kingdom of Jordan for an agreement between the European Union and the Hashemite Kingdom of Jordan on Readmission’ (Brussels, 1 April 2016) 6963/16.
\textsuperscript{424} European Commission, ‘Communication from the Commission to the European Parliament, the European Council, the Council and the European Investment Bank on Establishing a New Partnership Framework with Third Countries under the European Agenda on Migration’ (Strasbourg, 7 June 2016) COM (2016) 385 Final.
\textsuperscript{425} Ibid, 5.
comprehensive partnerships with third countries to better manage migration in full respect of our humanitarian and human rights obligations’.\textsuperscript{426} Operating through country-specific compacts, with the short term objective of increasing the number of effective returns.\textsuperscript{427} The Commission views an increase in returns as ‘breaking’ the smugglers, as individuals would no longer be willing to pay for the journey if they know that there is a high chance that they will be returned.\textsuperscript{428} It is interesting to note the increased distinction between countries of origin and transit in these compacts. Countries of transit are seen as being capable of managing the migration flows and thereby requiring cooperation and support on effective border management.\textsuperscript{429} Countries of origin require greater support in identifying individuals to be returned and their effective reintegration into the state’s society.\textsuperscript{430} This level of distinction had not been seen in previous EU readmission policy measures.

Recognising an implementation gap, the Commission proposed five new priorities. First, focus on countries of origin while facilitating cooperation between countries of origin and transit, arguably advancing the ‘Readmission Network’. Second, improved cooperation between the EU and Member States. In a sign of the urgency of the migration situation, it states ‘the paramount priority is to achieve fast and operational returns, and not necessarily formal readmission agreements’.\textsuperscript{431} This may be interpreted as suggesting an increased Member State role in the readmission process. As it can be seen from the example of Turkey, the EU has highlighted the role of the EU-Turkey RA and Greece-Turkey Protocol. Such bilateralism may facilitate cooperation beyond EURAs. The actual return process is largely decided at the Member State level, despite the EU’s aim of increasing harmonisation of the return procedure. Therefore, placing greater importance on achieving returns than negotiating EURAs suggests a change of emphasis in readmission policy. Third, improve the capacity of third countries to identify and fingerprint individuals to aid their return. Fourth, the EU should facilitate cooperation between countries of origin and transit via voluntary return and reintegration initiatives. Finally, to improve the acceptance of EU lasses-passers in third countries.\textsuperscript{432}

\textsuperscript{426} Ibid, 6.
\textsuperscript{427} Ibid, 5-6.
\textsuperscript{428} Ibid, 6.
\textsuperscript{429} Ibid, 7.
\textsuperscript{430} Ibid, 7.
\textsuperscript{431} Ibid.
\textsuperscript{432} Ibid.
As part of the selection process, the Commission and Member States discussed 16 states for the creation of country packages, with the aim of improving cooperation on readmission. These are to be operationalised through compacts, which include financial measures to support their ability to accept returns, effectively manage migration and build the capacity of public authorities. The long term aim of the financial support was ultimately to address the root causes of migration. The Commission separated countries of priority into short term and long term, with many of the short-term states being in the Africa or the Middle East. Long term, target states included Afghanistan, Iran, Algeria, Morocco and Egypt.

In its conclusions on the return and readmission of irregular migrants which appear to confirm the slight change of emphasis which can be seen in the second priority under the proposed country compacts between the role of Member States and the Union, the Council noted EURAs were the main instrument for creating readmission obligations but recognised negotiations were slow. In contrast, Member States have a wider range of measures to ensure effective readmissions beyond RAs. When read in light of the need to use all the available measures to ensure effective returns, this again suggests the enhanced role of Member States in readmission policy. However, an argument against such an interpretation is the Council proposed political readmission arrangements, such as those used by Member States, could be used by the EU and may facilitate future negotiations for EURAs. Significantly, such EU political arrangements would have the same objectives of Member State

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433 Ibid, 8 (Afghanistan, Algeria, Bangladesh, Eritrea, Ethiopia, Ghana, Ivory Coast, Niger, Nigeria, Mali, Morocco, Pakistan, Senegal, Somalia, Sudan and Tunisia).
434 Ibid.
435 Ibid, 10.
436 Ibid, 11-12.
438 Ibid, 16.
440 Ibid, 2.
441 Ibid.
442 Ibid, 4.
arrangements. Following these developments in June 2016, at the behest of the Italian government, the Commission received a mandate to open negotiations with Nigeria.

2.6. Conclusion

This chapter has examined the historical development of readmission policy, beginning with its intergovernmental origins, through the treaty provisions of Maastricht, Amsterdam and Nice until the Treaty of Lisbon. It has been argued the development of readmission policy tracks wider changes in the EU’s legal order, institutions, competence and EU-Member State dynamics. Indeed, the rationale behind the development of its readmission policy reflects other policy areas, particularly the objective of creating an area free of internal borders. In the intergovernmental and Maastricht eras, it has been shown Member States identified problems they were experiencing returning third country nationals to their state of origin. Member States communicated these difficulties to each other and identified common denominator states. Recognising these shared issues, and the areas of leverage or strength of relationship which Member State possesses, decided to coordinate their actions and leverage at the supranational level through the EU. This also facilitates the enhancement and realisation of the objective of creating an area free of internal borders. Matching the developments in readmission, the EU and Member States have created human rights, development, trade and development policies and approaches which allow for the fulfilment of its readmission policy and vice versa.

It is possible to trace a gradual evolution in rationale as to the purpose and role of an EU readmission policy. Throughout large parts of its development, readmission policy has been reactive, particularly in response to the ‘migration crisis’ from 2010 onwards. Eastern and Southern Mediterranean states have risen in prominence, leading to an intensification of cooperation with states such as Turkey. This has been with the objective of reducing the number of irregular entries into the EU and allowing for the return of third country nationals and stateless persons to those neighbouring states. Since 2014, there has been a transition to a preventative or proactive policy, with a focus on sub-Saharan and Horn of Africa States. Here, readmission is partnered with assistance on the root causes of migration, thereby linking readmission with development policy. This has been achieved in large part by the

443 Ibid.

444 M. Fick, ‘Nigeria and EU to start migrant return talks’ Financial Times (27 April 2016) <https://next.ft.com/content/c082e124-0c77-11e6-b0f1-61f222853ff3> accessed 22 July 2016

increasing use of political arrangements such as Mobility Partnerships, examined in detail in Chapter Four, aiding cooperation on wider issues of irregular migration.

The development of the EU’s readmission policy is described as growing in small increments, with significant leaps in policy occurring sporadically. This agenda was developed by intergovernmental groups such as TREVI and the Schengen Group, who viewed readmission very much as a security concern rather than a migratory concern. The resultant security-focused lens used by the Member States has continued to the present day to the detriment of the human rights afforded to individuals in the readmission process.

With Maastricht, we can observe the start of readmission being placed on the EU’s agenda, with Member States now able to adopt common positions on asylum matters. During the early 1990s, the EU began to produce standard model agreements for Member State use, based largely on the preceding Schengen-Poland RA. The language used in these early agreements has filtered through to later agreements. One of the most significant developments during this period was the move by Member States to have readmission obligations in EU mixed agreements, now a cornerstone of the EU’s readmission policy. Under Amsterdam, Member States collectively identified third countries to pursue RAs and the EU enjoyed the competence to create EURAs. Furthermore, we can observe the beginnings of the incentive/punishment policy accompanying the negotiation and implementation of EURAs. It can be observed how regular migration policies such as visa cooperation and development policy became intertwined with readmission.

It is proposed readmission policy grew significantly under Nice, with the introduction of specific criteria for identifying third countries. Furthermore, Member States continued to propose states based on the nationalities they were experiencing difficulties with in returning to their country of origin. Much of the growth in readmission during this period is closely linked to the expansion of the EU’s role in international affairs. As it increased, the EU was able to include readmission obligations in a broader range of agreements. The Lisbon era has seen the entry into force of many EURAs, and it is this era more than most which demonstrates the flexibility of readmission as a preventative and reactive policy. In parallel with the growing migration pressure, readmission policy has become more targeted and country-specific, with a wide range of policy measures being utilised in order to ensure cooperation. This is demonstrated by the EU-Turkey RA, through which the EU sought to combine visa liberalisation, financial assistance and accession negotiations to ensure the return of Turkish nationals, third country nationals and stateless persons.
Figure 1 EU Readmission Agreements

<table>
<thead>
<tr>
<th>Readmission Agreement</th>
<th>Entered into Force</th>
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<tbody>
<tr>
<td>EU-SAR Hong Kong</td>
<td>1 March 2004</td>
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<tr>
<td>EU-SAR Macao</td>
<td>1 June 2004</td>
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<tr>
<td>EU-Sri Lanka</td>
<td>1 May 2005</td>
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<tr>
<td>EU-Albania</td>
<td>1 May 2006</td>
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<tr>
<td>EU-Russia</td>
<td>1 June 2007</td>
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<tr>
<td>EU-Ukraine</td>
<td>1 January 2008</td>
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<tr>
<td>EU-FYROM Macedonia</td>
<td>1 January 2008</td>
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<tr>
<td>EU-Bosnia and Herzegovina</td>
<td>1 January 2008</td>
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<td>EU-Montenegro</td>
<td>1 January 2008</td>
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<td>EU-Serbia</td>
<td>1 January 2008</td>
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<td>EU-Moldova</td>
<td>1 January 2008</td>
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<tr>
<td>EU-Pakistan</td>
<td>1 December 2008</td>
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<tr>
<td>EU-Georgia</td>
<td>1 March 2011</td>
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<td>EU-Armenia</td>
<td>1 January 2014</td>
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<td>1 September 2014</td>
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<td>EU-Turkey</td>
<td>1 October 2014</td>
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<tr>
<td>EU-Cape Verde</td>
<td>1 December 2014</td>
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<tr>
<td>EU-Belarus</td>
<td>Not yet in force</td>
</tr>
</tbody>
</table>
Chapter 3: The EU Institutions and Readmission

The preceding chapter demonstrated the complexity of the EU’s readmission policy as it developed through each Treaty revision, moving from a policy area primarily governed by inter-governmentality to an area of shared competence under Lisbon. As the EU’s readmission competence has expanded so has the role and importance of the EU institutions. However, the relationships between these institutions have not been without tension. The institutional picture in this policy area has been further complicated by the inclusion of readmission obligations in mixed agreements. Such mixed agreements rely on a wide range of EU competence to create rights and obligations in diverse areas such as development, trade and security cooperation. In addition, over the last ten years new agencies and bodies have been created, such as the EEAS, which further affects the institutional dynamics in readmission policy.

This chapter will argue the fluctuating institutional dynamics in the creation and implementation of readmission policy raises wider questions concerning the EU’s competence, the role of subsidiarity and the use of conditionality in the negotiation of EURAs. The discussion is structured as follows. First, it will look at EU readmission competence. Having established the relevant competence, it will then move to the importance of subsidiarity, and various questions which the unique formulation of EU readmission policy poses. This question stems from the EU and Member States being prompted to create readmission obligations, at the bi- and multilateral levels, which may not be congruent with the separation of competences. Having established the underlying concepts, and their manifestation within readmission policy, this chapter will turn to the bodies created by RAs, who have the primary role of overseeing their implementation.

This discussion will provide an insight into the initial dynamics of the Commission and Council, who fulfil different roles. Following this, the chapter will examine the various institutional and agency roles in the identification of third countries for EURAs, their negotiation and conclusion. This examination will seek to identify not only the role of each institution but also the perspectives which each institution brings to the process. As previously demonstrated in the historical account of Chapter Two, readmission policy has created tension between the institutions, culminating in Commission v Council,\(^1\) the only instance in which a question on the legality of an aspect of EU readmission policy has come before the CJEU. Significantly for its future development, it is possible to observe aspects of

\(^1\) Case C-377/12 European Commission v Council of the European Union (CJEU, 11 June 2014).
the Court’s ruling which have already caused a manifest change in the direction of the policy. Not only has the Court’s ruling provided clarity as to the status of readmission obligations, it has also provided an opportunity to gain an insight into wider external relations and how readmission fits within this.

3.1 EU Competence in the Migration and Readmission Acquis

Reiterating the rationale behind a readmission policy at the EU level, as contained in the historical account of the second chapter, the ‘driving force’ behind the policy has been the stated aim to create an area free of internal frontiers. This necessitated the development of both internal and external migration systems in order to regulate the arrival, processing and removal of irregular third country nationals. Readmission, as well as migration and asylum, are now components of the AFSJ under Title V TFEU, the purpose being to:

‘ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals’.

The creation of the ASFJ has not been controversial as the policy areas are ‘essential functions and prerogatives of the modern nation-state’. Furthermore, these are areas in which states had previously preferred to cooperate on an intergovernmental basis, with the transition to the supranational EU level occurring over time as Member States recognised the advantages of presenting a united voice supported by common structures and supervision. It can be argued the change from ‘Justice and Home Affairs’ to ‘Area of Freedom, Security and Justice’ is an implicit recognition of such importance and reflects a greater recognition not only of restrictive measures on migration or the transfer of EU citizens under European Arrest Warrants, but also of the provision of rights to those within the system.

For the negotiation of EURAs and inclusion of readmission obligations in mixed agreements, Art.79(3) TFEU provides the legislative basis. However, its exercise is shaped by other provisions such as Art.8 TEU containing the EU’s commitment to good neighbourliness and the creation of special or close relationships with third countries in the surrounding geographical area. Such close relationships,

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4 Ibid, art.67 (2).
typically founded on Association Agreements, contain an obligation for the parties to accept the readmission of own nationals. Furthermore, such agreements may contain a covenant facilitating the future negotiation of an EURA encompassing third country nationals and stateless persons. Under Art.4 TFEU, measures within the AFSJ are an area of shared competence,\(^7\) including readmission. The exercise of shared competence means the Member States may only exercise their competence when the EU has not exercised its own in the same area under the doctrine of pre-emption.

Despite the apparent ‘black letter’ certainty provided by the Treaties, the development of EU readmission policy has not conformed to the prescribed separation and conditions. The unique circumstances of readmission in the EU legal order raises questions which ultimately lead us to consider one of the key principles which ensures the effective functioning of the Union: the role of subsidiarity.

3.2 Readmission and Subsidiarity

In the AFSJ, tensions exist between the EU and Member States due to the sensitive nature of the relevant policies and measures in what is an area of shared competence. This combination, which has been described as leading to an ‘intense competence debate’,\(^8\) and its manifestation in the EU’s readmission policy leads us to question the role of subsidiarity in the EU-Member State relationship.

Subsidiarity is defined as meaning: ‘the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at a regional level, but can rather, by reason of scale or effects of the proposed action, be better achieved at Union level’.\(^9\) Furthermore, its practical observance is regulated under Protocol No2.\(^{10}\) Such questioning may appear to initially be unfounded, particularly when we consider how the policy originally came into being. It was the recognition by Member States that more could achieved as a collective, rather than on a bilateral basis, which led to the creation of an overarching EU readmission policy to effectively represent their interests and allow for the collective negotiation and application of EURAs.

\(^7\) TFEU (n3) art.4(2)(j).


\(^9\) TEU (n6) art.5(3).

\(^{10}\) Protocol (No2) on the application of the principles of subsidiarity and proportionality [2012] OJ C326/206.
The Council set out its views in 1999\(^\text{11}\) on the relationship between EURAs and Member State agreements as follows:

‘A Member State can continue to conclude readmission agreements with third countries provided that the Community has not concluded an agreement with the third State concerned or has not concluded a mandate for negotiating such an agreement. In individual cases Member States may also conclude bilateral agreements after the conclusion of a Community agreement or after the opening of negotiations, for instance where the Community agreement or the negotiating mandate contains only general statements on readmission but one or more Member States require more detailed arrangements on the matter. The Member States may no longer conclude agreements if these might be detrimental to existing Community agreements.’\(^\text{12}\)

However, there are instances within the last decade which raise questions as to the application of subsidiarity in readmission policy. It is argued 2015 saw a policy shift from the EU, in response to the ‘migration crisis’, to step away from subsidiarity. This is demonstrated by the various readmission obligations which exist between the EU and Turkey. Prior to the conclusion of the EU-Turkey RA,\(^\text{13}\) Greece already enjoyed a readmission protocol with Turkey and since 2014 both agreements have been in force in parallel. The immediate question raised by this situation is what are the differences between the agreements, and which is more effective? Furthermore, based on the definition of subsidiarity, if the Greece-Turkey Protocol failed to meet its objectives, and the EU-Turkey Agreement was to be the replacement, why is the readmission protocol still in force? This raises an issue for subsidiarity, and potentially the EU’s commitment to other founding principles or values. As Panizzon argues, duplications such as this undermine the human rights of individuals returned under the agreements as one agreement may provide a higher level of protection than the other, but both may be used.\(^\text{14}\) The situation is further complicated by the EU-Turkey Statement,\(^\text{15}\) and the consequential

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\(^{12}\) Ibid, 8.


\(^{15}\) EU-Turkey Statement, 18 March 2016 (2016) PRES 144/16.
approach of the Turkish government. The Commission noted in November 2016, from the Turkish perspective, returns were not being made under the obligations contained in the EU-Turkey RA or the Greece-Turkey Protocol, but rather under the Statement.

While these observations may apply to EURAs, Member States have a range of political tools in order to secure the effective return of third country nationals without an RA. These other policy tools have been highlighted by the EU on several occasions. In October 2015, the European Council emphasised the need to implement all readmission obligations, including those contained in ‘other arrangements’. The Council then developed this in June 2016 with a proposal for informal readmission measures to be adopted at the EU level. The adoption of informal measures at the EU level again raises the issue of subsidiarity, especially if such measures are going to be targeted at third countries which Member States already have informal arrangements.

The rulings in the cases of NF, NG and NM v European Council, and their upholding in the Court of Justice, created a further category of readmission cooperation: multilateral political arrangements. The applicants in these cases were three individuals (two Afghan and one Pakistani) who applied for asylum in Greece but had arrived via Turkey. If the applicant’s asylum claims were unsuccessful, they then faced return to Turkey. Such return would be politically facilitated by the EU-Turkey Statement, and it is this measure which they sought to have annulled. It was submitted by the European Council the EU-Turkey Statement did not constitute an agreement of the European Council, rather an agreement concluded by members of the Council in their role as Heads of State. The European Council described the Statement as ‘the fruit of an international dialogue between the

17 Ibid, 79.
20 Ibid, 4.
21 Case T-192/16 NF v European Council (CJEU, 28 February 2017).
22 Case T-193/16 NG v European Council (CJEU, 28 February 2017).
23 Case T-257/16 NM v European Council (CJEU, 28 February 2017).
24 Joined Cases C-208/17 to C-210/17 P NF, NG and NM v European Council (CJEU, 12 September 2018).
25 Case T-257/16 NM v European Council (n 23) [14].
26 Ibid, [26].
Member States and Turkey27 and therefore did not constitute an EU agreement, but rather a ‘political arrangement’ .28 The Court ruled the Statement does indeed constitute a political arrangement made by Member States, not the European Council, and therefore it lacked jurisdiction.29

The decision in these cases may prove to be significant in the long-term development of EU readmission policy for three reasons. The first is EU-Turkey readmission cooperation now occurs on three different bases: The Greece-Turkey Readmission Protocol; the EU-Turkey RA and now the EU-Turkey Statement. We have therefore moved from bilateral agreement to an EU agreement, but with the further addition of a multilateral political agreement. The effect of these agreements, in theory at least, should be the same. This raises the question of why the political arrangement was considered necessary by the Member States. This is significant when we consider Turkey approaches all returns from Greece to take place under the Statement, and not the EURA or Protocol.30

The second reason to attach significance to these cases is they raise questions for the role of subsidiarity and the founding values due to the commonalities between these agreements. As it has been shown, the Treaties and the Council’s own guidance refer to legal agreements but do not mention political arrangements. If we examine the last criteria: ‘Member States may no longer conclude agreements if these might be detrimental to existing Community agreements’, it is difficult to reason that the EU sought to exclude the creation of bilateral Member State RAs but would allow political arrangements which are detrimental to the EU-Turkey RA. It is argued the detrimental effect of the Statement is the side-lining of the EU-Turkey Agreement. Borges argues the drawing together of economic and political concerns in the Statement has come at the expense of the rights of the returnees involved.31 Third, the Statement has been described as ‘an attempt to reverse ‘Lisbonisation’,32 meaning it represents an occasion in which Member States preferred to conclude an agreement outside of EU structures rather than the EU level, in contrast to the direction of travel of readmission policy being towards further EURAs.

27 Ibid.
28 Ibid, [28]-[31].
29 Ibid, [73].
3.3 Readmission and Conditionality

Throughout the development of the policy, there has been an increasing level of importance attached to the need for leverage, both positive and negative, to induce cooperation. The focus on such measures has increased in the last five years, yet implementation has been limited by the separation of competences, which has left the range of measures available to the Union as ‘rather limited’. 33

Conditionality has been applied by the EU to informal arrangements as well as EURAs. In respect of formal RAs, conditionality takes the form of the implementation of visa liberalisation/facilitation agreements. These agreements are often concluded before or after the conclusion of a formal RA. For example, as part of the negotiations for the EU-Turkey RA, the Union agreed to enter a dialogue on visa liberalisation. This dialogue led to the creation of a visa liberalisation roadmap in 2012, 34 with the Commission recommending the lifting of visa requirements on Turkish nationals in May 2016. 35 The lifting of these requirements was conditional on Turkey meeting 72 criteria, including its obligations under the EURA and Statement. However, in November 2016 the Commission noted the third country national obligations of the EURA were still pending before the Turkish Council of Ministers. 36 Therefore, Turkey had failed to meet all the criteria for the lifting of visa requirements. With formal RAs, a degree of conditionality exists throughout their implementation via the visa waiver suspension mechanism reformed in February 2017. 37 The mechanism has been revised to allow for suspension if the third country has decreased the degree of readmission cooperation or has increased the number of rejected readmission applications of own and third country nationals. 38

38 Ibid.
Turning to informal readmission methods, one of the more recent, and controversial, examples of conditionality has been the EU-Afghanistan Joint Way Forward,\textsuperscript{39} agreed in late 2016. Despite being a political arrangement, it aimed to facilitate an increase in the number of Afghan nationals returned to Afghanistan. However, the controversy stems from how it was negotiated and the role of development assistance in the process.\textsuperscript{40} Although it does not create legal obligations,\textsuperscript{41} the Joint Way Forward reaffirms Afghanistan’s pre-existing obligations under international law to readmit its own nationals.\textsuperscript{42}

The controversy stems from the circumstances in which the agreement was concluded and a leaked Commission-EEAS paper on enhancing cooperation with Afghanistan.\textsuperscript{43} The Joint Way Forward was agreed during the Brussels Conference on Afghanistan of 4-5 October 2016,\textsuperscript{44} which focused on providing international aid to Afghanistan, with the EU and Member States providing €5 billion. Prior to this financial commitment, the Commission and EEAS had identified Afghanistan’s reliance on aid, recognising ‘without continued high levels of international transfers, the Afghan state established after the 2002 intervention is unlikely to prevail’.\textsuperscript{45} The paper then turned its attention to the Brussels conference and, at a minimum, inferred a link between the Afghanistan’s agreement to the Joint Way Forward and the provision of development aid and funding. First, and arguably the clearest indication of this approach, the paper states ‘the leverage of the conference should be used as a positive incentive for the implementation of the Joint Way Forward’.\textsuperscript{46} It then proceeds to argue:

‘The EU should stress that to reach the objective of the Brussels Conference to raise financial commitments “at or near current levels” it is critical that substantial progress has been made

\textsuperscript{39} Council of the European Union, ‘Joint Way Forward on Migration Issues Between Afghanistan and the EU’ (Brussels, 22 September 2016) 12191/16.
\textsuperscript{40} E.g. S.E. Rasmussen, ‘EU Signs Deal to Deport Unlimited Numbers of Afghan Asylum Seekers’ The Guardian (3 October 2016).
\textsuperscript{41} Council of the European Union, ‘Joint Way Forward on Migration Issues Between Afghanistan and the EU’ (Brussels, 22 September 2016) 12191/16, 3.
\textsuperscript{42} Ibid, 4.
\textsuperscript{43} Council of the European Union, ‘Joint Commission-EEAS non-paper on enhancing cooperation on migration, mobility and readmission with Afghanistan’ (Brussels, 3 March 2016) 6738/16.
\textsuperscript{44} Council of the European Union, ‘Brussels Conference on Afghanistan: Main Results’ (5 October 2016) PRES 554/16.
\textsuperscript{45} Council of the European Union, ‘Joint Commission-EEAS non-paper on enhancing cooperation on migration, mobility and readmission with Afghanistan’ (Brussels, 3 March 2016) 6738/16, 5.
\textsuperscript{46} Ibid, 8.
in the negotiations with the Afghan Government on migration by early summer, giving the Member States and other donors the confidence that Afghanistan is a reliable partner able to deliver.\(^{47}\)

The use of development aid as an incentive for the enforcement of readmission obligations on a state which is reliant on outside funding differs from the previously employed approach, and demonstrates the Union using all available tools to aid the effective returns of individuals. The shared competence between the EU and Member States has allowed them to, in some instances, diverge in their aid policies towards Afghanistan. For example, Germany committed to provide Afghanistan with €1.7 billion in aid but dependent on the Afghan government accepting the return of own nationals as envisaged under the Joint Way Forward.\(^{48}\) The United Kingdom, Denmark and Sweden on the other hand, committed £750 million, \(^{49}\) 1.7 billion Kroner\(^{50}\) and 8-8.5 billion SEK\(^{51}\) up to 2020 not dependant on the implementation of the Joint Way Forward. Therefore, there is a difference in approach which is facilitated by the separation of competences on development and humanitarian aid which acts to undermine the EU’s use of its competence to apply leverage to enforce readmission obligations. The use of conditionality in such a way raises questions, particularly in relation to Art.3(5) TEU, which states:

‘In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the

\(^{47}\) Ibid.


rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter’.

It is questionable whether conditioning development aid on accepting the return of greater numbers of Afghan citizens, to a state in desperate need of international assistance, is congruent with the EU’s founding values which it seeks to export. Does it promote respect for human dignity and human rights and freedoms and is it congruent with the aim of contributing to peace and sustainable development?

3.4 Readmission and EU Agencies and Bodies

The expansion of readmission policy has required the creation of new bodies, as well as increasing the roles of pre-existing agencies. There are parallels between readmission and mixed agreements and treaties concluded at the UN level: the creation of specific bodies to monitor and manage the implementation of the obligations contained within the agreement/treaty. In EURAs, these bodies are Joint Readmission Committees, comprised of officials from the contracting parties. The Union’s delegation to the Committees is made up of Commission officials and Member State experts.\(^{52}\)

Procedurally, meetings of the Committee may either be requested\(^{53}\) or otherwise take place every six months.\(^{54}\) As Coleman noted, the precise workings of the Committees are unclear, with no public scrutiny and no involvement from Parliament.\(^{55}\) In order to find information on how these Committees function we must examine the individual EURAs. As there are potentially 17 different Joint Readmission Committees from which to choose, this examination will focus on the EU-Turkey RA Committee. This agreement lists the tasks of the Committee as being to monitor the application of the agreement;\(^{56}\) facilitate regular exchanges of information\(^{57}\) and decide on the implementing procedures.\(^{58}\) Importantly, the decisions of the Committee are binding, but are subject to the internal procedures of the parties.\(^{59}\) Therefore, Committee decisions are subject to the approval of the Council, which is the only mechanism through which it is possible to gain an understanding of how the

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\(^{52}\) TFEU (n3) art.19 (3).

\(^{53}\) Ibid, art.19 (4).


\(^{55}\) Ibid, 107.


\(^{57}\) Ibid, art.19(1)(b).

\(^{58}\) Ibid, art.19(1)(c).

\(^{59}\) Ibid, art.19(2).
Committee’s function. Such opaqueness raises issues around democracy, as there is a lack of democratic oversight and accountability from Parliament, in conjunction with an inability to access and scrutinise decisions and policies of the Committees.

The important role and functions of the Joint Readmission Committees can be observed with the EU-Turkey Agreement, in which the Committee was mandated to alter the originally agreed implementation date. Due to migration pressures, the EU sought to bring forward the implementation of the third country national and stateless persons’ obligation from 2017 to June 2016. This process began with the EU-Turkey statement of November 2015. The Commission then proposed a position for the Council to take on the Joint Readmission Committee, following discussions which occurred at the second EU-Turkey Readmission Committee meeting of 19 January 2016. The Joint Readmission Committee then produced a draft decision allowing for the bringing forward of the obligations under Art.4 and 6 of the Agreement. The Council adopted this decision in March 2016, which allowed the Commission representatives to agree the position with their Turkish counterparts at the following Joint Readmission Committee meeting.

The prime example of a pre-existing agency expanding its role and importance in response to readmission policy is the EEAS, established in 2010, which acts as the EU’s diplomatic service and

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60 Meeting of Heads of State or Government with Turkey-EU Statement, 29/11/2015 (Brussels, 29 November 2015) PRESS 870/15.

61 European Commission, ‘Proposal for a Council Decision establishing the position to be taken on behalf of the European Union within the Joint Readmission Committee on a Decision of the Joint Readmission Committee on implementing arrangements for the application of Articles 4 and 6 of the Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation as of 1 June 2016’ (Brussels, 10 February 2016) COM (2016) 72 Final.

62 Ibid.

63 Decision No 2/2016 of the Joint Readmission Committee set up by the Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation on the implementing arrangements for the application of Articles 4 and 6 of the Agreement from 1 June 2016.

64 Council Decision (EU) 2016/551 of 23 March 2016 establishing the position to be taken on behalf of the European Union within the Joint Readmission Committee on a Decision of the Joint Readmission Committee on implementing arrangements for the application of Articles 4 and 6 of the Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation from 1 June 2016 [2016] OJ L95/9.

currently has 139 delegations worldwide.\textsuperscript{66} The role of the EEAS is to assist in the functions of the High Representative of the Union for Foreign Affairs and Security,\textsuperscript{67} who chairs the Foreign Affairs Council and CFSP.\textsuperscript{68} It is comprised of Council and Commission staff, as well as seconded staff from Member States.\textsuperscript{69}

The primary role of the EEAS in readmission policy lies in the stage prior to the commencement of negotiations in the creation of the appropriate diplomatic relations which will allow the EU to broach the idea of an EURA. The importance of the EEAS in this role was confirmed by the Commission in the renewed Action Plan.\textsuperscript{70} However, its importance may diminish where an agreement, such as Cotonou,\textsuperscript{71} facilitates the future negotiation of RAs. In such cases, the necessary arrangements already exist. In contrast, the absence of such facilitating clauses with specific states may require the EEAS. Significantly, the EEAS is responsible for the implementation of the European Neighbourhood Policy,\textsuperscript{72} which is the overarching policy for relations with states bordering the EU to the East and South. Within the Neighbourhood Policy, readmission cooperation may arise through two different types of agreement: readmission and association. Association Agreements deepen cooperation between the signatory parties in many different areas, including readmission but are often concluded after an EURA. Therefore, in many instances they restate the obligations to effectively implement the EURA.

The practical application of EURAs encompasses a further two Union agencies, the first of which is Frontex, the European Border and Coast Guard Agency, reformed in September 2016.\textsuperscript{73} In its new


\textsuperscript{67} TEU (n6) art.27(1).

\textsuperscript{68} Ibid, art.27(2).

\textsuperscript{69} Ibid, art.27(3).


\textsuperscript{71} Agreement amending for the second time 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, signed in Cotonou on 23 June 2000, as first amended in Luxembourg on 25 June 2005 [2010] OJ L287/1 (Cotonou Agreement).


form, Frontex is tasked with ensuring the effective management of the EU’s external borders.\textsuperscript{74} In order to achieve this, Frontex is tasked with assisting Member States during return operations, including providing technical knowledge, equipment\textsuperscript{75} and staff.\textsuperscript{76} Not only may Frontex assist Member States, it may also conduct operations with third countries to manage migration movements.\textsuperscript{77} In conjunction with the practical role of Frontex at the external border, the second agency which has a role is EASO,\textsuperscript{78} which is tasked with ensuring the implementation of the wider CEAS.\textsuperscript{79} Although EASO does not operate ‘on the frontline’ as is the case with Frontex, it provides wider technical assistance to both Member States and third countries. In the case of readmission, the EASO has several different roles. First, it may cooperate on building the capacity of reception and asylum procedures in third countries,\textsuperscript{80} which is key if the EU is to effectively return significant amounts of irregularly-resident third country nationals to states which often lack the finances and legal structures to ensure a functioning asylum system. Second, the EASO cooperates on resettlement with third countries and ensure persons who are returned have access to international protection.\textsuperscript{81}

However, we return back to the human rights situations in such states and often access to international protection is not the main concern for returned citizens, but rather the prevalent human rights situation. Furthermore, cooperation on access to international protection presumes the state in question is a signatory to the Refugee Convention or other instruments which offer protection.

We can observe how agencies and bodies now play a larger role in readmission policy than initially conceived. If we view readmission and return as a linear process, the EEAS establishes the initial diplomatic ties and strengthens them to the extent it is possible to negotiate and conclude an EURA. This is then followed by the Joint Readmission Committee, which monitors and ensures the

\textsuperscript{74} Ibid, art.1.
\textsuperscript{75} Ibid, art.8(h).
\textsuperscript{77} Frontex Regulation (n73) art.14(2)(c).
\textsuperscript{79} Ibid, art.1.
\textsuperscript{80} Ibid, art.7.
\textsuperscript{81} Ibid.
effectiveness of the agreement. The EASO cooperates with third countries to ensure they have the
capacity to accept returnees and provide protection and, finally, Frontex works alongside Member
States to ensure returns facilitated by the EURA are effectively carried out. However, what binds this
plethora of bodies and agencies together is their inability to create policies independently. They are
still reliant on receiving their directions or mandates from EU institutions.

3.5 Readmission and Institutional Dynamics

Having considered the various agencies and bodies which have a role in the creation and
implementation of EU readmission policy, it is appropriate to shed light on the institutions which
create the policy. Although the TFEU lists seven EU institutions, only four of these are relevant for
readmission: Council, Parliament, Commission and CJEU. It must be borne in mind each institution has
its own set of values and agendas, which then compete in the formulation of policy. For example, it
can be observed from the preceding historical account the Parliament has often raised objections to
readmission policy based on human rights protection. Whereas the Council appears to feel more
pressure from EU citizens to bring under control the ‘migration crisis’ and therefore appears more
willing to compromise on human rights protection during the readmission process.

The Council, for readmission purposes, is composed of the ministers responsible for immigration
and/or home affairs and, along with the Commission, is one of the driving forces historically behind
EU readmission policy. Throughout this development, the Council has fulfilled numerous roles. In the
embryonic stages of the policy, it was the meeting of JHA ministers through informal
intergovernmental groups where Member States began to recognise, they shared problems with the
return of irregular individuals to specific states. As the policy evolved in parallel with the development
of EU competence and institutions, it became the role of the Council to identify states to consider for
negotiations for RAs. This may be observed in 1996, as the Council identified China, India and Southern
Mediterranean states for the conclusion of RAs, followed by Vietnam in 1997. The Council then
took on a more practical role in readmission policy when it drafted the first form of an EU-Third

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82 Council of the European Union, ‘Proposal to examine, in a joint meeting with the relevant working parties
from the other Pillars, what measures can be taken in respect of countries with which there are problems
regarding return’ (Brussels, 6 February 1997) 5735/97 ASIM 26, 1-2.

83 Council of the European Union, ‘Results of the Joint Meeting between the Working Group Asia/Oceania and
members of the Migration Working Party concerning readmission of nationals of China, India and Vietnam
illegally resident on the territory of Member States’ (Brussels, 11 April 1997) 7338/97 ASIM 71.
Country RA in 1999, which was then developed further by the Commission into the form of agreement which is used in the present-day.

The Commission, the primary administrative and enforcement institution, has also been the main driving force for readmission. Within its structures, several Directorates-Generals (DGs) have an influence on the development of readmission policy. Commissioners Margaritis Schinas (Promoting Our European Way of Life) and Ylva Johansson (Home Affairs) are responsible for migration policy, including the CEAS and readmission. As readmission obligations have been included in FCA/Association Agreements, other DGs such as International Partnerships and Neighbourhood and Enlargement also have a role. Historically it has been the role of the Commission to identify states to open negotiations, with the criteria being definitively prescribed in 2002 as the following: migratory pressure; the existing relationship with the third country; geographical location; the added value of the readmission agreement and a geographical balance between states of origin and of transit. In addition to these, the Commission also accepts suggestions from the Council and Member States. The possibility of receiving suggestions from these two parties may add an element of democratic legitimacy to the process of identifying appropriate third countries as they may come directly from Member State governments, which may be acting in response to concerns of their citizens.

The Parliament, which, in comparison with the Council and Commission, has enjoyed an uneasy relationship with readmission policy and has expressed its dissatisfaction on several occasions. In 1995, it expressed dissatisfaction with how the Commission and Council had created a standard bilateral RA for use by Member States without consultation. The basis of this argument can be found under Article K.6 Maastricht Treaty, which obliged the Commission and Council to consult the Parliament on all activities within the JHA policy sphere. On the other hand, we can observe how the Parliament pushed for the harmonisation of migration policy across the Union in 1992 and ultimately

85 Council of the European Union, ‘Criteria for the Identification of Third Countries with which New Readmission Agreements need to be negotiated - Draft Conclusions’ (Brussels, 16 April 2002) 7990/02 COR 1.
86 Ibid, paras.2-3.
the creation of readmission strategy at the EU level.\(^90\) In more recent times, the Parliament has also sought to recommended specific states for the Commission to negotiate with.\(^91\)

Having established how appropriate third countries are identified, the negotiation and conclusion process itself is relatively straightforward. The creation of readmission law and policy is governed by the ordinary legislative procedure, as set out in Art.294 TFEU, and involves the Commission, Council and Parliament at various stages of the process. Within the procedure, it is the role of the Commission to submit a proposal to the Council and Parliament.\(^92\) The two latter institutions then adopt positions, which become subject to up to three different readings if an agreement cannot be reached between them. However, in order to conclude an EURA, the Art.218 TFEU procedure applies. As an international agreement concluded by the Union, the Commission is required to make a recommendation to the Council to begin negotiations.\(^93\) The Council may then authorise the beginning of negotiations through a decision\(^94\) or give specific directions to the Commission.\(^95\) The Parliament must be informed throughout the entire negotiation procedure.\(^96\) Once the negotiations have been concluded, the Commission must then seek the approval of the Council to sign the agreement, which then makes a decision to this effect.\(^97\) At this point, the Parliament must give its consent to the conclusion of the agreement, as readmission is an area to which the ordinary legislative procedure applies.\(^98\) Once Parliament has given its consent, the Council is then able to adopt a decision concluding the agreement.\(^99\)

Parliament’s involvement in the negotiation and conclusion process demonstrates there is a democratic element to it, as Parliament may block the conclusion of an agreement. Despite possessing this ability, it has to date not blocked the adoption of an EURA, despite the human rights concerns which exist for several states. However, Parliament’s grievance in 1995 indicates the dynamics between the institutions is not always sedate, and there are instances in which disagreements may

\(^90\) Ibid, para.74.
\(^91\) E.g. European Parliament resolution of 14 September 2016 on the EU relations with Tunisia in the current regional context (2015/2273 (INI)).
\(^92\) TFEU (n3) art.294(2).
\(^93\) Ibid, art.218(3).
\(^94\) Ibid.
\(^95\) Ibid, art.218(4).
\(^96\) Ibid, art.218(10).
\(^97\) Ibid, art.218(5).
\(^98\) Ibid, art.218(6)(v).
\(^99\) Ibid, art.218(6).
occur. In such cases, it is the role of the CJEU to adjudicate and, rather surprisingly, the CJEU has been required to rule between the Council and Commission.

3.6 Inter-institutional Conflict and the CJEU

It is within this context of inter-institutional disagreement that readmission obligations have made their only appearance before the CJEU in Commission v Council.\(^{100}\) The case concerned the correct treaty basis for the negotiation of the EU-Philippines Partnership and Cooperation Agreement,\(^{101}\) particularly the inclusion of readmission obligations and provisions on the environment and transport.\(^{102}\) It was submitted by the Commission the Agreement may be negotiated and concluded on the basis of Art.207 and 209 TFEU. Therefore, from the Commission’s perspective, the agreement, and all the obligations contained within, related to the common commercial policy and common development policy. However, the Council added Art.79(3), 91, 100 and 191(4) TFEU. Therefore, the Court had to consider the correct basis upon which the EU may include readmission obligations in this type of agreement. This case has been described as significant in providing clarity on the correct legal bases and addressing some of the contradictions in EU external relations.\(^{103}\) Silga draws attention to the AFSJ and its role within wider external relations as this contains sensitive issues such as migration cooperation.\(^{104}\)

The first important aspect of the legal reasoning behind this case can be found in the opinion of AG Mengozzi, delivered in January 2014. The Opinion recognised the references to readmission in the Agreement were not simply to facilitate a future EURA or to enhance cooperation,\(^{105}\) as under Art.26(4). Instead, they created substantial legal obligations upon the parties.\(^{106}\) Under Art.26(3) of

\(^{100}\) Case C-377/12 European Commission v Council of the European Union (CJEU, 11 June 2014).

\(^{101}\) Framework Agreement on Partnership and Cooperation between the European Union and its Member States, of the one part, and the Republic of the Philippines, of the other part (2011).

\(^{102}\) Ibid, para.35.


\(^{104}\) Ibid, 440.

\(^{105}\) Case C-377/12 European Commission v Council of the European Union (CJEU, 11 June 2014), Opinion of AG Mengozzi, [66].

\(^{106}\) Ibid, [67].
the Agreement, the Philippines agreed to readmit its nationals ‘without undue delay once nationality has been established and due process in the Member State carried out’. 107

It is interesting to observe the variations in diction used in agreements which were concluded prior and following the decision in Commission v Council when establishing readmission obligations. In the 1999 EU-Uzbekistan PCA, 108 Uzbekistan agreed to ‘readmit any of its nationals illegally present on the territory of a Member State, upon request by the latter and without further formalities’. 109 This use of ‘without further formalities’ was continued in the Cotonou Agreement, which will be examined in detail in the next chapter. Reflecting the EU’s readmission competence at the time, this agreement facilitates the conclusion of bilateral RAs between Member States and Uzbekistan to include third country nationals and stateless persons, 110 rather than an EU-Uzbekistan RA. The language used in the EU-Indonesia PCA 111 can be described as a hybrid of the two, with the parties committing to ‘readmit any of their own nationals illegally present on the territory of a Member State or Indonesia, upon request and without undue delay and further formalities once nationality has been established’. 112 Under the recent EU-Vietnam PCA, 113 the parties ‘shall readmit any of its nationals illegally present on the territory of a Member State, upon request by the competent authorities of the latter and without undue delay’. 114

Therefore, it is possible to observe a transition in language between the agreements. The earlier agreements make specific reference to the formalities which may be required, which then reached a form of ‘half-way house’ in the EU-Indonesia Agreement, and finally transitioned to references to the time period. This change in language may reflect the migration situation at the time. As ensuring effective returns has grown in prominence for the EU, the focus has moved from procedural concerns to the time allocated for the third country to accept a readmission application. Recent EU policy

107 Framework Agreement on Partnership and Cooperation between the European Union and its Member States, of the one part, and the Republic of the Philippines, of the other part [2011], art.26 (3) (a).

108 Partnership and Cooperation Agreement establishing a partnership between the European Communities and their Member States, of the one part, and the Republic of Uzbekistan, of the other part [1999] OJ L229/3.

109 Ibid, art.72(1).

110 Ibid, art.72(2).


112 Ibid, art.34(3)(a).


114 Ibid, art.27(3)(a).
documents have highlighted poor readmission rates, with recent figures suggesting the rate of effective returns stands at 36.4 per cent, and falls to 27 per cent when the Western Balkans are excluded.\footnote{European Commission, ‘Communication from the Commission to the European Parliament and the Council on a more effective return policy in the European Union – A Renewed Action Plan’ (Brussels, 2 March 2017) COM (2017) 200 Final, 2.} This falls below the 40 per cent average achieved in 2014, which was itself considered to be too low.\footnote{European Commission, ‘Communication from the Commission to the European Parliament and the Council on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration’ (Brussels, 10 February 2016) COM (2016) 85 Final, 16.}

Comparing the language used in such agreements before and after \textit{Commission v Council} is significant for two reasons. First, Mengozzi notes the provisions on readmission are more detailed than the clauses on transport and environment, with clearly distinguishable elements facilitating general cooperation and the creation of legal objectives.\footnote{Case C-377/12 \textit{European Commission v Council of the European Union} (CJEU, 11 June 2014), Opinion of AG Mengozzi, [67].} Therefore, a legal distinction exists which is, as Mengozzi argues, not solely the reiteration of customary international law to readmit a state’s own nationals into the Agreement but the creation of new legal obligations.\footnote{Ibid, [68].} The creation of new legal obligations in this context is pertinent as this allows the EU to potentially take enforcement measures if the obligations are not fulfilled. If we then accept the distinction proposed by Mengozzi, the second significance is the gradual loss of reference to procedure, which Mengozzi interprets as meaning the readmission obligations under Art.26 do not constitute an EURA for the purposes of the correct competence basis for negotiation.\footnote{Ibid, [76].} If we accept this reasoning, then the legal effect of readmission obligations in PCAs is uncertain. On the one hand, the EU-Philippines Agreement created substantial legal obligations on readmission beyond restating existing customary international law. On the other hand, the lack of detail in Art.26 means it falls below the precision of an EURA and therefore cannot be considered as such. Yet, the EU-Vietnam Agreement contains even less detail than the EU-Philippines Agreement.

\footnote{European Commission, ‘Communication from the Commission to the European Parliament and the Council on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration’ (Brussels, 10 February 2016) COM (2016) 85 Final, 16.}
The ruling in Commission v Council ultimately turned on the ‘centre-of-gravity’ or ‘absorption’ test, which originated in Portugal v Council, which developed previous case-law such as Commission v Council. Portugal v Council concerned the basis for the conclusion of a cooperation agreement with India on partnership and development. Portugal submitted the chosen legal bases for the conclusion of the agreement meant the European Community was not able to conclude the agreement on its own, and instead also required Member State consent. The Court ruled ‘the choice of legal basis for a measure must be based on objective factors which are amenable to judicial review. Those factors include in particular the aim and context of the measure’. The test in Portugal v Council was developed in Parliament v Council, in which the Court ruled when a measure pursues a number of ‘inseparably’ linked objectives, it must be based on the relevant individual bases. Furthermore, the use of a dual legal base may only occur when the legislative procedures are compatible.

As Van Vooren and Wessel have previously set out, the Court must examine whether ‘a strong, direct and immediate effect of link between the content of the instrument and its aim’ exists, which is achieved using five criteria. First, a qualitative examination, with the Court examining the policy impacts of the content of the agreement. Second, the Court uses a quantitative approach of recording how many clauses or covenants within the agreement support its primary aim. The third criteria involves what Van Vooren and Wessel describe as ‘far off’ content, but do not have an effect

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124 Ibid, [22].
126 Ibid, [44].
127 Ibid, [45].
129 Ibid, 162-163.
130 Ibid, 163.
131 Ibid.
on the primary aim. Fourth, the Court considers the overall context in which the agreement is taking place and finally the potential influence of other EU instruments on the agreement.\textsuperscript{132}

The question before the Court in \textit{Commission v Council} was ultimately to what extent can the covenants on readmission, transport and environment be considered part of development cooperation policy. Therefore, the Court relied on the ‘centre of gravity’ test, defining it as:

‘If examination of a European Union measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of those is identifiable as the main or predominant purpose of component, whereas the other is incidental, the measure must be founded on a single legal basis, namely, that required by the main or predominant purpose or component’.\textsuperscript{133}

In this regard, the Court relied on references within existing EU development policy documents and ruled that readmission, transport and environment did contribute to the achievement of the EU’s aim of development cooperation.\textsuperscript{134} The second stage of the test required the Court to examine the extensiveness of the obligations on readmission, transport and the environment and rule on whether they may be considered to be incidental or distinct objectives. The Court, as did AG Mengozzi, distinguished the obligations on transport and the environment as lacking the necessary detail to be considered as distinct obligations from development.\textsuperscript{135} However, Art.26 of the EU-Philippines Agreement was considered to contain specific obligations on readmission\textsuperscript{136} but ruled they are not of sufficient detail to allow for implementation. As a result, the Court ruled the readmission obligations were not sufficiently extensive and could be considered as incidental, allowing for their inclusion in the Agreement through Art.209 TFEU\textsuperscript{137} and annulling the Agreement.

Such a ruling is interesting when examined in light of \textit{Parliament v Council (EIB Guarantees)},\textsuperscript{138} in which the Court stated ‘where the Treaty contains a more specific provision that is capable of constituting the legal basis for the measure in question, the measure must be founded on that provision’.\textsuperscript{139} Such reasoning may lead us to conclude the use of Art.79(3) TFEU, despite the Court

\begin{itemize}
  \item \textsuperscript{132} Ibid, 163-164.
  \item \textsuperscript{133} \textit{Case C-377/12 European Commission v Council of the European Union} (CJEU, 11 June 2014), [34].
  \item \textsuperscript{134} Ibid, [55].
  \item \textsuperscript{135} Ibid, [56].
  \item \textsuperscript{136} Ibid, [57].
  \item \textsuperscript{137} Ibid, [57]-[60].
  \item \textsuperscript{138} \textit{Case C-155/07 Parliament v Council (EIB Guarantees)} [2008] ECR I-8103.
  \item \textsuperscript{139} Ibid, [34].
\end{itemize}
concluding that it did not constitute an EURA, may have been an appropriate basis for the inclusion of readmission obligations.

It may be noted in this regard the Court relied on Art.26(4) of the Agreement, ‘the Parties agree to conclude as soon as possible an agreement for the admission/readmission of their nationals, including a provision on the readmission of nationals of other countries and stateless persons’. This is despite the Court recognising the creation of new, specific readmission obligations under Art.26(3). It is therefore possible to distinguish the readmission obligations under PCAs from those contained in others, such as Association Agreements due to the different language used. Under PCAs, the facilitating clause of the future negotiation of a EURA refers to both own nationals as well as third country nationals and stateless persons. On the other hand, older Association Agreements may allow for the negotiation of a bilateral RAs, whereas more recent Association Agreements have been concluded with third countries following the conclusion of an EURA. As with the Cotonou Agreement, a contradiction exists in the text of EU Partnership and Cooperation Agreements due to the use of the term ‘further formalities’. However, unlike the Cotonou Agreement, PCAs appear to suggest the need for a formal RA to implement the contained obligations.

Silga expressed surprise that the readmission clause received such attention, however, De Baere and Van Den Sanden highlight the wider implications of the inclusion of readmission in such an agreement. They argue the inclusion of readmission is a distinct objective from development cooperation and is included for the purpose of leverage. Such a perspective is congruent with the previously stated strategy of including readmission clauses in all external agreements, and the use of all available tools as leverage.

*Commission v Council* serves to demonstrate a fraction of the complexities which the EU navigates in order to create its readmission policy. This is in part due to the many different policy areas, and the various competences, which are present in a mixed agreement. However, many of these complexities are removed in an EURA as they only include legal readmission obligations. The use of leverage or

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140 E.g. Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Arab Republic of Egypt, of the other part [2004] OJ L304/39, art.69.


143 Ibid, 101.
other policy tools takes place through separate legal and political agreements or arrangements. As it has been shown, the process for negotiating and concluding an EURA are relatively straightforward. However, it is important to recognise not only are there competing interests between the institutions, but the third country concerned also has its own interests and these may delay or even preclude the negotiation of an agreement.

3.7 Conclusion

This chapter has demonstrated the foundational and institutional issues or conflicts which have been created by the EU’s readmission policy, some of which question the role of the founding principles of the Union. Having set out the competence basis for policy at the EU level, this chapter examined the interaction between subsidiarity and readmission, arguing readmission, as a policy area primarily driven by the ‘migration crisis’, has seen the Union compromise the principle of subsidiarity as it has sought an effective return policy. As it has been highlighted, readmission is an area of shared competence under Art. 4 TFEU, and subject to Protocol 2. Under the Treaties, there are instances in which Member States may create legal agreements when the EU has already exercised its competence in the shared area. This is further enhanced by the JHA Council’s own guidance from 1999. It has been argued the EU has compromised subsidiarity as demonstrated by the RAs or arrangements which exist with Turkey. Readmission cooperation with Turkey now exists on the bilateral Member State level, the EU level, and now with the NF v European Council series of cases, at the multilateral Member State political level. The separation of competences would preclude the Member States multilaterally reaching an agreement as heads of government with Turkey as the EU has already exercised competence in the same area. However, the EU-Turkey Statement is a political arrangement which prejudices the EU-Turkey RA as Turkey considers all returns to be under the Statement, which includes no legal obligations. It also contains no explicit references to human rights, rather to ‘relevant international standards’. It is difficult to argue the Treaties allow for a political arrangement which has such effect when a legal agreement would be unlawful in the same circumstances.

It then proceeded to examine the increasing exercise of conditionality in EU readmission policy, focusing on the recent EU-Afghanistan Joint Way Forward. The discussion showed how development aid was made conditional on Afghanistan fulfilling its international obligations to accept the return of its nationals and at a much greater rate. It has been argued such an approach compromises the Art. 2 TEU founding values. Again, this may be attributed to the ‘migration crisis’ and the need to use all available leverage to increase the number of effective returns.

Having considered some of the broader issues which arise, this chapter turned to the agencies and bodies which have either been created by readmission policy itself or have taken on a much greater
role in its formulation. The first such body was the Joint Readmission Committee, which monitors the implementation of the formal RAs, with the focus being on the democratic accountability and scrutiny of the meetings and decisions of these committees. Following this, the increased roles of the EEAS, Frontex and EASO were examined. It was argued these agencies have grown in significance as they create the necessary diplomatic foundations for the EU to begin negotiations, or they ensure the practical effectiveness of RAs through return operations and cooperation with third countries. Without such agencies, the effectiveness of RAs would be severely diminished.

The key characteristic which binds these various agencies and bodies together is their lack of general competence to make decisions, which still resides with the institutions. It has been demonstrated how the key institutions of the Commission, Parliament and Council interact during the policy-making process and compete to have their agendas and interests recognised. Despite relations between the three being largely cooperative, the CJEU ruled in Commission v Council on the correct treaty basis for the inclusion of readmission obligations in the EU-Philippines PCA. This case has given rise to questions which must be borne in mind before assessing readmission policy and its congruence with the EU’s founding values. The first such question is the legal status of readmission obligations in mixed agreements. Second, the case highlighted how the language in such agreements has developed depending on the area of importance at the time. For example, it has moved from the level of formalities necessary for a readmission application to how long the readmission application should take before being accepted. Therefore, the question is how potentially the current political environment will affect the EU’s priorities in future agreements. The final question, and potentially the most important, is in which direction is readmission policy moving and the effects of other policy areas on this direction. As this chapter has demonstrated, interactions with development aid for example have begun to move readmission policy increasingly towards a conditionality approach, which may lead to increased tension with the Union’s founding values.
Figure 2 Commission, Agency and Policy Framework of EU Migration Cooperation
Figure 3 Council, Agency and Policy Framework of EU Migration Cooperation
Chapter 4: Readmission Obligations in Other Agreements

The preceding chapters examined the historical development of EU readmission policy and institutional dynamics, tracing how it has been shaped by external pressures and political concerns. Readmission features centrally on the political agenda at the EU level, with the EU and Member States moving away from a reliance on bilateral and EURAs to political arrangements. Not only has readmission diversified into political arrangements, but readmission obligations are in other legal instruments. This strategy originates from the Council in 1993, where it sought to establish a link between readmission and Association or Cooperation Agreements. This is grounded in the idea of conditionality and increasing EU leverage. The inclusion of readmission in mixed agreements allows for the successful application of the ‘more for more’ principle. If readmission is negotiated alongside trade, economic cooperation, aid and other policy areas it allows the EU to apply further leverage during the process as it can strengthen or weaken cooperation in these other areas depending on the receptiveness of the third country to readmission. Furthermore, such agreements are often to the overall advantage of the third country, and therefore less likely to risk the conclusion of such agreements by rejecting the inclusion of readmission obligations.

Beyond EURAs, the EU has applied two approaches to the inclusion of readmission obligations at the legal and political levels. First, readmission obligations within mixed agreements constitute new obligations to readmit own nationals. This is the case in the Cotonou Agreement between the EU and ACP States. Second, including a facilitating obligation for the future negotiation of bilateral or EURAs. This approach is often used in Framework Cooperation and Partnership Agreements. In such instances, the EU is then reliant on the customary international obligation for a state to readmit own nationals. Therefore, such agreements lack provisions for the return of third country nationals and stateless persons.

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At the political level, the migratory pressure on the EU’s external borders has necessitated a shift away from legal structures towards political arrangements. The primary policy tool in this being Mobility Partnerships, which govern not just irregular migration but also avenues for regular migration⁴, thereby maintaining the approach of ensuring agreements are primarily for the benefit of the third country. However, further political arrangements have also been used to ensure wider cooperation on migration matters such as Partnership Frameworks. Political arrangements have the advantage of speed but at the expense of enforceability.

This chapter will, in combination with the preceding chapter, complete the policy picture of the EU’s readmission policy. First it will examine the Cotonou Agreement, which provides the legal basis for migration cooperation between the EU and ACP. Such an examination will primarily be concerned with Art.13 containing the readmission obligations. It will be argued Art.13 poses several questions for EU readmission policy around the language used, as well as the human rights situations in several ACP states considering the obligation of non-refoulement. Concluding the examination of Cotonou, this chapter will consider its future development, with the Agreement due to expire in 2020.

The chapter will then proceed to readmission obligations contained in Association and Cooperation Agreements, which provide a framework to strengthen relations with third countries. These include accession states and bordering states such as Ukraine⁵ and Moldova.⁶ As demonstrated by the enhanced role of the EEAS in the readmission process, it is imperative for the EU to enjoy good relations with third countries prior to EURA negotiations due to the nature of the obligations within it. Therefore, Association and Cooperation Agreements may include facilitating obligations for future EURAs. The emphasis of this chapter will then move to Mobility Partnerships, a recent policy tool created to improve political cooperation on migration. It will be demonstrated how states such as Morocco, which have proven resistant to the Union’s advances on an EURA, have become party to Mobility Partnerships. This chapter will set out a several reasons behind the reluctance to conclude an EURA while being content to sign a political undertaking to almost the same effect.

⁵ Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part [2014] OJ L161/3.
4.1 The Cotonou Agreement and Readmission

On 23 June 2000, the EU concluded the Cotonou Agreement with ACP States, with the intention ‘to promote and expedite the economic, cultural and social development of the ACP States, with a view to contributing to peace and security and to promoting a stable and democratic political environment’. The ACP group aims to maintain peace and stability, aid development, reduce poverty and develop unity and understanding between the members. The Agreement builds on the cooperation facilitated by the four preceding Lomé Conventions.

Despite its overarching objective to facilitate development, political, economic and trade cooperation, it also governs migration between the parties. It is reasoned that improving development and the economic situation of ACP States will lower or ‘normalise’ migration to the EU. Reference is also made to a ‘prevention policy’ towards irregular migration. Significantly, the Agreement lacks references to refugees or asylum-seekers in the EU, originating from or transiting through ACP States. At Art.13(5)(c), ACP States will readmit own nationals irregularly residing in the Union. Significantly, this is to be ‘without further formalities’. These obligations under Art.13(5)(c) have been described as ‘remarkable’ and creating ill-feeling between the parties. Furthermore, it has been noted such obligations represent a climb-down from the EU’s initial proposals, which included mandatory repatriation agreements, and the Parliament has acknowledged readmission was a ‘last minute’ inclusion in the negotiations.

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7 Cotonou Agreement (n 3) art.2.
11 Cotonou Agreement (n 3) art.13(4).
12 Ibid, art.13(5)(a)
14 Ibid.
Initially, the intentions behind the use of the phrase ‘without further formalities’ are unclear. It may be interpreted as bypassing the more complex procedures outlined in EURAs and Member State agreements. At present, the Cape Verde EURA\textsuperscript{16} is the only agreement with an ACP State, with negotiations ongoing with Nigeria. The Cotonou Agreement can be viewed from two different perspectives: the first as facilitating readmission on the text and, second, as a facilitator of further cooperation which would lead to the negotiation of separate RAs. Koeb and Hohmeister propose readmission under Art.13 requires further arrangements, therefore discounting the first perspective.\textsuperscript{17} However, this can be rejected on two grounds. First, a comparison between the wording of the draft 1999 RA,\textsuperscript{18} the draft Schengen RA of 1998,\textsuperscript{19} and the wording of Art.13(5) reveals few differences. At Art.2(1) of both draft agreements, in reference to own nationals, the term ‘without any formality’ is used. This is not substantially different from ‘without further formalities’. The significance is the term ‘without any formality’ has been used in EURAs. Although these are draft agreements which may be used as a template during negotiations, they still have the purpose of facilitating readmission and, if used, would be the sole basis of readmission between the Contracting States. Second, such an interpretation is not supported by the text of Art.13(5)(c)(ii), which reads:

‘At the request of a Party, 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 and stateless persons. Such agreements will lay down the details about the categories of persons covered by these arrangements as well as the modalities of their readmission and return’.

There are two sections to this clause: (1) readmission of own nationals and (2) third country nationals and stateless persons. The latter is only included if deemed ‘necessary’ by the Parties. Therefore, it is


\textsuperscript{18} Council of the European Union, ‘Draft Readmission Agreement between the EU Member States, of the one part, and third countries, of the other part’ (Brussels, 30 April 1999) 10338/2/98 REV 2 COR 1.

\textsuperscript{19} Draft Uniform Readmission Agreement between Schengen States and Third States – New Version adopted further to the meeting of 22 April 1998 (1 January 1998) SCH/11 – Read (98) 8.
conceivable a bilateral RA could be negotiated excluding the latter two categories of people, leaving only own nationals as the Parties do not consider it necessary to go beyond this. This would then conflict with (5)(c)(i), which allows for readmission without further formalities. It is argued such an agreement would then represent a further formality. This apparent contradiction goes against Koeb and Hohmeister, that readmission under Cotonou requires further arrangements. Instead, it is only in the case of third country nationals and stateless persons further negotiations are required. On the other hand, the EU-Cape Verde Agreement makes specific reference to Art.13(5)(c)(i) and ‘desiring to facilitate the obligation for Parties to readmit their own nationals’. However, it is argued both the reference in the Preamble and Art.2 EU-Cape Verde Agreement can be considered to be themselves further formalities. Accepting such an argument then requires the consideration of the meaning of ‘further formalities’ in the wider context of the Cotonou Agreement.

The description of readmission agreements as ‘formal’ and the use of the term ‘further formalities’ in Art.13(5)(c) raises uncertainty as to how readmission under Art.13 is realised. This is particularly the case when the EU is defined as a separate party under the Agreement, exercises shared competence in the AFSJ, and has competence to conclude EURAs. These distinctions are important as Art.13(5)(c)(iii) distinguishes between the EU and Member States as separate parties capable of concluding RAs. In the context of formalities, if a Member State sought to conclude an RA with an ACP State then it may rely or refer to the specimen 1994 bilateral RA, accompanied by the 1995 guiding principles, whereas the EU may rely upon the specimen 1999 EURA. A comparison of the latest

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20 EU-Cape Verde Readmission Agreement (n 16) Preamble.
21 Cotonou Agreement (n 3) art.13(5)(c)(iii).
22 Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/01 (TFEU) art.4(2) (c)
23 Ibid, art.79(3)
26 Council of the European Union, ‘Draft Readmission Agreement between the EU Member States, of the one part, and third countries, of the other part’ (Brussels, 30 April 1999) 10338/2/98 REV 2 COR 1.
three EURAs concluded with Cape Verde, Turkey\(^27\) and Azerbaijan\(^28\) demonstrates how, despite the overall framework being the same, the exact content of each article differs between agreements, even in those which entered into force within three months of each other. An initial reading of the agreements reveals the EU-Azerbaijan Agreement contains fundamental principles to be complied with,\(^29\) which are not present in either of the other agreements. It is unclear as to why there is this difference between them. The EU-Turkey Agreement contains 16 definitions in Art.1, whereas the EU-Cape Verde Agreement contains 13, and the EU-Azerbaijan Agreement contains none. It can also be observed that there are substantial procedural differences between the agreements. For example, the validity of travel documents ranges from three months\(^30\) (Turkey) to 150 days\(^31\) (Azerbaijan) to six months\(^32\) (Cape Verde) for own nationals. Furthermore, elements such as the use of the accelerated procedure also differ, with Turkey\(^33\) and Cape Verde\(^34\) requiring direct and illegal entry from the Requested State, whereas the EU-Azerbaijan Agreement includes a geographical apprehension element of up to 15 kilometres from seaports or international airports of the Requesting State.\(^35\) These demonstrate the wide variations and tailoring of EURAs. This supports the argument that in order to readmit within the framework of Cotonou further formalities are required, which conflicts with the text when referring to own nationals. It demonstrates how allowing, without the need for further formalities, the readmission of individuals to 78 different states is complex. However, it should be recognised as part of the 2010 negotiations, the EU did seek to address this criticism with the inclusion of operational covenants. These were opposed and Art.13 was not


\(^{29}\) Ibid, art.2.

\(^{30}\) EU-Turkey Readmission Agreement (n 27) art.3 (4).

\(^{31}\) EU-Azerbaijan Readmission Agreement (n 28) art.5 (4).

\(^{32}\) EU-Cape Verde Readmission Agreement (n 16) art.4 (5).

\(^{33}\) EU-Turkey Readmission Agreement (n 27) art.7 (4).

\(^{34}\) EU-Cape Verde Readmission Agreement (n 16) art.6 (5).

\(^{35}\) EU-Azerbaijan Readmission Agreement (n 28) art.7 (3).
revised.\textsuperscript{36} It can be argued the EU has now accepted this apparent impasse.\textsuperscript{37} The ‘Conclusions on the Future of EU Return Policy’ sets out the EU’s position on the return of third country nationals from both a legal and political perspective, and can be viewed as part of its wider response to the ‘migration crisis’. Measures include the creation of the Readmission Capacity Building Facility and the commitment of more than €800 million to support returns through the Asylum, Migration and Integration Fund.\textsuperscript{38} Referring to Cotonou, the Council recognises the ‘without further formalities’ element of Art.13.\textsuperscript{39} The most telling element is the passage in which ‘the Council invites the Commission to propose negotiating directives for readmission agreements with relevant countries of origin where it is necessary to formalise the practical cooperation arrangements’.\textsuperscript{40} It is argued this further supports the previously presented arguments regarding both the practical difficulties and further formalities being unnecessary for readmission.

Such an interpretation is further supported by various documents produced by the Commission, Council and Parliament, for example, the Valletta Summit Action Plan,\textsuperscript{41} which refers to Art.13 and its status as international law, creating obligations.\textsuperscript{42} This is further substantiated by the Parliament raising the issue ‘that every ACP State is required to agree to the return and readmission of its own nationals illegally present on the territory of a European Union Member State’.\textsuperscript{43} In addition, the European Council’s conclusions of 15 October 2015\textsuperscript{44} highlighted the need to ‘effectively implement all readmission commitments, whether undertaken through formal readmission agreements, the Cotonou Agreement of other arrangements’.\textsuperscript{45} It is also interesting to note Mali, Gambia, Nigeria and


\textsuperscript{38} Ibid, para.4.

\textsuperscript{39} Ibid, para.11.

\textsuperscript{40} Ibid.


\textsuperscript{42} Ibid, 20.


\textsuperscript{44} European Council, ‘Conclusions of 15 October 2015’ (Brussels, 16 October 2015) EUCO 26/15.

\textsuperscript{45} Ibid, para.2 (p).
Ghana are identified as states who need to be reminded of their obligations under Art.13(5). Despite this, at the time of writing, the Commission only has a negotiation mandate for Nigeria. In the absence of another mechanism, the sole method of readmission to these states is the Cotonou Agreement.

Bringing these strands together, the EU is currently in a position where it seeks to readmit own nationals using an agreement which contains no defined procedures as to how this should take place. It has been argued the readmission clause was added to the Agreement to address the EU’s focus on managing irregular immigration, with African States considered a priority. This is attributed to the conclusions of the Seville Council of 2002, in which it was concluded any agreement with third countries should include obligations for the readmission of third country nationals who irregularly reside in the EU. It may be argued the readmission of an ACP State’s own nationals is not the priority of the EU. Instead, it is the conclusion of EURAS which allow for the readmission of third country nationals and stateless persons. The rationale for such an approach has its origins in 1993, when the European Council considered the link between readmission and cooperative agreements with third countries. From a legal standpoint, the Cotonou Agreement may be considered an effective facilitating tool within the EU framework of migration management. However, from the perspective of an agreement allowing for readmission in its own right, which is the EU’s main intention based on recent evidence, the Cotonou Agreement is both impractical and represents a clumsy, broad-stroke approach to the readmission of irregular migrants to 78 different states.

However, the effective return of individuals is a two-stage process, which goes beyond the ‘black letter’ analysis of the text of the Agreement. Any such return is reliant on (a) the ACP State accepting
the individual is a national of the state and (b) the domestic situation in the ACP state does not present a risk to the rights of the returnee.

4.2 The Future of the Cotonou Agreement

The Cotonou Agreement was originally drafted with a 20-year life period, expiring in 2020. Therefore, in 2016, the Commission commenced a process of evaluation of different options which may be available for EU-ACP relations post-2020. The evaluation of July 2016\(^52\) examined two questions relevant to readmission.

The first question was whether Art.8 and 96 have led to meaningful changes in the states in which they have been used. The Commission began by recognising the structure of the Agreement is unique in comparison to other international agreements,\(^53\) however, the application of Art.96 ‘has not always been coherent and effective’.\(^54\) This is aptly demonstrated by Eritrea in comparison to other ACP States where Art.96 has been used. This lack of effectiveness, according to the Commission, may be attributed to two different factors. First, for a number of ACP States there is a cultural clash when discussing the essential elements such as respect for human rights.\(^55\) This may in part be due to the range of international human rights agreements which some ACP States are signatories, while others are not. This has created a diverse picture of human rights protection across ACP States, with often fluctuating political arrangements. Comparatively the EU and Member States enjoy a degree of stability, with the CJEU and ECtHR ensuring the protection of human rights. The second factor is that some of the essential elements infringe on fundamental and politically sensitive issues, which ACP States may be unwilling to enter into a dialogue on or place different emphasis on particular essential elements.\(^56\) Therefore, there is certainly room for improvement on the Art.8, 96 and 97 procedures.

The second question concerned the operation of Art.13 and the extent it has resulted in meaningful improvements in migration management. Commenting on the earlier operation of Art.13, the Commission noted there was no in-depth dialogue on migration during the period 2000-2010.\(^57\) Its application has been ‘uneven’, but this may be due to the differences in migration between Caribbean

\(^53\) Ibid, 37.
\(^54\) Ibid, 42.
\(^55\) Ibid, 41.
\(^56\) Ibid.
\(^57\) Ibid, 51.
and Pacific States to the EU and African States to the EU. In this regard, the Commission highlighted the effectiveness of specific regional programmes such as the Khartoum Process to accommodate differences between states. Referring to the readmission obligations under Art.13, the Commission described it as a ‘key provision’ but not effectively implemented by states such as Cameroon and Ghana, highlighting this as an area for future improvement.

However, improving readmission cooperation under Art.13 requires not simply a restatement of the legal obligations but must also bring together economic, development and social cooperation. Such a range of relevant factors means increased cooperation may take a significant amount of time to come to fruition. In this context, the Commission examined the future EU-ACP relationship in November 2016 and produced new objectives. There are six main priorities proposed by the Commission: (1) the promotion of peace, democracy, the rule of law, good governance and human rights; (2) sustainable growth (3) addressing migration and mobility; (4) promoting human dignity and development; (5) action against climate change and (6) cooperation on the global stage in areas of common interest.

It is interesting to note the Commission highlights early on the Communication the need to effectively integrate the European Agenda on Migration and the Partnership Frameworks into the future relationship post-2020. This signifies an increase in the use of informal cooperation methods into what was previously a relationship based on the legally-binding Cotonou Agreement. Furthermore, the future arrangements must build upon Art.13 and include precise mechanisms for return and readmission. This represents a radical shift in the role of readmission obligations in mixed agreements. Such agreements have not previously included operational mechanisms in the text due to the legal status of the readmission obligations within them. However, this development is congruent with the EU’s aim of increasing the number of effective returns to ACP States. In effect, Art.13 would mirror an EURA between the EU and ACP States. The inclusion of third country nationals

58 Ibid, 52.
59 Ibid, 54.
60 Ibid.
61 Ibid, 56.
63 Ibid, 7.
64 Ibid, 11.
65 Ibid.
and stateless persons may be more difficult to achieve in this context due to the potential economic and social context applicable to certain transit states. If such transit states were to conclude an EURA, they may request visa liberalisation or increased development assistance. It is unlikely the EU would offer such terms to all ACP States. The inclusion of third country nationals and stateless persons may therefore depend on the level of conditionality applied by the EU. The Commission also states the objective of making future obligations under Art.13 enforceable but it is unclear how this could be achieved without resorting to a significant degree of conditionality. Such an approach would then call into question the EU’s commitment to its founding values.

The Commission offers different scenarios for the future EU-ACP relationship. The first of these is to allow the Cotonou Agreement to expire in 2020 without replacement, followed by the second option of a new agreement with little change. The third option is a substantially changed agreement, but the Commission recognises this would not fit alongside the various regional policies which it employs with ACP States. Therefore, the EU has a choice as to how formalised future relations with ACP States should be, and whether a mix of political arrangements and EURAs will be enough to achieve its objective of increasing the number of returns.

4.3 Mobility Partnerships and Readmission

Mobility Partnerships form a key part of the EU’s strategy within the Global Approach to Migration and Mobility and were first created in 2007. The Global Approach is based upon four pillars of objectives for cooperation with third countries: legal migration and mobility, development and migration, protection and asylum, and irregular migration. At the current time there are eight

66 Ibid, 17.
67 Ibid, 25.
68 Ibid.
Mobility Partnerships with Morocco, Moldova, Armenia, Georgia, Cape Verde, Tunisia, Azerbaijan and Belarus.

These partnerships have either been created prior to or after an EURA. For example, the EU-Morocco Partnership was signed in 2013, however, despite receiving a mandate in 2000, an EURA has not yet been concluded. This is an example of how the Union’s migration strategy transitions from political arrangements, which allow the EU to establish a relationship with the third country with fewer obligations, to binding agreements. On the other hand, in the case of Moldova, a Mobility Partnership was concluded after an EURA. In this instance, the Partnership reaffirms the party’s obligations under the EURA. The Global Approach can be seen to initially utilise either Mobility Partnerships or the Common Agenda on Migration and Mobility. The Common Agenda creates an initial dialogue where a party does not want to commit to the full obligations which may be created by more formal

72 Council of the European Union, ‘Joint declaration establishing a Mobility Partnership between the Kingdom of Morocco and the European Union and its Member States’ (3 June 2013) 6139/13 ADD 1 REV 3.
75 Council of the European Union, ‘Joint Declaration on a Mobility Partnerships between the European Union and Georgia’ (20 November 2009) 16396/09 ADD 1.
82 Council of the European Union, ‘Joint Declaration on a Mobility Partnerships between the European Union and the Republic of Moldova (n 73) 2.
agreements.\textsuperscript{83} It is then possible to transition to a Mobility Partnership,\textsuperscript{84} and from this to formal agreements. Therefore, Mobility Partnerships seek a political commitment from the third country to readmit its own nationals, and then to readmit third country nationals through a formal RA.\textsuperscript{85} The Partnerships cover cooperation on preventing ‘brain drain’, avenues for regular migration, improving visa procedures and the capacity to manage migration.\textsuperscript{86}

Despite being concluded at the EU level, not all Member States are parties. For example, France is the only Member State party to all Mobility Partnerships, whereas Luxembourg is only party to the EU-Cape Verde Mobility Partnership. This demonstrates the tailored nature of the Partnerships, as Member States have different interests and agendas which may see them choose to opt-in to Partnerships. This approach has been described as ‘bitty’,\textsuperscript{87} and the commitments offered through the Partnerships are indeed fewer than those which are offered by the Union when it acts through EURAs or cooperation agreements. These differences are reflected in how third countries are identified for negotiation. The initiative for a Mobility Partnership does not stem from the Member States or the Commission, but rather the Council. Once the Commission has entered into negotiations it then approaches the Member States to gauge interest and the potential range of incentives which Member States are willing to offer.\textsuperscript{88} This difference is further reflected in the absence of negotiation mandates from the Council to the Commission to commence negotiations.\textsuperscript{89}

Furthermore, Deuisscher identifies a key difference between Mobility Partnerships and the mixed agreements: Mobility Partnerships are primarily for the benefit of Member States, whereas mixed agreements are largely for the benefit of third countries.\textsuperscript{90} However, accepting such an argument presents us with difficulties in explaining state behaviour, an example being Morocco. Morocco is not

\begin{thebibliography}{99}
\bibitem{83} European Commission, ‘Global Approach to Migration and Mobility’ (n 71) 11.
\bibitem{84} Ibid.
\bibitem{85} 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’ (Brussels, 16 May 2007) COM (2007) 248 final, 4
\bibitem{88} Ibid, 331.
\bibitem{89} Ibid.
\end{thebibliography}
an ACP State and therefore the EU cannot rely on Art.13 Cotonou. The legal basis for relations is the
Association Agreement, which contains no references to readmission. The Commission received a
mandate to begin negotiations for an EURA in 2000, but so far, has been unable to conclude an
agreement. Morocco is of strategic importance to the EU’s ability to manage its external borders as
Morocco is the only African State which shares a border with a Member State via the two Spanish
enclaves of Ceuta and Melilla. Therefore, Morocco is primarily a state of transit for citizens of Sub-
Saharan States. As a transit state, it is imperative the EU concludes an EURA to allow for the return of
third country nationals and stateless person, and the EU has restated its commitment to concluding
an agreement. However, during this period Morocco has concluded a Mobility Partnership and is an
active participant and founding state in the Rabat Process of 2006. Under the Rome Programme for
2015-2017, Morocco and other participating states recognised preventing irregular migration,
including readmission, as a priority area for cooperation. Furthermore, the Programme calls for
increased readmission cooperation. Despite these political commitments, Morocco will not conclude
an EURA, despite the incentives on visa facilitation/liberation which may be available. Such incentives
may level the advantages available to the EU and Morocco. Whereas the Mobility Partnership is for
the benefit of Member States and offers similar areas of cooperation as would potentially be available
via an EURA. Mrabet offers an insight into the perspective of the Moroccan government, arguing
Morocco seeks to maintain close economic and political ties with the EU, and refrains from acting

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91 Euro-Mediterranean Agreement establishing an association between the European Communities and their
Member States, of the one part, and the Kingdom of Morocco, of the other part [2000] OJ L70/02.
92 Council of the European Union, ‘Recommendations for Council Decisions authorising the Commission to
Negotiate Readmission Agreements between the European Community and Sri Lanka, Morocco, Pakistan, Russia = Schengen Relevancy’ (Brussels, 6 March 2000) 6720/00 MIGR 25.
93 Council of the European Union, ‘Readmission Negotiations with Morocco’ (Brussels, 18 April 2011) 9087/11,
3.
96 Ibid, 3.
97 Ibid, 7.
and Law 379.
against EU interests.\(^{99}\) However, Carrera and others\(^{100}\) propose that the obligation to readmit third country nationals is the reason why an EURA has not been concluded.\(^{101}\) They argue accepting the return of third country nationals would damage Morocco’s economic and political relations with other African States, stating it would be a ‘public relations nightmare’ for Morocco to have camps and reception centres filled with the nationals of neighbouring African States.\(^{102}\) Therefore, Moroccan readmission cooperation has a ceiling, which is the conclusion of an EURA.

Due to the lack of legally binding status,\(^{103}\) individuals cannot be readmitted based on the Partnership itself. Rather, Mobility Partnerships include a political agreement to further enhance cooperation between the third country and Member States on readmission, including a political commitment to begin negotiations for a RA. Mobility Partnerships represent just one element of a growing range of policy tools used by the EU to enhance cooperation. Operating alongside these political arrangements in the EU’s near neighbourhood, we may observe another type of legal agreement which compliments such political arrangements: Association and Cooperation Agreements.

### 4.4 Framework Cooperation, Partnership and Cooperation, and Association Agreements

So far in this chapter we have examined the Cotonou Agreement, which operates at a regional level, and the Mobility Partnerships, which are multilateral political arrangements facilitating increased migration cooperation. However, the main legal policy tool available to the Union to establish closer ties with a third country are Association or Cooperation Agreements. These allow for a gradual increase in the level of cooperation and operate on a scale of progression. These move from Framework Cooperation Agreements to Partnership and Cooperation, and finally to Association Agreements. The two former types have been concluded with third countries across a wide

\(^{99}\) Ibid, 380.


\(^{101}\) Ibid, 5-6.

\(^{102}\) Ibid, 6.

geographical range, from Indonesia\textsuperscript{104} to Uzbekistan.\textsuperscript{105} Association Agreements have tended to be concluded with states in the EU’s geographic neighbourhood such as Israel\textsuperscript{106} and Tunisia.\textsuperscript{107} These agreements have also been concluded with prospective accession states.

References to readmission in these agreements take different forms, depending on whether an EURA has been concluded prior or after. For example, we may observe this progression in cooperation via the EU’s relationship with Vietnam, which has progressed from the 1995 Framework Agreement\textsuperscript{108} to the 2012 Partnership and Cooperation Agreement.\textsuperscript{109} Tellingly, in the earlier Framework Agreement, reference is made to the readmission of own nationals in an EU declaration in which the Union ‘recalls the importance’ of readmission of a state’s own nationals.\textsuperscript{110} In comparison, the Partnership and Cooperation Agreement contains commitments on migration management.\textsuperscript{111} Interestingly, in the same way as the Cotonou Agreement, the Partnership and Cooperation Agreement allows for the readmission of Vietnamese nationals.\textsuperscript{112} However, the text does not include reference to further formalities. Instead, at Art.27(4), either party may enhance cooperation through an EURA. It may be assumed, based on the timeline of previous EURAs, enhanced cooperation would encompass third country nationals and stateless persons. However, the text suggests this may not be the case as

\textsuperscript{104} Framework Agreement on Comprehensive Partnership and Cooperation between the European Community and its Member States, of the one part, and the Republic of Indonesia, of the other part [2014] OJ L125/17.
\textsuperscript{105} Partnership and Cooperation Agreement establishing a Partnership between the European Communities and their Member States, of the one part, and the Republic of Uzbekistan, of the other part [1999] OJ L229/3.
\textsuperscript{106} Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part [2000] OJ L147/3.
\textsuperscript{107} Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part [1998] OJ L97/2.
\textsuperscript{112} Ibid, art.27 (3).
reference is made to ‘the readmission of their own respective citizens’ but not to third country nationals. Therefore, it is unclear as to the status of readmission under Art.27(3). However, it can be observed as the level of cooperation has increased, the readmission commitments have also developed, from a declaration to an obligation to readmit their own nationals.

Association Agreements operate on a higher degree of cooperation, with the aim of creating an ‘all-embracing framework to conduct bilateral relations’. Therefore, the readmission obligations have tended to be more sophisticated than in other agreements. The precise obligations included are dependent on when they were concluded. In earlier agreements, such as Turkey, Tunisia and Israel, there are no references to readmission or enhanced migration cooperation. The EU-Jordan Association Agreement of 1997 progresses cooperation, allowing for a dialogue on irregular migration without explicitly referring to readmission. Following this, content was then dependent on whether an EURA existed between the parties, such as those with Georgia, Moldova and Ukraine. In these instances, an EURA had already been concluded. Therefore, references to readmission within these agreements are limited to the full implementation of the EURAs. On the

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116 Ibid, art.80(3).
other hand, agreements with Egypt,\textsuperscript{121} Lebanon\textsuperscript{122} and Algeria\textsuperscript{123} include the obligation for those states to readmit their own nationals, as well as the future negotiation of RAs.

Based on this examination, readmission obligations contained in Association, Partnership and Cooperation and Framework Cooperation Agreements escalate depending on the closeness of the ties between the EU and the third country. The obligation proceeds from an initial dialogue on migration, to a dialogue on irregular migration and culminates in either the obligation to readmit their own nationals or a facilitating obligation to negotiate a formal readmission agreement at the request of a contracting party.

4.5 Conclusions

This chapter has examined the forms of readmission obligations in EU legal agreements and political arrangements, however, there are other political arrangements which have not been included in this chapter due to being entirely tailored to the third country in question. For example, the Partnership Frameworks and EU-Afghanistan Joint Way Forward.

This examination began with the Cotonou Agreement, acting as the legal basis of EU-ACP relations and regional policies such as the Rabat and Khartoum Processes. This chapter has focused on Art.13(5), which obliges the parties to readmit their own nationals. However, this is not a re-declaration of the customary international law obligation. The main issue identified in this chapter is the language used in Art.13, specifically ‘without further formalities’ and its interpretation. It had been argued by Koeb and Hohmeister that the absence of any procedural definition meant an RA would be required to return an ACP national to their country of origin. However, this chapter argued the EU relies on Art.13(5) alone to readmit such nationals. The rationale behind this argument, in its purest form, is requiring an RA to readmit nationals constitutes a further formality. Such an argument is based on three strands. First, by comparing the language to that contained in EURAs, we may observe the high degree to which an EURA is tailored to the third country. However, the Cotonou Agreement is not tailored in any way, yet is applicable to 78 states. Second, there is significant evidence from institutional documents the EU does indeed treat Art.13 as constituting a readmission obligation. For

\textsuperscript{121} Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Arab Republic of Egypt, of the other part [2004] OJ L304/39, art.68.

\textsuperscript{122} Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the Republic of Lebanon, of the other part [2006] OJ L143/2, art.68.

\textsuperscript{123} Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the People’s Democratic Republic of Algeria, of the other part [2005] OJ L265/2, art.84(1).
example, the JHA Council identifying Mali, Gambia, Nigeria and Ghana as states which need to be reminded of their obligations under the Agreement. As EURAs have not been concluded with these countries, there is no obligation other than Art.13(5). The third strand centres on the failed negotiations of 2010 in which the EU sought to rectify the lack of procedural definitions, but ultimately failed to do so. Despite having failed to do so, the EU did not then seek to rapidly expand the number of EURAs with ACP States. This suggests, despite its shortcomings, Art.13 is enough for the EU’s purposes.

Following the examination of the Cotonou Agreement, this chapter considered the principal political arrangement employed by the EU and Member States to manage migration and foster cooperation: Mobility Partnerships. These encompass cooperation on all levels of migration, including readmission. Although a political instrument, the EU’s situation with Morocco raises an interesting question. If we accept Mobility Partnerships are for the benefit of Member States, why would Morocco conclude a Mobility Partnership but not an EURA? This chapter has emphasised the difficulty which the EU experiences when trying to include third country nationals and stateless persons in its agreements.

The third category of agreements considered were Association, Framework Cooperation and Partnership and Cooperation Agreements, which act as a gradual progression of cooperation across different policy areas. These have been concluded with a range of countries, from Asia, to Africa to EU accession states. Within this progression, this chapter has set out how readmission cooperation also progresses from a political dialogue on migration to the inclusion of an obligation to readmit own nationals as included in Association Agreements. Furthermore, it has been demonstrated how such agreements interact with EURAs, with some emphasising the effective implementation of pre-existing EURAs or committing the parties to future negotiations.

This chapter, in conjunction with Chapters Two and Three, demonstrates the complexity of readmission policy, and introduces some of the key issues around principles such as subsidiarity. It has been possible to observe some of the dilemmas faced by policy makers, such as the use of conditionality, the use of political versus legal agreements and the direction of travel of the EU’s readmission policy. In addition, preceding chapters have gradually introduced the interactions between the founding values of respect for human dignity, human rights, the rule of law and democracy and readmission. However, this examination has been limited due to the difficulties in defining these founding values. The following chapters, commencing with human dignity, seek to construct new definitions or conceptions of these values through the interactions between them and readmission policy in order to assess the extent this policy is congruent with the Union’s founding values.
### Figure 4 EU Agreements and Arrangements Engaging Readmission

<table>
<thead>
<tr>
<th>Agreement</th>
<th>Status</th>
<th>Description</th>
<th>Relation to Readmission</th>
<th>Existing Agreements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mobility Partnership</td>
<td>Political</td>
<td>Part of the Global Approach to Migration and Mobility. Mobility Partnerships are political declarations which aid cooperation in the management of regular and irregular migration.</td>
<td>Concluded before or after an EURA.</td>
<td>Armenia, Azerbaijan, Belarus, Cape Verde, Georgia, Jordan, Moldova, Morocco, Tunisia</td>
</tr>
<tr>
<td>Partnership and Cooperation Agreements</td>
<td>Legal</td>
<td>Partnership and Cooperation Agreements increase the level of cooperation provided by a Framework Cooperation Agreements, including political and economic cooperation.</td>
<td>Partnership and Cooperation Agreements may make several references to readmission. Ranging from the inclusion of an article on cooperation on migration (including readmission) to an article on illegal migration. These allow for the future negotiation of an EURA. In other Partnership and Cooperation Agreements, the parties agree to examine how they can cooperate on irregular migration, including readmission, but does not obligate the parties to negotiate an EURA.</td>
<td>Armenia, Azerbaijan, Belarus (negotiations frozen), Brunei (negotiations ongoing) Georgia, Indonesia, Iraq, Kazakhstan, Kyrgyzstan, Malaysia (negotiations ongoing), Moldova, Mongolia, Russia, Singapore, South Africa, Sri Lanka, Thailand, Tajikistan, Turkmenistan (pending), Ukraine, Uzbekistan, Vietnam,</td>
</tr>
<tr>
<td><strong>Association Agreement</strong></td>
<td>Legal</td>
<td>Concluded based on Art.217 TFEU, which allows for the conclusion of an agreement including reciprocal political and economic obligations and rights. These agreements often replace a Partnership and Cooperation Agreement and strengthens the cooperation between the signatories. However, this is not always the case.</td>
<td>Often concluded after EURAs and therefore are limited in this area to obligating the parties to fulfil the agreement.</td>
<td>Albania, Algeria, Chile, Egypt, Georgia, Israel, Jordan, Lebanon, Morocco, Tunisia, Turkey, Ukraine</td>
</tr>
<tr>
<td><strong>Readmission Agreement</strong></td>
<td>Legal</td>
<td>These allow for the return of irregularly resident or present third country nationals and stateless persons to be returned to their country of origin or a third country. Often negotiated alongside a Visa Facilitation Agreement and build upon the obligations/political declarations issued in Mobility Partnerships or Cooperation and Association Agreements.</td>
<td></td>
<td>Albania, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Cape Verde, Georgia, Hong Kong, Macao, Former Yugoslavian Republic of Macedonia, Moldova, Montenegro, Pakistan, Russia, Serbia, Sri Lanka, Turkey, Ukraine</td>
</tr>
<tr>
<td>Mobility Partnership</td>
<td>Signed/Agreed</td>
<td>Participating EU Members</td>
<td>Migration Articles/Paragraphs</td>
<td>Relation to Readmission</td>
</tr>
<tr>
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</tr>
<tr>
<td>Moldova</td>
<td>21/05/2008</td>
<td>Bulgaria, Cyprus, Czech Republic, France, Germany, Greece, Hungary, Italy, Lithuania, Poland, Portugal, Romania, Slovakia, Slovenia, Sweden.</td>
<td>Paras.1-11</td>
<td>Paras.9 and Annex (agreement to cooperate).</td>
</tr>
<tr>
<td>Georgia</td>
<td>20/09/2009</td>
<td>Belgium, Bulgaria, Czech Republic, Denmark, Estonia, France, Germany, Greece, Italy, Latvia, Lithuania, The Netherlands, Poland, Romania, Sweden, UK.</td>
<td>Paras.1-10</td>
<td>Paras.11 and 13, Annex (agreement to conclude readmission agreement).</td>
</tr>
<tr>
<td>Armenia</td>
<td>27/10/2011</td>
<td>Belgium, Bulgaria, Czech Republic, France, Germany, Italy, The Netherlands, Poland, Romania, Sweden.</td>
<td>Paras.1-16</td>
<td>Paras.10, 12 and Annex (improve cooperation and implement the readmission agreement).</td>
</tr>
<tr>
<td>Morocco</td>
<td>07/06/2013</td>
<td>Belgium, France, Germany, Italy, The Netherlands, Portugal, Spain, Sweden, UK.</td>
<td>Paras.12-27</td>
<td>Paras.12 and 13 (continue cooperation and negotiate readmission agreement).</td>
</tr>
<tr>
<td>Azerbaijan</td>
<td>05/12/2013</td>
<td>Bulgaria, Czech Republic, France, Lithuania, The Netherlands, Poland, Slovakia, Slovenia.</td>
<td>Paras.1-14</td>
<td>Paras.7, 9 and Annex (fully implement the readmission agreement).</td>
</tr>
<tr>
<td>Country</td>
<td>Date</td>
<td>Parties</td>
<td>Paras.</td>
<td>Additional Information</td>
</tr>
<tr>
<td>-----------</td>
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</tr>
<tr>
<td>Tunisia</td>
<td>03/03/2014</td>
<td>Belgium, Denmark, France, Germany, Italy, Poland, Portugal, Spain, Sweden, UK.</td>
<td>1-16</td>
<td>Para.9 (develop cooperation on readmission alongside a visa facilitation agreement).</td>
</tr>
<tr>
<td>Jordan</td>
<td>09/10/2014</td>
<td>Cyprus, Denmark, France, Germany, Greece, Hungary, Italy, Poland, Portugal, Romania, Spain, Sweden.</td>
<td>9-21</td>
<td>Paras.9 and 33 (agreement to negotiate readmission).</td>
</tr>
<tr>
<td>Belarus</td>
<td>13/10/2016</td>
<td>Bulgaria, Finland, Hungary, Latvia, Lithuania, Poland, Romania.</td>
<td>1-20, 26-29</td>
<td>Para.12 and 17 (fully cooperate on readmission and conclude the EU-Belarus Readmission Agreement).</td>
</tr>
</tbody>
</table>
### Figure 6 EU Association Agreements and References to Readmission

<table>
<thead>
<tr>
<th>Association Agreement</th>
<th>Signed/Entered into Force</th>
<th>Member State Parties</th>
<th>Migration Covenant(s)</th>
<th>Relation to Readmission</th>
</tr>
</thead>
<tbody>
<tr>
<td>Turkey</td>
<td>12/09/1963 1970</td>
<td>Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, The Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, UK.</td>
<td>None</td>
<td>No references to readmission.</td>
</tr>
<tr>
<td>Tunisia</td>
<td>17/07/1995 01/03/1998</td>
<td>All Member States</td>
<td>Art.69</td>
<td>Art.69(3)(b) and (c) facilitate a dialogue on immigration and return. No references to readmission.</td>
</tr>
<tr>
<td>Israel</td>
<td>20/11/1995 01/06/2000</td>
<td>All Member States</td>
<td>Art.57</td>
<td>No references to readmission.</td>
</tr>
<tr>
<td>Morocco</td>
<td>26/02/1996 01/03/2000</td>
<td>All Member States</td>
<td>Art.69</td>
<td>Under Art.69(3), the Parties are to enter into a dialogue on migration and illegal immigration. No references to readmission.</td>
</tr>
<tr>
<td>Jordan</td>
<td>24/11/1997 01/05/2002</td>
<td>All Member States</td>
<td>Art.80</td>
<td>Under Art.80(3), the Parties are to enter into a dialogue on migration and illegal immigration. No references to readmission.</td>
</tr>
<tr>
<td>Country</td>
<td>Date Signed</td>
<td>Date Entered</td>
<td>Art.</td>
<td>Additional Notes</td>
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<tr>
<td>Chile</td>
<td>18/11/2002</td>
<td>01/02/2003</td>
<td>46</td>
<td>Art.46 (not in force) Art.46 allows for cooperation on illegal immigration, under 46(1) including the readmission of own nationals. Cooperation could be furthered under 46(3), with the conclusion of an EU-Chile RA or under 46(4), bilateral agreements with Member States.</td>
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<tr>
<td>Egypt</td>
<td>25/06/2001</td>
<td>01/06/2004</td>
<td>68, 69</td>
<td>Art.68 allows for the readmission of own nationals of the Parties. Bilateral readmission agreements could be agreed under Art.69.</td>
</tr>
<tr>
<td>Algeria</td>
<td>22/04/2002</td>
<td>01/09/2005</td>
<td>72, 84</td>
<td>Art.72(3)(b) and (c) allow for a dialogue on the issues of migration and return. Under Article 84(1), the Parties allow for the readmission of their own nationals. Under Art.84(2) Parties may conclude a readmission agreement if it is requested.</td>
</tr>
<tr>
<td>Lebanon</td>
<td>17/06/2002</td>
<td>01/04/2006</td>
<td>64, 68, 69</td>
<td>Art.64(3)(b) and (c) facilitate cooperation on illegal immigration. Under Article 68, nationals of the parties can be readmitted. Art.69 allows for the conclusion of bilateral readmission agreements.</td>
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<tr>
<td>Albania</td>
<td>12/06/2006</td>
<td>01/04/2009</td>
<td>4, 80, 81</td>
<td>Art.81 allows for the readmission of own nationals, third country nationals and stateless persons through the EU-Albania RA. Under 81(4), Albania agrees to conclude readmission agreements with other stabilisation and association states.</td>
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<tr>
<td>Country</td>
<td>Date Range</td>
<td>All Member States</td>
<td>Article Numbers</td>
<td>Remarks</td>
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<tr>
<td>Georgia</td>
<td>27/06/2014 - 01/11/2014</td>
<td>Art.15 and 16</td>
<td>Art.15 facilitates cooperation in the area of asylum and the management of migration. Art.16 reaffirms the implementation of the EU-Georgia RA.</td>
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<tr>
<td>Moldova</td>
<td>27/06/2014 - 01/06/2016</td>
<td>Art.14</td>
<td>Art.14(2) facilitates cooperation on asylum and migration. No specific references to readmission outside of the preamble.</td>
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<tr>
<td>Ukraine</td>
<td>21/03/2014 - 01/11/2014 (27/06/2014 - 01/01/2016)</td>
<td>Art.16 and 19</td>
<td>Art.16 allows for cooperation on migration and asylum and Art.19 affirms that the EU-Ukraine RA will be fully implemented.</td>
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Human dignity constitutes one of the founding values of the EU. Alongside respect for the rule of law, democracy, human rights, freedom and equality under Art.2 TEU, respect for human dignity acts as a theoretical anchor for all EU activities, both internally and externally. Therefore, the Union’s readmission policy has also developed within this wider framework of fundamental values and principles. As a founding value, the EU has the ability to investigate a Member State if there is a ‘clear risk of a serious breach’ of the value of human dignity and may ultimately determine such a breach has occurred. In such instances, the voting rights of a Member State in the Council may be suspended. The potential ramifications of Art.7 TEU infringement proceedings would suggest the EU possesses some form of agreed conception of its founding values. Yet, the Treaties do not provide a definition of the EU’s conception of the value of human dignity, despite it being possible for a Member State to breach it and be sanctioned for such a breach. The open-ended nature of Art.2 TEU allows for flexibility on the one hand, but at the expense of clarity. It could be argued there are many concepts within EU law which are not defined in the text of the treaties themselves, either relying on protocols to the treaties, secondary legislation or on the interpretation of the CJEU.

As Art.7 TEU does not provide an exhaustive list of the types of measures which may be subject to review, it is thereby possible for the value of human dignity to be breached by a Member State through its own readmission policy. How such a breach may occur is dependent on the stage of the readmission process, either in the Member State itself or the act of returning an individual to a third country. What is lacking in this situation is a mechanism against the EU itself if it were to breach one of its fundamental values. This leads us to three questions: (1) what is the EU’s conception of human dignity and from which sources is it drawn?; (2) to what extent is the EU committed to the protection of the value of human dignity?; and (3) to what extent is the EU’s readmission policy congruent with its own conception of human dignity?

2 Ibid, art.7(2).
3 Ibid, art.7(3).
4 See European Commission, ‘Communication from the Commission to the European Parliament and the Council: A New EU Framework to Strengthen the Rule of Law’ (Brussels, 19 March 2014) COM (2014) 158 final 2 for how the EU is enhancing the protection of the rule of law under Article 7 TEU.
This chapter will first address the question as to what the EU’s conception of human dignity is and from which sources it is drawn. This extends beyond a formal, legal definition to the core philosophical foundations upon which it is based. Such an examination will begin with the Treaty basis for respect for human dignity in EU law, contained in the TEU and CFR. Due to Art. 6 TEU, the sources of the EU’s conception of human dignity may extend to its use in Member States’ constitutional orders, as well as sources of international law, which constitute general principles of EU law. Combining this examination with the judicial interpretation of the CJEU and ECtHR respectively, we may observe not only how the courts themselves have referred to respect for human dignity in their rulings, but also how claimants have sought to rely on the concept in their submissions. After considering these various factors, it is then possible to provide a base understanding of what is the EU’s conception of human dignity, who possesses it, why they possess it and when it can be relied upon.

The unique process of readmission in EU law requires the tailoring of the concept of human dignity as it involves the creation of cross-border legal and political obligations. Such tailoring, or even the basic legal definition, cannot be separated from its philosophical foundations. It will be argued the EU conception of human dignity, and indeed the creation of such cross-border obligations, mirror Levinasian moral theory, with interaction required between the EU and Member States on the one hand, and the returnee as Levinas’ ‘other’. Such a conception allows scope beyond the purely legal obligations to include political obligations and agreements. As it has been demonstrated in previous chapters, the EU’s readmission policy is a mix of legal and political agreements and arrangements, which act on a multilateral and bilateral basis.

The second and third questions this chapter will address are interlinked, with the second question acting as a normative standpoint to question three. These questions will be answered through a case study methodology. The focus in this section of this chapter will be on two instances of EU cooperation on readmission with Turkey in particular. This is justified on the basis that EU-Turkey readmission cooperation is the most sophisticated the Union has developed thus far. Readmission may take place under customary international law, bilateral agreements, the EU-Turkey RA, and the EU-Turkey Statement. Not only is it the most sophisticated relationship, it is arguably also the most strategically valuable partnership on the management of migration flows from the Middle East to the territory of the EU. The focus in this instance will be two-fold. First, this chapter will examine the various arrangements and agreements which allow for the readmission of Turkish nationals, third country

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6 TEU (n 1) art.6 (3).
nationals and stateless persons. Second, it will then analyse the treatment which returnees face upon their return to Turkey.

This chapter will seek not only to apply a conception of human dignity to the readmission arrangements with Turkey, but also seek to determine whether we are able to improve our understanding or further define the EU’s conception of this fundamental value via its relationship with Turkey. It will be argued the current readmission relationship with Turkey, and the treatment which returnees may face, raises wider questions as to the Union’s commitment to the value of human dignity, which it commits to export in its external relations under Art.3 (5) TEU.

5.1 Human Dignity as a Constitutional Value Under EU Law

Current human dignity discourse has often focused on the role of human dignity as a constitutional value or as a constitutional right, and its classification as one or the other may have a significant impact on its value, not only for academics but also potential litigants. For example, Chaskalson argues human dignity as a constitutional value is worth more than human dignity as a defined constitutional right.7 This is in part due to a constitutional value shaping all the rules and legislation which is produced from it, rather than a constitutional right which may be subject to legal and theoretical limitations. However, the EU’s legal structure is unique in that human dignity is simultaneously both a constitutional value and a constitutional right.

5.1.1 Human Dignity as a Constitutional Value

The basis of the assertion human dignity acts as a constitutional value under EU law can be found in Art.2 TEU, where it is defined as one of the founding values of the Union. In conjunction with this, there is a legal obligation under Art.3(5) TEU for the export of the value of human dignity, in addition to the other founding values in the EU’s external relations. As explained by Von Bogdandy and Bast,8 respect for human dignity is to be considered as a legal norm rather than a purely ethical value.9 This is significant as, if respect for human dignity holds only an ethical value then it cannot necessarily be protected and fulfilled as the treaties require it to be.

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9 Ibid, 22.
The use of human dignity as a constitutional value may reflect the importance placed by the EU and European legal systems on society and social values. However, at the level of the individual, or a potential returnee, human dignity as a constitutional value rather than a constitutional right may have several implications. First, the enforcement mechanisms available under EU law differ substantially. As set out previously, violations of the constitutional value of human dignity by a Member State may be subject to the infringement and enforcement mechanisms in Art.7 TEU. The ability of an individual to raise a violation of a founding EU value before the domestic courts or the CJEU is more difficult, and in the case of human dignity may require a positive legal or constitutional right in order to make it effective. For Barak, the inclusion of human dignity as a constitutional value has several implications for the wider protection of human rights:

‘it provides the theoretical foundation for human rights; it assists in the interpretation of human rights at the sub-constitutional level; it is one of the values that every constitutional right is intended to realise; it plays a role in the limitations to constitutional rights and in determining the limits to such limitations; it plays a primary interpretative role in those cases where the constitution does recognise a constitutional right to human dignity’.  

This can be interpreted as meaning human dignity as a constitutional value ultimately means humanity itself, and it is the role of constitutional rights to achieve the constitutional value which has been placed on it by the treaties as a founding value. However, it can be argued the dual nature of human dignity as a constitutional value and right in the EU’s legal order, and their respective sources, means this may not be the only purpose and meaning of human dignity.

As well as respect for human dignity under Art.2 TEU, we may observe two further avenues in which respect for human dignity is incorporated into the Union’s legal order at the level of a constitutional value, rather than a right. The first of which is via the general principles of EU law under Art.6 TEU. Second, we may observe the role of human dignity in Member State constitutional orders.

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12 Ibid, 362.

13 Ibid, 363.

14 Ibid, 365.
5.1.2 Human Dignity as a General Principle of EU Law Arising from the United Nations

Lenaerts and Gutierrez-fons have argued general principles fulfil three functions in the EU legal order. First, they allow the judiciary to fill ‘normative gaps’ in the Treaties. Second, they aid the judiciary in the interpretation of EU and Member State laws and third, they act as grounds for judicial review. In respect to human dignity, international human rights instruments may constitute general principles of EU law. Therefore, it is appropriate to examine the international instruments primarily at the UN and CoE levels, in which human dignity is expressly referenced or there is a recognised interpretation of the meaning of human dignity.

The UDHR references the value of human dignity. First, in the Preamble, human dignity is described as one of the foundations of justice, peace and freedom. The Declaration further goes on to state ‘all human beings are born free and equal in dignity and rights’. For Capps, the role of human dignity in the UDHR is to provide a normative basis for the human rights which follow. Expanding this to wider international law, Capps offers two elements of human dignity: first, individuals have dignity ‘when they can exercise freedom, or more specifically autonomy’ and second, the role of human rights is then to protect such autonomy and ultimately human dignity. Yet, Neal argues such an approach is reductionist, and instead autonomy is only an element of human dignity as it would limit its applicability to only those individuals who are autonomous. As noted by Rodriguez, the UDHR does not actually define the meaning of dignity, which then arguably led to the regional fragmentation of

18 Ibid, art.1.
21 Ibid, 108.
23 Ibid, 28-30.
its interpretation across legal systems.\textsuperscript{24} In response to this argument, Hughes\textsuperscript{25} proposes examining the drafter’s intentions and the political climate at the time of the initial drafting of the Universal Declaration. The proposed argument in respect to the Declaration is inherent human dignity was necessary to provide the subsequent inalienable rights decoupled from religion.\textsuperscript{26} There are further rights in the UDHR which we may associate with respect for human dignity as they are found in later UN conventions. For example, the right to life,\textsuperscript{27} protection from slavery\textsuperscript{28} and torture,\textsuperscript{29} recognition as a person before the law\textsuperscript{30} and protecting an individual’s privacy, honour and reputation.\textsuperscript{31}

Accepting the important role of the UDHR in the development of the concept of human dignity,\textsuperscript{32} we may observe further references to the concept in other UN instruments to which Member States are signatories. It is interesting to note neither the Refugee Convention\textsuperscript{33} or the 1967 Protocol\textsuperscript{34} reference the dignity of individuals who may fall under its protection. We must first look to the ICERD,\textsuperscript{35} which links the eradication of racial discrimination and respect for human dignity. The following ICESCR\textsuperscript{36} links the right to education with dignity, stating ‘education shall be directed to the full development of the human personality and the sense of its dignity’.\textsuperscript{37} From this, we may observe a link between human personality and human dignity, and an understanding of human dignity may only be achieved


\textsuperscript{26} Ibid, 2-9.

\textsuperscript{27} UDHR (n 17) art.3.

\textsuperscript{28} Ibid, art.4.

\textsuperscript{29} Ibid, art.5.

\textsuperscript{30} Ibid, art.6.

\textsuperscript{31} Ibid, art.12.

\textsuperscript{32} G. Hughes (n 25) 4.


\textsuperscript{37} Ibid, art.13 (1).
through education. The use of education in this context must mean it possesses at least some universal and recognisable characteristics.

In the ICCPR\(^{38}\) there are three references to the concept of dignity, which confirm the link between human rights and human dignity, with an express link made between detained individuals and their treatment in light of their human dignity.\(^{39}\) If we accept human dignity as a constitutional value underpins all subsequent rights, the ICCPR provides us with an opportunity under international law to recognise which rights are particularly linked to the concept. The Convention on the Elimination of All Forms of Discrimination against Women\(^{40}\) states discrimination against women is a violation of equality and human dignity in the Preamble, but the concept is not further refined to specific rights within the Convention. In comparison, the CAT\(^{41}\) contains only one reference to dignity in the Preamble. The final two UN Conventions, the CRC\(^{42}\) and the ICRPD,\(^{43}\) contain more references to the concept of human dignity. First, the CRC recognises the rights of children with mental or physical disabilities to ‘enjoy a full and decent life, in conditions which ensure dignity’.\(^{44}\) Thereby, we may link living conditions with the fulfilment of human dignity. Under Art.28(2) CRC, school discipline must be administered in a manner which is congruent with respect for human dignity. Dignity is also explicitly linked to the treatment of children deprived of their liberty;\(^{45}\) the recovery and integration of child victims of neglect and abuse\(^{46}\) and the treatment of children under criminal law.\(^{47}\) In regards to persons with disabilities, respect for dignity is explicitly linked to the physical and psychological


\(^{39}\) Ibid, art.10.


\(^{41}\) Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT).


\(^{44}\) CRC (n 42) art.23 (1).

\(^{45}\) Ibid, art.37 (c).

\(^{46}\) Ibid, art.39.

\(^{47}\) Ibid, art.40 (1).
rehabilitation and reintegration of persons with disability,\textsuperscript{48} the right of disabled persons to access education\textsuperscript{49} and the healthcare treatment of disabled persons.\textsuperscript{50}

Based on this preliminary assessment of the use of human dignity in the UN system, we can observe several shared characteristics. First, respect for human dignity prevents discrimination against individuals, whether on the grounds of race, gender, age or disability. Second, within the UN system, human dignity, as set out in the Universal Declaration, is the normative basis for all the rights contained in the various conventions and covenants. Third, human dignity is closely linked to a certain degree of a standard of living, as well as a standard of treatment, whether in a medical setting or in instances of deprivation of liberty. As such conventions and covenants form general principles of EU law, their use of the concept of human dignity must therefore inform the basis of the Union’s own conception of human dignity.

5.1.3 Human Dignity as a Constitutional Value Arising from Member State Constitutions

Ullrich\textsuperscript{51} identifies four different forms of human dignity in national constitutions, which can be applied to various Member States:

‘(1) constitutions that recognise the concept of human dignity in programmatic sense by inclusion in the preamble; (2) constitutions that overtly consider human dignity in the context of specific human rights; (3) constitutions that emphasise the fundamental legal implications of human dignity by assigning it a prominent place among the first provisions; and (4) constitutions that rely on human dignity as an unwritten principle.’\textsuperscript{52}

As argued by Dupré, the inclusion of respect for human dignity in Member State constitutions is in part due to their construction within a post-war environment, which emphasis human dignity and established it as playing a central role in their respective constitutional systems.\textsuperscript{53} Such post-war

\textsuperscript{48} ICPRD (n 43) art.16 (4).
\textsuperscript{49} Ibid, art.24 (1) (a).
\textsuperscript{50} Ibid, art.25 (d).
\textsuperscript{52} Ibid, 1549.
constitutionalism in Europe during the late 1940s and 1950s was then followed by the fall of a number of dictatorships during the 1970s, and the fall of the Berlin Wall in the 1990s.  

Focusing on Member States with a form of written constitution, we may begin to establish or observe a common basis or conception of respect for human dignity which ultimately informs its construction at the EU level. In this respect, the Member State with the most developed jurisprudence on human dignity is Germany, with its inclusion under Art.1(1) of the Basic Law and its interpretation by the German Federal Constitutional Court establishing respect for human dignity as a ‘fundamental guideline for all times’. Art.1(1) states ‘human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority’, and its inclusion as the first clause in the German Constitution signifies its fundamental nature. However, the text of the Basic Law does not provide us with a definition, and it is not specifically mentioned in any of the rights which follow from it. Therefore, it has been the role of the Federal Court to outline the base understanding of human dignity in German law. For Ullrich, the Court has taken a two-pronged approach to submissions which seek to rely on Art.1(1), which is often relied upon alongside other provisions of the Basic Law. First, the Court outlines human dignity from a negative standpoint, meaning rather than prescribing situations where human dignity can be violated, it examines each situation and rules as to whether there has been a violation. Second, the Court uses the ‘object formula’, thereby a violation of respect for human dignity where an individual is treated by the state as an object, rather than a person, and this is reflected in the state’s treatment of such a person. The use of these two approaches means the Court does not actually need to produce a definition of human dignity. Despite this, it is possible for the right to human dignity under Art.1(1) to come into conflict with other provisions of the Basic Law. As outlined by Jones, the rights under the Basic Law are considered to be equal, and are to be equal.

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57 Ullrich (n 51) 1613.
58 Ibid, 1608.
60 Ibid, 1610.
harmonised if they conflict with each other. Yet, human dignity cannot be encroached upon, which leads Jones to conclude human dignity is not actionable alone and has to combined with other rights. Furthermore, Jones observes human dignity is often included in submissions before the Court alongside the rights to life, liberty and private life.

In comparison to the German approach, the Italian, Spanish, Portuguese and Hungarian constitutions raise human dignity in relation to specific rights. In the Italian Constitution, human dignity is expressly referenced under the fundamental principles of the constitution, as well as under economic rights and duties. In the former, Art.3 states ‘all citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions’. It is interesting to note the addition of the term ‘social’ to dignity in the Italian system, with the rest of the article listing criteria upon which an individual cannot be discriminated against. In the Italian context, human dignity as a fundamental principle centres on non-discrimination by society against an individual. Such an understanding is congruent with the inclusion of human dignity under Art.41, private economic activity cannot be undertaken in such a way as to ‘damage’ human dignity. On a prima-facie reading, we may understand ‘damage’ to represent a lower actionable threshold than ‘violate’. Therefore, we may interpret human dignity within the Italian constitution as a right against both society and businesses on the grounds of equality and non-discrimination. Within the Spanish Constitution, human dignity also constitutes one of the fundamental rights under s.10 and appears alongside references to inherent rights and ‘the free development of the personality’ as foundations of the Spanish state.

In comparison to the Italian and Spanish constitutions, those of Portugal and Hungary are more prescriptive and offer a greater insight into their respective notions of human dignity. Art.1 of the Portuguese Constitution states Portugal is a republic based on human dignity with further references under the rights to: equality; the protection of personal information; protection of an individual’s
genetic information;\textsuperscript{71} workers’ rights;\textsuperscript{72} assisted conception\textsuperscript{73} and public court hearings.\textsuperscript{74} Similar to the German, Spanish and Italian constitutions, there are no references to human dignity in the preamble of the Portuguese Constitution. The Hungarian Constitution includes nine references to human dignity. For the Hungarian state, ‘human existence is based on human dignity’, and such existence includes life at the point of conception.\textsuperscript{75} Therefore, the Hungarian Constitution introduces foetal rights and gives them a right to respect for human dignity. As with the Portuguese Constitution, the Hungarian Constitution explicitly links working rights and conditions with human dignity.\textsuperscript{76} Demonstrating the importance of human dignity, Art.37 governs the state budget and if Hungary’s debt exceeds half of its GDP, the Constitutional Court’s powers are restricted to finding budgetary acts unlawful on four grounds, including the right to life and human dignity.\textsuperscript{77}

The constitutions of Member States such as Finland,\textsuperscript{78} Croatia,\textsuperscript{79} Slovenia\textsuperscript{80} and Belgium\textsuperscript{81} follow a similar pattern. The Finnish Constitution utilises human dignity alongside the right to life, liberty and integrity;\textsuperscript{82} the treatment of deportees from Finland to third countries\textsuperscript{83} and the quality of life and access to social security of residents\textsuperscript{84}. Croatia specifies human dignity and conditions of arrest\textsuperscript{85} and the right to a private and family life\textsuperscript{86} within its constitution. For Slovenia, Art.21 (protection of human personality and dignity) invokes respect for human dignity in legal proceedings including the deprivation of liberty. Art.34 contains a right to personal dignity and safety but provides no description. The Belgian Constitution provides a non-exhaustive list as to what kind of rights are required to live a life which is congruent with human dignity, with a focus on economic, cultural and

\textsuperscript{71} Ibid, art.26 (3).
\textsuperscript{72} Ibid, art.59 (1) (b).
\textsuperscript{73} Ibid, art.67 (2) (e).
\textsuperscript{74} Ibid, art.206.
\textsuperscript{75} Constitution of Hungary (1989) art. II.
\textsuperscript{76} Ibid, art. XVII (3).
\textsuperscript{77} Ibid, art. 37 (4).
\textsuperscript{78} The Constitution of Finland (1999).
\textsuperscript{80} Constitution of the Republic of Slovenia (1990).
\textsuperscript{81} Belgian Constitution (2012).
\textsuperscript{82} The Constitution of Finland (1999) section 7.
\textsuperscript{83} Ibid, section 9.
\textsuperscript{84} Ibid, section 19.
\textsuperscript{86} Ibid, art.35.
This list includes a right: to employment and free choice as to such employment; social security including legal aid, medical aid and healthcare; cultural and social fulfilment; a healthy environment and decent accommodation. It is argued the Belgian Constitution provides the clearest indication of a Member State conception of respect for human dignity. This is in part due to the use of a positive list, rather than the negative approach taken by the Basic Law and the German Federal Constitutional Court.

We may contrast the approaches taken by most Member State constitutions in their use of human dignity with Poland and Ireland. The Polish Constitution specifically states under Art.30 ‘inherent and inalienable dignity’ is the source of the human rights which are further set out in the Constitution. This means it is one of the few Member State constitutions which expressly sets out the source of the rights which they contain, without expressly using human dignity in other clauses of the constitution. The Constitution of Ireland only contains one reference to dignity in the preamble and approaches the meaning of dignity not through reference to specific human rights and freedoms, but rather societal values of justice, prudence and charity.

This examination of Member State constitutions which explicitly refer to the value of human dignity or respect for human dignity reveals several common conceptions or criteria. First, human dignity fulfils both a positive and negative role in Member State constitutions and their interpretation. For some states, human dignity is specifically linked to rights which can be categorised as follows: the right to liberty, good working conditions, equality and ultimately a certain standard of lifestyle and freedom. Yet, none of the constitutions provide us with a definition of human dignity and thereby its interpretation takes place from a negative approach, as exemplified by the reliance on human dignity by the German Federal Constitutional Court. Using Ullrich’s four classifications, we may conclude Member States use all four categories. On the one hand, this is of benefit as it provides an insight into which rights may engage or rely upon respect for human dignity as under category two. On the other hand, the mix of classifications means it is difficult to ascertain how each interacts within the general principles of EU law.

5.1.4 Human Dignity as a Constitutional Value Arising from the CofE

As well as constitutional traditions giving rise to general principles of EU under Art.6(3) TEU, the ECHR and ECtHR jurisprudence also constitute general principles. Although the Convention itself does not

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89 The Constitution of Ireland (1937).
90 European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (ECHR)
expressly refer to respect for human dignity as a fundamental right, human dignity has been invoked by the ECtHR which may further inform our understanding of respect for human dignity as a constitutional value under EU law.

Prior to examining its judicial interpretation, it is appropriate to consider the reasons which have been proposed for the absence of human dignity in the ECHR, which was drafted at a time when human dignity was being proposed as the fundamental basis of all human rights at the UN level. Costa argues its absence is ‘surprising’, and draws comparison between the ECHR and the UDHR. However, what is of note is the argument ‘their intention was not to use solemn, emphatic language, but instead to concentrate on more practical, even technical issues’. It can be argued such an approach to human dignity has not been repeated at the UN level or within the EU Member States themselves since the Convention was drafted. Yet, Riley suggests ultimately the Convention is based on respect for human dignity as it draws upon the UDHR, without explicitly stating as such, therefore, the Convention mirrors Ullrich’s fourth category of constitutional human dignity.

In the absence of an express provision protecting human dignity, Costa proposes human dignity is most prominent in Art.2 (right to life), 3 (prohibition of torture), 4 (prohibition of slavery and forced labour), 5 (right to liberty and security), 6 (right to a fair trial) and 8 (right to respect for private and family life). Furthermore, its use in relation to these rights in particular is to both reinforce the Court’s reasoning, as well as linking the Convention to UN and international instruments.

Concerning Art.3 ECHR, we may broadly separate the use of human dignity to cases concerning the conditions of detention or other forms of deprivation, and those concerning expulsion to a third country. In the former category, the Court relied on human dignity in Ribitsch v Austria when examining the use of force against an individual during their detention, and the use of force not made ‘strictly necessary by his own conduct’. Here, the Court introduces two elements, the first of which is the idea of moving beyond what is necessary in the particular circumstances, or beyond what is

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92 Ibid.
94 J-P Costa (n 91) 396-399.
95 Ibid, 400-401.
96 Ribitsch v Austria App no 18896/91 (ECtHR, 4 December 1995).
97 Ibid, [38].
proportionate to the conduct of the applicant. Where the treatment is beyond reasonable or proportionate then it may be possible to invoke respect for human dignity. Second, a link is made with the physical integrity of the person, as the Court ruled ‘the requirements of an investigation and the undeniable difficulties in the fight against crime cannot justify placing limits on the protection to be afforded in respect of the physical integrity of individuals’. Here, we may observe an interpretation of respect for human dignity which is congruent with the understanding in a number of EU Member State constitutions. Such an approach was confirmed in the later cases of Tekin v Turkey, where the applicant was treated in such a manner that constituted inhuman and degrading treatment and therefore an interference with human dignity, and in Selmouni v France.

In the latter category of Art.3 ECHR cases concerning expulsion, the landmark case of M.S.S. v Belgium and Greece considered the potential conditions faced by an Afghan national if returned from Belgium to Greece under the Dublin Regulation, making numerous references to the concept of human dignity. First, reference is made to the guarantees and founding values of the EU as defined under Art.2 TEU. Second, the Court refers to a report by the CofE Commissioner for Human Rights, which states all individuals should be treated in a manner which is in-keeping with respect for human dignity when they arrive at a Contracting Party’s border. In reiterating its prior jurisprudence, the Court brings to our attention the role of human dignity in degrading treatment, specifically ‘showing a lack of respect for, or diminishing, his or her human dignity’. The Art.3 ECHR criteria and respect for human dignity were applied to both the living and detention conditions in Greece. The inclusion of detention conditions is uncontroversial, as it is a situation in which a Contracting Party may utilise almost full control over the life of a detainee. For example, access to toilets in the Greek detention facility was entirely at the guard’s discretion. However, the applicant submitted the ‘extreme poverty’ of his living conditions in Greece also gives rise to a breach of Art.3 ECHR. For the Court, responsibility, and potential liability, on behalf of the Contracting Party could be engaged where an

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98 Ibid.
99 Tekin v Turkey App no 22496/93 (ECtHR, 9 June 1998).
100 Ibid, [53].
101 Selmouni v France App no 25803/94 (ECtHR, 28 July 1999), [99].
103 Ibid, [57].
104 Ibid, [87].
105 Ibid, [220].
106 Ibid, [34].
107 Ibid, [235].
individual is ‘wholly dependent on State support’ and finds themselves in ‘serious deprivation or want incompatible with human dignity’. It is clear from the judgment the factual basis of the applicant’s case contained numerous hardships which ultimately led the Court to rule the living conditions breached Art.3 ECHR and they had been a ‘victim of humiliating treatment showing a lack of respect for his dignity’. We can broadly categorise the contributing factors to this part of the judgment as thus: access to the economic means to alleviate his situation; lack of access to shelter, food and hygiene and a long-standing situation of insecurity and fear. Although we are able to synthesise these conditions and criteria as part of the wider ECtHR understanding of human dignity, the judgment has not been without criticism. In particular, Bossuyt argues the extension of Art.3 ECHR to include the living conditions of asylum seekers is problematic, as it ‘goes far beyond the concept of an absolute prohibition of torture’. Furthermore, it is argued the Court has now added an additional positive obligation on EU Member States in comparison to other Contracting Parties as it has included EU law obligations as part of its reasoning. Bossuyt does however raise a larger and more significant question for the EU’s conception of human dignity: to what extent is it to be considered a positive obligation upon the EU and its Member States, in comparison to a negative right?

In S.H.H. v The United Kingdom, the Court ruled on the potential return of an Afghan national to Afghanistan, where he faced a real risk of treatment in violation of Art.3 ECHR. However, what is most significant in this case was the reliance on the CRPD, and the use of human dignity within it. The Court referred to both Art.1 and 16 ICRPD, which expressly refer to human dignity as simultaneously the purpose of the ICRPD and the recovery and rehabilitation of individuals with disabilities who have been victims of violence, abuse or exploitation. Furthermore, the applicant submitted inherent dignity as outlined under the ICRPD should be included under Art.3 ECHR. However, the Court found no violation under Art.3 ECHR and did not make a further reference to human dignity as argued by the

108 Ibid, [253].
109 Ibid, [263].
110 Ibid, [261].
111 Ibid, [254].
112 Ibid.
114 Ibid, 592.
116 Ibid, [60].
applicant. Therefore, it is unclear whether inherent dignity under Art.1 and 16 CRPD do indeed constitute an element of Art.3 ECHR protection.

Away from Art.3 ECHR jurisprudence, In the case of Bock v Germany\(^\text{117}\) the Court referred to human dignity in proceedings regarding a breach of Art.6(1) ECHR, specifically the length of time taken for divorce proceedings and the numerous suggestions the applicant was suffering from mental health issues. That these allegations were untrue encroached on the applicant’s human dignity.\(^\text{118}\) We may therefore implicitly observe a form of interference with reputation, which would normally be protected under Art.8 ECHR, as being capable of interfering with respect for human dignity under the ECHR.

Although the ECHR is the primary instrument of human rights protection under the CoE, it is not the only source of obligations which contain respect for human dignity. The Istanbul Convention\(^\text{119}\) was signed by the EU on 13 June 2017 and has been ratified by a further 14 Member States.\(^\text{120}\) Although it contains only two references to human dignity, under Art.40 it is explicitly linked with sexual harassment and is tailored to such a situation. It possible to discern two elements within the Article; first, there is the ‘unwanted verbal, non-verbal or physical conduct of a sexual nature’; second, the creation of an ‘intimidating, hostile, degrading, humiliating or offensive environment’. The use of dignity in this context is interesting as prior uses of human dignity have relied on either a physical, harmful act to an individual, or a mental effect on an individual, whereas the introduction of an environmental element widens the potential scope for the violation of human dignity in comparison to other international instruments. In parallel to the use of human dignity in the ECHR, the Convention on Action against Trafficking in Human Beings\(^\text{121}\) broadly follows Art.3 jurisprudence in its explicit references to human dignity.\(^\text{122}\) The last CoE instrument to rely upon a conception of human dignity is the revised European Social Charter,\(^\text{123}\) which incorporates a right to dignity at work,\(^\text{124}\) including


\(^{118}\) Ibid, [48].

\(^{119}\) Council of Europe Convention on preventing and combating violence against women and domestic violence (2011).


\(^{121}\) Council of Europe Convention on Action against Trafficking in Human Beings (2005).

\(^{122}\) For example, art. 16.


\(^{124}\) art. 26.
protection from sexual harassment and ‘recurrent reprehensible or distinctly negative and offensive actions’.

Drawing upon the CofE and its primary constitutive conventions containing provisions related to the protection of and respect for human dignity, we can add further elements to the EU’s understanding of human dignity as a constitutional value. First, there are the ‘headline’ articles of the ECHR (2-6 and 8), with which we may broadly categorise the instances within which the CofE utilises human dignity. Alongside the other conventions we may observe dignity plays a role in instances of detention and standards of treatment, as well as instances of everyday living, including treatment in the workplace. Treatment which engages human dignity may be physical or mental, including the creation of a general environment. Of interest is the CofE also approaches the concept from a negative standpoint. As demonstrated by the Court’s jurisprudence, it has been willing to invoke human dignity in instances where it has been violated without laying down any definition, however imprecise, of what respect for human dignity entails. It is argued the CofE introduces a greater emphasis on humiliation and reputational damage than either Member State constitutions or the UN. Therefore, we may conclude, as with specific Member State constitutions (such as Italy), there is also a societal element which may engage respect for human dignity, rather than the archetypal individual to state/non-state actor relationship.

5.2 Human Dignity as a Constitutional Right Under EU Law

The primary right in relation to human dignity which an individual may invoke is Art.1 CFR. As the Charter now enjoys the same primary law status as the Treaties, individuals, as well as the courts, have been more open to invoking it in judicial proceedings. Art.1 CFR states: ‘human dignity is inviolable. It must be respected and protected’. However, Title I, containing Art.1-5, described as the ‘constellation of core prohibitions’, is also ascribed to the protection of and right to human dignity. This section includes the right to life, right to integrity of the person, prohibition of torture and the prohibition of slavery. Dupré makes three observations in relation to the structure of Art.1 CFR and Title I. First, the inclusion of human dignity differentiates its importance in comparison to the

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126 CFR (n 5) art.2.
127 Ibid, art.3.
128 Ibid, art.4.
129 Ibid, art.5.
ECHR and instead brings the Charter closer to Member State constitutions. Second, this Title broadly matches the core prohibitions contained in the initial articles of the ECHR and, finally, the Charter as a whole is an explicit codification of already existing rights. Alternatively, Landau characterises the Charter as giving ‘concrete form’ to the EU’s founding values. Therefore, we may characterise the Charter as a synthesis of the position and meaning of human dignity as demonstrated in the examinations of Member State constitutions and the CofE position, including the ECHR.

As set out in the Explanations to the Charter, human dignity is the fundamental basis of all human rights and goes on to state:

‘None of the rights laid down in this Charter may be used to harm the dignity of another person, and that the dignity of the human person is part of the substance of the rights laid down in this Charter. It must therefore be respected, even where a right is restricted’.

Therefore, to a varying degree, human dignity is pervasive in every article of the Charter, meaning a violation of any article may also violate respect for human dignity. If we accept this premise then we may observe an interesting dynamic between the Charter itself and the ECHR, which constitutes the minimum standard of protection at the EU level. In effect, the EU is reading into the ECHR articles a respect for human dignity which the ECtHR itself may not have. For example, Art.11 CFR (freedom of expression and information) corresponds to Art.10 ECHR (freedom of expression), but the ECtHR has not considered it appropriate or necessary to implicitly read into the article respect for human dignity, whereas the Charter does. Although, of course, the Charter and by extension the CJEU are free to move beyond ECHR rights, this is an interesting dynamic when examining the EU’s conception of human dignity and from which sources it is drawn from. This is even more so where rights in the Charter do not correspond to rights under the ECHR. In this respect, and significantly for the interactions between human dignity and the EU’s return and readmission policy are Art.18 and 19 CFR, which provide for a right to asylum and protection in the event of removal or expulsion (incorporating Art.4 of Protocol No.4 ECHR). Indeed, as Jones argues, this may be to the benefit of

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131 Ibid, 75.


134 Ibid.

individuals and applicants, as human dignity could act as a catalyst for the expansion of all the other rights within the Charter.\textsuperscript{136}

Prior to the Charter, the CJEU had already sought to refer to and reply upon respect for human dignity in its rulings. In the case of \textit{P v S and Cornwall County Council},\textsuperscript{137} concerning equal access of men and women to employment, training and working conditions,\textsuperscript{138} the Court referred to respect for dignity in its finding that discriminatory practices were being applied, further adding ‘the Court has a duty to safeguard’.\textsuperscript{139} This was followed by \textit{Netherlands v Parliament and Council},\textsuperscript{140} concerning biotechnological inventions. It was submitted by the applicants Directive 98/44/EC undermined the value and right to human dignity as reducing ‘living human matter to a means to an end’.\textsuperscript{141} The case is significant for two reasons. First, the Court recognised the right to human dignity and integrity as part of the general principles of EU law.\textsuperscript{142} Under the Treaty of Amsterdam, which was in force at the time of the judgment, respect for human dignity did not occupy its current position as a founding value of the EU. Therefore, it may be argued this ruling began the process and rise in prominence which ultimately led to its inclusion in Art.2 TEU. Second, the Court relied on inferring the presence of respect for human dignity into the text of the Directive, reading the protection of human dignity into Art.5(1).\textsuperscript{143} It may have been possible to rely upon respect for human dignity separate from inferring it from the text itself.

Arguably the Court’s most significant jurisprudence in relation to respect for human dignity as a constitutional right stem from the case of \textit{Omega}\textsuperscript{144} and the opinion of AG Stix-Hackl. The matter concerned the opening of a ‘laserdrome’ in Germany by Omega, a German company. However, this was prohibited on the grounds of public order, with reference to Art.1 of the Basic Law, and Omega appealed on the basis the equipment for the laserdrome was from a UK company. Therefore, the

\begin{flushright}
\textsuperscript{138} Ibid, [1].
\textsuperscript{139} Ibid, [22].
\textsuperscript{140} Case C-377/98 Kingdom of the Netherlands v European Parliament and Council of the European Union [2001] ECR I-07079
\textsuperscript{141} Ibid, [69].
\textsuperscript{142} Ibid, [70].
\textsuperscript{143} Ibid, [71].
\textsuperscript{144} Case C-36/02 Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn [2004] ECR I-9609.
\end{flushright}
Court was asked for a preliminary ruling concerning the free movement of goods and of services. The referring German Court stated:

‘human dignity is a constitutional principle which may be infringed either by the degrading treatment of an adversary...or by the awakening or strengthening in the player of an attitude denying the fundamental right of each person to be acknowledged and respected, such as the representation, as in this case, of fictitious acts of violence for the purposes of a game’.

Therefore, the Omega case was a conflict of freedoms, between respect for human dignity and freedom of services and goods. For the Court, fundamental rights were already part of the general principles of law, drawing on constitutional traditions and rights from the Member States. Therefore, seeking to protect respect for human dignity was compatible with EU law and a legitimate interest. The Court ultimately ruled EU law is not precluded from being subject to national Member State restrictive measures on the grounds of public policy concerns.

The opinion of AG Stix-Hackl provides an important insight not only into how various freedoms existing at the EU and national level may be balanced, but also as to the nature of respect for human dignity at the EU level. First, the AG observes ‘there is hardly any legal principle more difficult to fathom in law than that of human dignity’. For Stix-Hackl, human dignity is inherent due to every individual’s humanity and acts as the basis of all other human rights and protections. There also links between self-determination and human dignity, as well as personality, legal equality and identity. Turning to the inclusion of human dignity in Member State constitutions, the AG argues the majority of Member State constitutions which include respect for human dignity do so as a ‘general article of faith’, yet this is not the case with the German Basic Law. In paras.85 and 86 of her opinion, Stix-Hickl makes two key points for respect for human dignity as a constitutional right under EU law and the Charter. First,

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145 Ibid, [1].
146 Ibid, [12].
147 Ibid, [33].
148 Ibid, [34].
149 Ibid, [35].
150 Ibid, [41].
152 Ibid, [75]-[76].
153 Ibid, [77]-[80].
154 Ibid, [84].
human dignity is a concept which only finds more concrete form through the medium of clear and settled rights and second, such codification, rather than direct use of respect for human dignity as included under Art.1 CFR, is more amenable to effective judicial application. 155 One of the more controversial elements of the opinion can be found in para.92:

‘it is almost impossible for the Court in this case...immediately to equate the substance of the guarantee of human dignity under the German Basic Law with that of the guarantee of human dignity as recognised in Community law’.

It could be argued this potentially leaves open the possibility a concept which is typically considered to be universal, despite being difficult to define, may contain substantive differences between forums. However, as Bulterman and Kranenborg156 suggest, the fact respect for human dignity appears at both EU and national level does not necessarily require an equivalent interpretation of the right.157 Indeed, Dupré goes much further than this in her consideration of Omega, arguing the CJEU purposefully avoided following the German model of human dignity for reasons such as to encompass its use across all Member States, or to create a fully autonomous conception of respect for human dignity.158

Therefore, the case of Omega does not necessarily contribute to our understanding of the content of respect for human dignity, but rather, its position within the EU’s legal order and its justiciability. As it has been shown, both the CJEU and the AG avoided delving into issues of definition and interpretation. However, by referring to its use in Member State constitutions and the general principles of EU law, the ruling began to create a conception of human dignity distinct from others while still sharing a desire to ensure its protection at both the EU and Member State levels.

We may distinguish to a small degree between pre- and post-2010 case law concerning human dignity as its protection under Art.1 CFR now enjoys a different status. In N.S.159 the Court was asked to consider the rights of asylum seekers being returned to Greece from the UK under the Dublin II

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155 Ibid, [85]-[86].

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However, for the purposes of establishing the content of the constitutional right of respect for human dignity is question five of the preliminary reference, namely, whether the rights under Art.1, 18 and 47 CFR are wider in scope than Art.3 ECHR. In answer to this question, the Court did not consider the precise issues as it did not consider it necessary to do so, ruling the answer to question five would not result in different answers being given to the preceding questions. In the case of *Cimade and GISTI* the Court was asked to rule on the Reception Directive, which contains a specific reference to human dignity in Recital Five, which states ‘this Directive seeks to ensure full respect for human dignity and to promote the application of Art.1 and 18 of the said Charter’. Therefore, we may establish a link, in the negative sense, between respect for human dignity and the right to asylum under the Charter. Furthermore, at para.56, it is stated the protection under Art.1 requires the full application of the minimum standards under the Directive, even for a short period of time. If we examine the areas included within the Directive, we may observe similarities with some of the areas included under respect for human dignity as a constitutional value. For example, access to healthcare, education of children, family unity and access to employment. The following case of *Saciri* also concerned the Reception Directive, and the Court reached the same conclusion in regards the relationship between the Directive and Art.1 CFR. However, the specific complaint in *Saciri* concerned the ability to afford accommodation in instances where asylum seekers are given an allowance for such a purpose, such an allowance must be sufficient to achieve its purpose.

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161 N.S. (n 159), [109].

162 Ibid, [114] - [115].


165 Ibid, art.13.

166 Ibid, art.10.

167 Ibid, art.8.

168 Ibid, art.11.

169 Case C-79/13 *Federaal agentschap voor de opvang van asielzoekers v Selver Saciri and Others* [2014] ECR I-0000.

170 Ibid, [35].

171 Ibid, [31].
The more recent case of *Aranyosi and Căldăraru*\textsuperscript{172} concerning the European Arrest Warrant, linked together Art.1 and 4 (prohibition of torture) CFR. The precise phrasing is significant as the Court suggests the prohibition of torture under Art.4 CFR is absolute because of its link to respect for human dignity and Art.1 CFR.\textsuperscript{173} This suggests respect for human dignity does indeed function as a foundation for all other human rights within the EU legal order and the Charter. The CJEU then went on to rule that Art.1 and 4 CFR, and Art.3 ECHR ‘enshrine one of the fundamental values of the Union’.\textsuperscript{174} The use of human dignity in this context supports the argument the constitutional right to respect for human dignity does indeed function in judicial proceedings alongside other rights, either in a foundational or parallel sense. This would also support the reasoning of Stix-Hickl in *Omega*.\textsuperscript{175}

There are two caveats to the role of respect for human dignity as a constitutional right under EU law using the Charter. First, as stated under Art.51 (1) CFR, the Charter only applies when the Union or its Member States are acting within the scope of EU law. Therefore, there is the possibility in certain Member States, where human dignity does not appear in their respective constitutions or in primary legislation, of a human dignity gap where it is not immediately obvious, beyond the discretion of judges, how respect for human dignity may be expressly relied upon in the course of judicial proceedings. Second, there is an argument the protection under Art.1 CFR may indeed be subject to the provisions under Art.52 CFR,\textsuperscript{176} namely, limitations can be placed upon the rights under the Charter. This would encompass respect for human dignity. If we accept such a proposition, then there is a conflict between the text of the Charter and the theoretical underpinning of the right as conceived by the CJEU. It is difficult to, one the one hand, limit respect for human dignity, while on the other hand it acts as the fundamental basis for all human rights. Furthermore, the protection under Art.4 CFR is equivalent to Art.3 ECHR, which cannot be curtailed in any shape or form. Yet, it is included in the Charter under Title 1 (dignity).

Collating these considerations together, we may reach a several conclusions as to the nature of respect for human dignity as a constitutional right under EU law and its value within the EU legal order. First, the protection afforded under Art.1 CFR is seldom relied upon as the sole ground of appeal before the CJEU, rather, we may look to the rights under Art.2 to 4 CFR to provide a positive conception


\textsuperscript{173} Ibid, [85].

\textsuperscript{174} Ibid, [87].

of respect for human dignity. Second, the Court’s jurisprudence demonstrates how respect for human dignity may be used as both a specific right as well as a concept which may be ‘read into’ existing legislation. This means it may not be necessary for the parties to the proceedings to raise the concept themselves, judges may identify it within provisions of the applicable regulation or directive. Third, the EU’s conception of respect for human dignity is distinct, but still linked to Member States. Finally, from the negative perspective, the Court’s use of respect for human dignity means we can identify new categories in which the concept may be violated. Alternatively, we may narrow down the categories which appear under the conception of respect for human dignity as a constitutional value in the EU legal order. For example, as demonstrated by Saciri, respect for human dignity does not necessarily mean the Member State concerned must provide an asylum-seeker with accommodation, but rather the necessary means by which to attain it.

Thus far, the examination of respect for human dignity as both a constitutional value and right in the EU legal order has taken place outside of the theoretical landscape which exists in this area. Therefore, in order to move towards an overall conception of human dignity within the EU and to examine the questions highlighted in the introduction to this chapter, we must consider the theoretical debates and requirements which have been proposed as to how human dignity is constructed and interpreted.

5.3 The Theoretical Framework of Respect for Human Dignity

The preceding examinations of respect for human dignity in the EU have relied on two founding presumptions. First, there is such a thing as human dignity itself and second, such a concept is justiciable and, due to the nature of the Charter, applicable not only to EU citizens but also those of third countries. Furthermore, such a concept exists legally, politically and theoretically. It’s inclusion as a constitutional value is a political choice, although in a legal document, the role of respect for human dignity under Art.2 TEU is to shape the political direction of the Union, all political decisions must undertake to respect the dignity of individuals. As a legal concept within the EU it is possible for individuals to litigate using the legal right wherever EU law is applied. However, as a legal concept it may be possible to place limits upon it, as Brownsword correctly argues, ‘there would be little support for the proposition there should be a law providing, quite simply, it is a criminal offence to act in a way which fails to respect, or compromises, human dignity’. At the theoretical level, human dignity may go beyond the legal concept, raising questions of a moral obligation to society.

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5.3.1. The Function of Respect for Human Dignity

Riley proposes respect for human dignity contains three notions: the foundational notion, the bridging notion and the heuristic notion.\(^{177}\) The foundational notion contains or sets the minimum for the treatment of persons,\(^{178}\) which speaks to the value’s use in the EU legal order to lay down the minimum level of protection in the reception of irregular migrants, or in instances of deprivation of liberty. It could be argued respect for human dignity is a last resort right in the EU, it is not used as the sole basis for a claim but is often paired with another right contained in the Charter. Particularly as rights such as the prohibition of torture under both the CFR and ECHR do not allow for derogation under any circumstance, whereas the exact status of the right under Art.1 CFR is unclear in this respect. The second notion, a ‘bridging’ notion between different human rights corresponds closely with the function of human dignity as a constitutional value and right. Although it is more closely associated with rights under Title I CFR as a constitutional right, its use as a constitutional value which draws upon the interpretations used by individual Member States, thereby includes access to employment other social rights. Within the foundational notion, McCrudden suggests the reliance on human dignity has changed over time to fulfil different purposes,\(^{179}\) and has transitioned from its use in the 1960s, largely contained in the Preambles of international conventions,\(^{180}\) to its conclusion in post-dictatorship constitutions during the 1970s and then the 1990s.\(^{181}\) McCrudden argues human dignity was used to fill a theoretical void, to provide a degree of consensus between parties,\(^{182}\) or as it is put ‘everyone could agree that human dignity was central, but not why or how’.\(^{183}\) This point further highlights the uniqueness of the ECHR in the absence of an explicit reference to human dignity in its text. The final notion proposed by Riley, the heuristic, proposes that human dignity is used by judges as a problem-solving tool in cases.

Jones makes an interesting observation in which to frame the examination of the theoretical underpinnings of the EU’s conception of respect for human dignity. Jones argues the CFR does not create a hierarchy of rights, it’s a mix of positive and negative obligations on the EU and its Member

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\(^{178}\) Ibid.


\(^{180}\) Ibid, 669.

\(^{181}\) Ibid, 673.

\(^{182}\) Ibid, 674.

\(^{183}\) Ibid, 678.
States.\textsuperscript{184} If we accept such an argument, then this may have substantial impact on the framing of respect for human dignity. As the examination of human dignity as a constitutional value and right in the EU has shown, it forms the foundation of human rights, at the EU level, the Member State level and the UN. Düwell argues respect for human dignity is not to be weighed against other, competing rights, it ‘trumps’ such other rights.\textsuperscript{185} If human dignity is treated differently to other rights, this would suggest a form of hierarchy. On this basis, we can reject Jones’s argument the CFR treats all rights equally. This can also be observed by the level of protection afforded to the prohibition of torture under Art.3 ECHR and Art.4 CFR. Therefore, we can elevate it above other human rights, while simultaneously being solidified through such other rights. Den Hartogh, rather than relying on the language of rights taking precedence over others, describes a ‘status-ranking’, with human dignity at the top of such a ranking.\textsuperscript{186}

5.3.2 The Substance of Respect for Human Dignity

As Riley correctly suggests when describing human dignity, ‘a term’s having global discursive currency does not entail its garnering universal assent’,\textsuperscript{187} yet although the substance of human dignity is in some aspects contentious, shaped by cultural, religious, legal and national traditions, it is possible to identify a number of key theories which are applicable to the EU’s interpretation and use of the concept.

First, respect for human dignity suggests it offers a degree of protection to a person, an individual may appeal to human dignity.\textsuperscript{188} This does not necessarily mean, as Tasioulas contends, human rights capture the full nature of human dignity.\textsuperscript{189} When discussing the UN, Riley specifically points to the individual to state relationship, with human dignity being an element which elevates concerns as to the individual over concerns as to the state.\textsuperscript{190} This can be seen in issues such as detention, where the state may have public policy concerns which, it believes, justifies the detention of an individual, but the concerns of the individual mean certain standards must be upheld despite the states’ interests.

\textsuperscript{184} J. Jones (n 136) 282.
\textsuperscript{187} S. Riley (n 177), 119.
\textsuperscript{188} Ibid.
\textsuperscript{189} J. Tasioulas, ‘Human dignity and the foundations of human rights’ in C. McCrudden (ed), \textit{Understanding Human Dignity} (OUP 2013) 308.
\textsuperscript{190} S. Riley (n 177) 119.
McCrudden suggests there is an ontological and relational claim for respect for human dignity, which speak to an individual’s intrinsic worth, which must be recognised, respected and protected from infringement.\textsuperscript{191} Human rights documents then further these claims as they then apply to the individual-state relationship.\textsuperscript{192}

In constructing a theory of human dignity for the 21\textsuperscript{st} century, Dupré categorises human dignity as having an ‘inward’ and ‘outward’ direction, the inward being ‘the inner mental and emotional world of the person’ and the outward as ‘social and relational identity and being’.\textsuperscript{193} This definition is supported by reference to the substance of Art.3 ECHR and Art.4 CFR.\textsuperscript{194} Again, we may find the individual-state relationship, and the role of the person in society. Feldman goes further than this and puts forward a third level of operation for human dignity, which applies to the entire human race, rather than just the individual or groups within society.\textsuperscript{195} For Mahlmann,\textsuperscript{196} respect for human dignity not only concerns the individual-state relationship but also the structure of the state itself.\textsuperscript{197} This concurs with Feldman’s argument, the structure of the state must facilitate respect for human dignity.\textsuperscript{198} However, interestingly Mahlmann goes on to argue human dignity, and its interpretation, may be narrower than of liberty and equality.\textsuperscript{199}

Further to an idea of intrinsic worth and the applicability of human dignity to the individual-state relationship, as Capps suggests, there is also a common element of autonomy of the person.\textsuperscript{200} Such an understanding serves to link the concepts of human dignity and freedom. However, Neal emphasises human dignity should not be reduced down to autonomy alone, or the two should not be conflated, rather it is part of the ‘dignity picture’.\textsuperscript{201} Neal provides three reasons for this: first, it would

\begin{flushleft}
\textsuperscript{191} C. McCrudden (n 179) 679.
\textsuperscript{192} Ibid.
\textsuperscript{194} Ibid, 195-196.
\textsuperscript{196} M. Mahlmann, ‘Human Dignity and Autonomy in Modern Constitutional Orders’ in M. Rosenfeld and A, Sajó (eds), The Oxford Handbook of Comparative Constitutional Law (OUP 2012).
\textsuperscript{197} Ibid, 379.
\textsuperscript{198} D. Feldman (n 195), 685.
\textsuperscript{199} M. Mahlmann (n 196), 392.
\textsuperscript{200} P. Capps, Human Dignity and the Foundations of International Law (Hart 2009) 108.
\end{flushleft}
mean only autonomous individuals possessed dignity, second, dignity has a ‘reflexive value’ which means the party which violates another’s human dignity is also violating their own and third, it is possible to violate autonomy while not also violating human dignity.

To these characteristics we may add equality and non-discrimination. For Schlink, ‘human dignity is used as a flag under which people unite and fight for freedom, equality, and decent living conditions that enable them to take care of their needs’. Although arguing against the existence of a right to dignity, O’Mahony recognises if human dignity is intrinsic then it cannot be dependent on outside characteristics, which should subsequently have no effect on the enjoyment of dignity.

5.3.3 Formulating the EU’s Conception of Human Dignity

Recognising the nature of human dignity, it is not possible, and indeed, as argued by Rodriguez, Byk and Dupré respectively, desirable, to produce an overarching definition of human dignity which covers all eventualities. Rather, this section will set out how the previous examinations of respect for human dignity fit within the overall theoretical framework in order to provide a ‘base’ definition or conception which can be applied to the EU’s readmission policy.

There are two possible framings for the conception of human dignity based on its interpretation as a constitutional value and right. First, Düwell proposes five questions which an account of human dignity must meet:

1) ‘What is the relationship between human dignity and human rights?
2) What is the relationship between a moral and a legal interpretation of human dignity?
3) Who has human dignity?

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202 Ibid, 28.
203 Ibid, 29.
204 Ibid, 30.
206 C. O’Mahony, ‘There is no such thing as a right to dignity’ (2012) 10 (2) International Journal of Constitutional Law 551, 555.
209 C. Dupré, ‘Constructing the meaning of human dignity: four questions’ in C. McCrudden (ed), Understanding Human Dignity (OUP 2013) 121.
4) What is the normative content of human dignity?

5) What are the necessary presuppositions for a commitment to human dignity? 

Alternatively, Dupré suggests ‘what, who, when and why’ are the key questions for a construction of human dignity. Therefore, based on the preceding examinations of respect for human dignity as a constitutional value and right, in conjunction with the examination of the theoretical underpinnings of the concept, it is possible to provide answers to these questions.

1) What is the relationship between human dignity and human rights?

Within the EU’s conception of human dignity, human dignity fulfils many simultaneous roles. It acts as the foundation for all human rights in the EU while acting as a facilitator for the development of existing rights or the creation of new human rights. These are reflected in the expanding range of cases in which the CJEU is referring to, or even relying upon, human dignity in their decision making. Human rights, in many respects, allow us to elucidate the nature of respect for human dignity and as more human rights are recognised, we can observe more characteristics of human dignity.

2) Who has human dignity and when?

For the EU, the constitutional right which every individual, whether an EU citizen or of a third country, who is present within the territory of an EU Member State or under the jurisdiction of a Member State possesses human dignity, and has a right to see this right respected, protected and fulfilled. This responsibility does not necessarily end once an individual has left the territory or jurisdiction of the EU, it may still be responsible for the treatment of an individual if the decision to leave was made by a Member State authority. As a constitutional value which shapes all EU policy decisions, every individual who may in one way or another be affected, directly or indirectly, has the right to have their dignity respected and taken into consideration.

3) Why does an individual have dignity?

Every individual, regardless of autonomy, has the right to respect for their human dignity. It is inherent to all beings and seeks to protect their bodily integrity, this is the only presupposition for its application within the EU.

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5.3.4 The EU’s Conception of Human Dignity

Drawing the strands together from the constitutional value, right and theoretical conception of respect for human dignity in the EU, it is possible, in the negative sense, to conceive a basic but by no means exhaustive concept of human dignity. It may be formulated as thus:

Human dignity is inherent in all human beings, regardless of nationality, requiring respect for autonomy, psychological wellbeing and bodily integrity throughout their lives. It creates a minimum relationship between one individual to another, shaping not only society and the structure of the state but also the state’s relationship with the individual. It acts as the foundation for all human rights applicable within the EU’s jurisdiction, allowing for the development of existing rights and the creation of new ones. It is pervasive in all human rights, with its precise scope limited only by judicial process and argument. It is most commonly found in issues of equality, discrimination, the loss of liberty and all relationships which allow the state, a private actor or another individual to exercise, or attempt to exercise, influence over an individual, providing a minimum standard of respect regardless of whether the influence is physical or mental.

As it has been established, the unique role of respect for human dignity as a constitutional value and right in the EU legal order means, not only should the value guide the creation of the policy, but also be an enforceable right for any individual affected by the policy. This duality is particularly significant in relation to non-EU citizens, who may enjoy fewer rights under individual Member State legislation, especially in the migration sphere. The readmission process is one which is particularly sensitive for the individuals affected, it involves the transplantation of their life from one state to another, the circumstances of which are often not of their choosing. The conception of human dignity included in this chapter demonstrates this goes beyond the fundamental human rights and freedoms an individual should expect to be observed, to include social and cultural rights. Yet, the readmission process involves an EU Member State and third country which may not be subject to the same human rights obligations. Due to this interaction between a member and non-member, in combination with the reasons which an individual may have had to migrate, means respect for human dignity is more fragile, or open to violation, in the readmission process than in other areas of EU law.

5.4 Respect for Human Dignity and Readmission

The EU readmission process is at its most basic level the return of a non-EU national to their country of origin or a transit country. Having entered the jurisdiction of EU law, rights have been established between the individual and the EU and Member States. Some of these rights are not extinguished upon exit from their jurisdiction, particularly the EU’s obligation to offer protection from torture, inhuman or degrading treatment or punishment upon return to another state, which forms but one
element of the wider concept of respect for human dignity. The readmission process, and the creation of legal obligations, can be likened to the ethical theory of Levinas. In Levinasian ethics, we substitute the returnee for the ‘Other’, jurisdiction for engaging with the face of the Other, which thereby creates obligations between the parties. Most significantly in Levinasian ethics, this responsibility may go beyond their own actions, ‘since the Other looks at me, I am responsible for him, without even having taken on responsibilities in his regard, his responsibility is incumbent on me. It is responsibility that goes beyond what I do’.\(^{212}\) Such responsibility for the Other exists even if the other party tries not to accept it\(^ {213}\). This mirrors the ECtHR’s and CJEU’s jurisprudence on jurisdiction and Member State or Contracting Party responsibility for the treatment which an individual may suffer upon their return to a third country.

Although Levinas offers a moral perspective rather than a legal or political one on human dignity and readmission, applying this ethical framework alongside the established EU concept of human dignity is important due to the fact respect for human dignity is a founding value and shapes the entire development of EU measures including readmission policy. In order to establish how they interact this section will consider the case of EU-Turkey readmission cooperation. In the first instance, how migrants are treated in Turkey, for example, access to suitable working conditions. Second, how returnees from the EU under the EU-Turkey Statement and EU-Turkey RA are treated by the Turkish authorities. As Turkey is an ECHR signatory, the ECtHR jurisprudence is binding, including its use of respect for human dignity. Finally, we must consider the treatment of migrants and returnees in the wider context of Turkish human rights protection.

5.4.1 Turkey’s Regular Migration Framework

In the Turkish legal system, there are two primary sources of law for the governance of migration to Turkey. First, the Law on Foreigners and International Protection\(^ {214}\) and second, the Temporary Protection Regulation\(^ {215}\). There are several types of legal residence in Turkey. A long term resident (eight years) receives the same rights as a Turkish national other than compulsory military service, the right to vote and be elected, public service and the exemption from customs duties when importing vehicles.\(^ {216}\) The humanitarian residence permit, governed under Art.46, allows for one-year residence


\(^{213}\) Ibid, 97.

\(^{214}\) Law No. 6458 of 2013 on Foreigners and International Protection (2013).

\(^{215}\) Temporary Protection Regulation (2014).

\(^{216}\) Law No. 6458 of 2013 on Foreigners and International Protection (2013) art.44.
in Turkey with the possibility of further renewals dependant on the situation in the individual’s country of origin. Due to Turkey’s geographic limitation under the Refugee Convention, it is not possible for non-European (CofE states)\(^{217}\) nationals to be granted refugee status. However, individuals may be granted conditional refugee status, which allows temporary residence until they can be resettled to another state.\(^{218}\) Such a provision cannot be found under the immigration laws of EU Member States, and it is unclear to which countries those with conditional refugee status would be resettled to. Subsidiary protection allows for those who may be in danger from indiscriminate violence in their country of origin, or from treatment which falls below the threshold required for refugee protection.\(^{219}\) It is possible for an applicant for international protection, or a conditional refugee, to apply for a work permit six months after making their claim.\(^{220}\)

The large scale movements, primarily of Syrians, from the Middle East to Turkey has necessitated the use of the temporary protection under the regulation, which allows ‘foreigners who were forced to leave their countries and are unable to return to the countries they left and arrived at or crossed our borders in masses to seek urgent and temporary protection and whose international protection requests cannot be taken under individual assessment’.\(^{221}\) Most importantly, those who receive temporary protection have not received any status defined under the Law on Foreigners, and the associated rights.\(^{222}\) Recipients of temporary protection are housed in temporary accommodation centres\(^{223}\) or, by a decision of the Turkish authorities, allowed to live elsewhere.\(^{224}\) In either instance, where a temporary protection receiver lives is at the discretion of the Turkish authorities. Access to education, health services, employment, social assistance and interpretation is provided,\(^{225}\) but apart from education and emergency healthcare, can be restricted if those eligible do not adhere to all their obligations.\(^{226}\) These obligations include reporting to the authorities, residing in the assigned accommodation, notifying personal changes and any other obligations which may be imposed.\(^{227}\)

\(^{217}\) Ibid, art.3 (1) (b).
\(^{218}\) Ibid, art.62.
\(^{219}\) Ibid, art.63.
\(^{220}\) Ibid, art.89 (4) (a).
\(^{221}\) Temporary Protection Regulation (2014) art.7 (1).
\(^{222}\) Ibid, art.7 (3).
\(^{223}\) Ibid, art.23.
\(^{224}\) Ibid, art.24.
\(^{225}\) Ibid, art.26 (1).
\(^{226}\) Ibid, art.35.
\(^{227}\) Ibid, art.33 (2).
Although Turkish migration law appears to satisfy at least some of the elements of the EU’s concept of human dignity in the negative aspect for example, access to employment and suitable accommodation, there are areas where the law is deficient. Specifically, it is argued here the geographical limitation on access to refugee status is discriminatory as it favours nationals from CofE states over those from the rest of the world. This is regardless of need, for example, it would possible for a Russian and an Afghan to be in identical situations but only one would be able to receive refugee status. This is key in terms of the duration of protection, as forms such as subsidiary or temporary protection need to be renewed by the Turkish authorities on a yearly basis, creating instability in the lives of those residing in Turkey with those statuses. Although all forms of international protection can be revoked for a variety of reasons, or cease, refugee status offers more certainty than most.

5.4.2 Treatment of Migrants

The forms of protection offered to migrants, or rather, the lack of access to refugee status for most of the asylum-seeking population in Turkey results in deficiencies in protection for migrants in Turkey. Furthermore, even if an individual is eligible for protection, there is substantial evidence which suggests an implementation gap exists in Turkey. Such a protection gap is constituted not only in access and content but also in the enforcement of rights.

Although focused primarily on torture, inhuman or degrading treatment or punishment in relation to the coup and domestic political situation, the UN Special Rapporteur’s report of December 2017\(^ {228}\) made observations which affect migrants. The first is the effect on the enforceability of migrant rights, not only in migration law but in other areas of society before the Turkish courts, for example, the expulsion of judges, lawyers and government officials\(^ {229}\) will affect access to justice for migrants in Turkey. Furthering this, the creation of an atmosphere of immunity for the perpetrators of torture, cruel, inhuman or degrading treatment, as detailed,\(^ {230}\) cannot be isolated solely to the criminal justice system. The application of any such behaviours would be in clear violation of the Union’s conception of respect for human dignity. Further concern has been shown by organisations such as the Global Detention Project\(^ {231}\) for the treatment of migrants in immigration detention, or indeed migrants who

\(^ {228}\) United Nations Human Rights Council, ‘Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Turkey’ (18 December 2017) UN Doc.A/HRC/37/50/Add.1.

\(^ {229}\) Ibid, para.101.

\(^ {230}\) Ibid, para.101 (c).

\(^ {231}\) Global Detention Project, ‘Turkey Immigration Detention’ <https://www.globaldetentionproject.org/countries/europe/turkey> accessed 12 March 2018
enter the Turkish justice system, and has been the subject of litigation before the ECHR on Art.3 and 5 ECHR. 232 This is an issue which affects migrants as well as returnees from the EU.

In conjunction with this, other issues exist such as the availability of legal aid funding for migrants to enforce their rights, as well as a lack of migration law practitioners to advise and represent them, issues which have been highlighted since 2015. 233 Apart from the enforcement of their rights, the other categories of concern can broadly be described as those of integration: employment, education, healthcare and political representation. Despite the provision of EU funding, these cannot yet be considered adequate and indeed, the long-term strategy for the integration of refugees and those receiving international protection is unclear. 234 For example, Simsek and Corabatir 235 highlight the lack of freedom of movement for migrants in Turkey once in receipt of international protection, which affects not only integration as a whole but employment opportunities and the means of financial subsistence in particular. 236 Their offered explanation for this relies in part on the absence of the term integration in Turkish law, while further provisions on naturalisation or assimilation through marriage are absent. 237

5.4.3 Treatment of Returnees
Although in theory Turkish law appears to satisfy many of the conditions for the EU’s concept of human dignity, returnees from the EU occupy a different legal space, and doubts have been raised by organisations, such as Amnesty International, as to whether or not Turkey is indeed a state to which the EU should be returning third country nationals and stateless persons, as well as Turkish nationals themselves under the EU-Turkey RA or the EU-Turkey Statement.

232 See cases Charahili v Turkey App no. 46605/07 (ECtHR, 13 July 2010); Z.N.S. v Turkey App no. 21896/08 (ECtHR, 28 June 2010); Abdolkhani and Karimnia v Turkey (no. 2) App no. 50213/08 (ECtHR, 27 October 2010)
236 Ibid, 78-79.
The case of the return of Turkish nationals to Turkey is very much dependent on the political situation following the attempted coup of July 2016, i.e. the specific circumstances of the returnee, their relations with the government etc, which complicates this examination. There is clear evidence those individuals considered to be enemies of the state, or co-conspirators or supporters of the coup are at enhanced risk of suffering torture, cruel, inhuman or degrading treatment or punishment in contravention of Turkey’s legal obligations in comparison to those who do not fall into the same political groupings. However, EU Member States have demonstrated an awareness of this situation, in both the examination of asylum requests/return decisions as well as in their responses to extradition requests from Turkey.\(^{238}\)

The return of third country nationals and stateless persons engages different concerns from those towards Turkish nationals. Apart from potential detention in Turkey, as well as the issues affecting all migrants, there is the possibility of onward returns from Turkey. Indeed, this possibility was raised by the applicants in the cases of NF, NG and NM v European Council. This possibility can be separated into two parts: first, the onward return of individuals to states with EURAs (such as Pakistan); and second, onward return to states which the EU does not (e.g. Iran).

Such chain refoulement would primarily engage Turkey’s legal responsibilities not to return, however, it may also engage the EU’s responsibilities where there is a clear risk of an onward movement to a state where they face a serious risk of treatment in contravention of their rights under the ECHR or EU law. There is evidence suggesting the Turkish authorities had previously engaged in push-back operations across the Turkish border to Syria.\(^{239}\) Indeed, Amnesty International has a body of evidence that the recent state of emergency in Turkey depleted the protection against refoulement of refugees, including Syrians who could potentially be returned to Turkey under the EU-Turkey Statement, including collective expulsions.\(^{240}\)


5.4.4 Implications of EU Readmission Policy on Human Dignity

The examination of EU readmission policy, and its application to Turkey in particular, raise numerous points which affect how the EU’s conception of respect for human dignity operates. First, it is clear from the examination above not all elements of the EU’s definition are met in the readmission process to Turkey. The treatment migrants, or returnees from the EU, receive suffers from an implementation gap in several different areas. However, it must be recognised in the area of economic and social rights, there are caveats at the UN level which mean Turkey may not be expected to provide such freedoms or opportunities as those in the EU Member States, which may rely upon different economic or societal values and priorities. This does not resolve the implementation gap as, if the Turkish government has seen fit to include such rights in its legislation it should also ensure they can be manifested.

The implementation gap in Turkish legislation highlights a second characteristic of the EU’s value of respect for human dignity: the difficulty in exporting the value through external relations. At a certain level, the EU and Turkey share the same definition of the value as they both draw upon the ECHR and the CoFE, however, beyond this they begin to diverge due to the other sources which the EU relies upon. The difficulty in exporting the EU’s conception is not only one of definition but also enforcement. Although human dignity explicitly appears in the Turkish Constitution, it is clear from the examination above the value is not completely enforceable for migrants and returnees, restricted by access to lawyers, courts and legal aid. The avenues to litigate human dignity are more restricted in Turkey than in EU Member States. A consequence of this is arguably the links between human dignity and human rights are stronger or more significant in readmission policy than other areas where a wider range of protection options are available.

Extrapolating beyond the example of Turkey, the EU’s readmission policy, in its interactions with the EU’s conception of respect for human dignity, requires a closer link between procedural rights and human dignity. This is particularly the case in instances of accelerated procedures. Furthermore, a distinction can be made between own nationals and third country nationals. It can be assumed an own national can be readmitted and reintegrated into their own society, culture, language etc more easily than a third country national in a transit state. This may have a profound impact on respect for human dignity, with such a range of potential differences between the two groups. Respect for human dignity in the readmission process should seek to mitigate these potential differences in treatment to as great a degree as possible. This, alongside the strengthening of respect for human dignity and congruence of the readmission process with it, may be accomplished by the inclusion of a human

dignity clause in EURAs. A clause which, it will be proposed, goes further than the non-affection clauses currently included, which require the third country to have ratified or be party to various human rights instruments, with differing enforcement mechanisms and levels of applicability. This may have the further advantage of allowing the EU to further export its values in its external relations.

5.5 Conclusions

The EU’s conception of human dignity operates at the two levels of a constitutional right and a constitutional value, forming one of the founding values under Art.2 TEU. In comparison to the other founding values of human rights, democracy, the rule of law, freedom and equality, the EU’s conception of human dignity is difficult to identify in the positive sense. Such difficulty is reflected not only in the EU’s own conception, but also in the sources upon which it draws.

In the first instance, respect for human dignity acts as general principle of EU law, drawing upon the constitutions of its Member States. Focusing on those states with written constitutions and express references to human dignity, it is possible to recognise not only when the constitutions were created, but also common themes or areas in which human dignity operates. Despite occupying the same geographical space and sharing similar historical developments over the past 100 years, this chapter has identified differences between Member States towards human dignity. For example, several Member States place an emphasis on the role of human dignity in the fulfilment of economic and social rights, whereas others expressly refer to it only on matters pertaining to human rights such as deprivation of liberty and conditions of detention. Furthermore, there are the international bodies and treaties to which the Member States are signatories/members, primarily the UN and CoFE.

Although the EU draws upon respect for human dignity as expressed in the sources examined in this chapter, the CJEU has emphasised the EU’s conception is separate, but related. As a result, the jurisprudence of the CJEU in relation to the rights under Title I CFR holds greater significance as, in conjunction with the Treaties, these are the only EU sources upon which to draw a form of definition. Although relying on a negative definition of the conception, it is proposed for the EU, respect for human dignity means:

Human dignity is inherent in all human beings, regardless of nationality, requiring respect for autonomy, psychological wellbeing and bodily integrity throughout their lives. It creates a minimum relationship between one individual to another, shaping not only society and the structure of the state but also the state’s relationship with the individual. It acts as the foundation for all human rights applicable within the EU’s jurisdiction, allowing for the development of existing rights and the creation of new ones. It is pervasive in all human rights, with its precise scope limited only by judicial process and argument. It is most commonly
found in issues of equality, discrimination, the loss of liberty and all relationships which allow the state, a private actor or another individual to exercise, or attempt to exercise, influence over an individual, providing a minimum standard of respect regardless of whether the influence is physical or mental.

Such a conception cannot be separated from the wider normative construction of human dignity, and subject to current discourse. Although this chapter does not seek to provide a ‘catch-all’ or a definitive outline of the concept, it is clear human dignity is difficult to define in a positive sense, which impacts its justiciability. As highlighted by CJEU jurisprudence, Art.1 CFR is not commonly relied upon as the sole ground of litigation, relying instead on the manifestation of respect for human dignity through other rights such as protection from torture, inhuman or degrading treatment or punishment among others. However, the EU’s conception may act as a useful judicial tool for judges, mirroring its use by the judges of the ECtHR to further develop new rights or indeed create new ones.

Applying the EU’s conception of human dignity to readmission policy raises issues which, although not redefining the concept, suggest human dignity requires a more nuanced and flexible approach when applied. Due to the nature of readmission, procedural rights are more significant in the protection of the individual than relying purely on human rights. For example, access to legal assistance. This flexible approach recognises the discourse as to whether human dignity is a concept which we should seek to define, since, through definition it may lose some of its usefulness. In conjunction with the difficulties in reaching a definition, this chapter has demonstrated the limited exportability of human dignity from the EU.

Although it is a universal concept, its recognition as a justiciable right is not. This limitation prompts two further observations. First, it is difficult to ascertain the EU’s commitment to respect for human dignity in its readmission policy because of the difficulties of defining it. This is particularly so in comparison to respect for human rights. Although Turkey is a member of the CoE, and a signatory of the ECHR, as the Convention does not refer to human dignity, it is more difficult for the EU, and indeed individuals, to challenge Turkey’s treatment of migrants and returnees on the grounds of human dignity. Second, the extent to which the EU’s readmission policy is congruent with respect for human dignity is dependent upon which agreement/arrangement is being assessed as the treatment of returnees relies not only on their personal circumstances but also the key distinction between own nationals and third country nationals and stateless persons.
Chapter 6: Human Rights and Readmission

In the preceding chapter, we examined the relationship between readmission and human dignity. However, it is in the area of human rights where we may observe the strongest relationship between the founding values and readmission policy. It is here where the values of respect for human dignity, freedom, equality, democracy and the rule of law are codified in a form which makes them accessible for those who face return from the EU to a third country, creating binding obligations upon Member States, and providing appropriate means through which their decisions can be challenged.

The readmission process entails the creation of rights and obligations among different parties, moving beyond the Member State-Individual relationship to include Member State-Third Country and Third Country-Individual interactions. Such a situation entails a transition from one jurisdiction to another, one which may not offer the same level of protection. In the framework of Levinasian ethics, respect for human rights engages with the substance of the obligations the EU and Member States owe to the ‘other’, how those obligations are interpreted and enforced. However, moving between legal jurisdictions does not extinguish the moral obligations on Member States or the Union. The level of protection afforded throughout the process may be inconsistent for several reasons. EU influence over third countries is limited, particularly in human rights. Under Art.3(5) TEU, the EU is committed to the protection of human rights in its external relations, including states which it has EURAs or political arrangements. Furthermore, Art.8(1) TEU states the EU will create special relationships with neighbouring states based on its founding values, including human rights. As geographical proximity is one of the criteria for identifying states for EURAs, there is a strategic link between exporting human rights and readmission policy.

Although EURAs refer to human rights, there are questions over the ability and willingness of the EU to enforce them. This is important as returnees are caught in a balancing act between political expediency on behalf of Member States and third countries, exacerbated by domestic political considerations, and their human rights commitments. Readmission obligations potentially create legal and political pressures, particularly for the Requested State as the return of third country nationals may affect their relations with third countries. As a result, third countries often, in some cases with EU encouragement, conclude RAs with other countries, leading to the creation of what will be termed

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1 See Chapter One.
the ‘Readmission Network’; this can create further political and legal distance between the Member States’ initial return act and what happens to an individual once they arrive in a third country.

These considerations presuppose the EU’s commitment to respect human rights. As an area of shared competence, we are concerned with EU and Member State commitments, commitments which are not necessarily shared. As the level of irregular migration to the EU has ebbed and flowed, EU and Member States focus excessively on effective returns, relegating human rights to a secondary concern. Furthermore, although the EU seeks to export respect for human rights, it cannot guarantee its successful transfer into a third country’s domestic legal system. Therefore, there are limits as to how effective such measures could be.

As well as the normative question as to what extent the EU is committed to respecting human rights in its readmission policy, this chapter also seeks to set out the EU’s conception of human rights, the sources upon which a returnee may draw to protect their rights, the appropriate judicial venue for enforcement as well as the rights which may be engaged following return.

The structure of the chapter is as follows: first, it will examine applicable customary international human rights obligations and, primarily, protection from refoulement. Although this right also exists in other sources, it is important to understand how non-refoulement operates as custom as it provides a base applicable to all actors in the readmission process. In addition, obligations stemming from international conventions will also be considered. The two primary sources being the Refugee Convention\(^3\) and CAT.\(^4\) Combining these two levels of human rights protection will address the question of how the EU interacts with sources of rights to which it is not a signatory. This draws upon general principles of EU law as well as CJEU jurisprudence on the integration and application of international law to EU measures and agreements.

The second question is the application of ECHR\(^5\) rights and ECtHR jurisprudence to the EU and Member States. Although the EU is not a signatory, the Convention enjoys a special status within the EU’s legal order, recognised as a source of EU law and part of its general principles, with the Luxembourg and Strasbourg Courts enjoying an especially close relationship. This section will begin with an examination of applicable ECHR rights, before moving to the ECtHR’s jurisprudence. The question of jurisdiction

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\(^4\) Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT).

will also be considered, which would affect the ability of returnees to launch legal proceedings against the EU or Member States to enforce their Convention rights. The third question contained in this chapter concerns the rights under the CFR. Although Charter rights correspond to those contained in the ECHR, such rights act as the minimum level of protection, therefore leaving open the possibility that the CJEU may go further or in a different direction to the ECtHR. Within this, the CJEU’s jurisprudence on returns and the interpretation of applicable rights will be considered.

Having established the EU’s understanding of human rights, this chapter will examine two aspects of readmission. First, with a focus on non-refoulement, the creation and implementation of the EURAs through the Readmission Network. This aspect involves an examination of the third countries with which the EU has EURAs or political arrangements, as well as states which these third countries have concluded their own RAs. It will be argued the expansion of the Readmission Network leaves returnees open to the possibility of chain refoulement.

The second aspect is the human rights protection provided in the text of EURAs, primarily in the form of non-affection clauses. However, it will be argued these are insufficient, rather than providing any rights, the clauses state EURAs will not affect the rights available under the listed international instruments. Furthermore, it will be argued this approach is over-reliant on the commitment of third countries to uphold such rights. It will be proposed that an additional clause should be included which would provide an avenue of legal challenge for breaches of human rights during the readmission process as well as upon arrival in the third country.

6.1 The EU and International Law

The sui generis nature of the EU means it enjoys a unique relationship with international and customary international law. As stated in Art.3(5) TEU, the EU is committed to ‘the strict observance and the development of international law’. However, it is not party to international conventions applicable in the readmission context, such as the Refugee Convention. As it cannot rely on being a signatory, the EU instead applies different principles to integrate international legal obligations into its legal order.

6.1.1 The EU and Customary International Law

Customary international law, defined in the Statute of the International Court of Justice as ‘a general practice accepted as law’,⁶ is binding upon the EU as a supranational organisation exercising legal personality under Art.47 TEU. Of the customary international law principles applicable to readmission,

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⁶ Statute of the International Court of Justice (1946) art.38(1)(b).
it is protection from refoulement\(^7\) (return to a state in which they may face harm or a threat to their life or freedom) which is most pertinent.

As binding international practice, its application is twofold. First, the obligation to protect individuals from refoulement is binding when returning individuals to their country of origin or transit. However, just as significantly, it is also binding upon the Requested State. This increases in importance where overlapping international instruments are not available or enforceable.

As Konstadinides observed, the EU appears to apply a dualist and monist approach to international law;\(^8\) dualist when concerned with international treaties, monist on the integration of customary international law.\(^9\) Further to customary international law, the EU is also bound by international conventions which ‘codify general rules recognised by international custom’\(^10\) despite not being a signatory. In respect of this, the CJEU has considered its applicability in *Opel*,\(^11\) *Racke*\(^12\) and *Vinkov*.\(^13\) Therefore, although non-refoulement applies to the EU as custom, it is not the most effective form of protection as it lacks the precision of the relevant international conventions in which it is codified.

6.1.2 The EU and UN

The application of international treaty law to the EU may be divided into three parts: (1) treaties to which it is a party in its own right, (2) treaties to which it is not a party but are binding through Member States and general principles of EU law and, (3) treaties which enjoy a ‘special’ or ‘raised’ status in the EU legal order through express references in primary or secondary law, or CJEU jurisprudence.

In the first category, the EU is signatory to one international human rights treaty, the CRPD,\(^14\) which has limited applicability to readmission due to its precise subject matter. It does, however, commit


\(^9\) Ibid, 513-516.

\(^10\) Case C-286/90 *Poulser* [1992] ECR I-06019, [10].


\(^12\) Case C-162/96 *Racke v Hauptzollamt Mainz* [1998] ECR I-03655, [45]-[46].

\(^13\) Case C-27/11 *Vinkov* [2012] 3 C.M.L.R. 22, [33].

the EU to ensure all disabled persons are able to realise their rights free from discrimination on the
grounds of disability.\textsuperscript{15}

Second, we can identify different instruments, including the UDHR,\textsuperscript{16} ICCPR\textsuperscript{17} and ICESCR\textsuperscript{18} as containing applicable rights. The most pertinent right under these two covenants is freedom from torture, cruel, inhuman or degrading treatment or punishment contained in Art.7 ICCPR. As set out in \textit{International Fruit Company},\textsuperscript{19} where the EU has assumed the competence of Member States in an area in which they were previously bound by an international agreement, the provisions of the international agreement are binding on the EU.\textsuperscript{20}

In the third category, there are two international instruments which have an elevated status above the treaties which have previously been referred to: Refugee Convention and CAT.

6.1.3 The EU and the 1951 Refugee Convention and 1967 Protocol

The Refugee Convention/Protocol is one of two international instruments which are expressly referenced in the Treaties (the other being the ECHR). Under Article 78(1) TFEU:

‘The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties’.

Therefore, the Refugee Convention is binding across the totality of EU asylum law, including, as defined in Art.78(2)(g) TFEU, cooperation and partnership with third countries. The rights contained within are only applicable to those individuals prescribed in the Convention and Protocol. In respect of readmission policy, we can narrow the applicability of the Refugee Convention to three provisions. First, the treatment of refugees unlawfully in the country of refuge under Art.31(1), prevents imposing

\textsuperscript{15} Ibid, art.4(1).
\textsuperscript{16} UN General Assembly, \textit{Universal Declaration of Human Rights} (10 December 1948).
\textsuperscript{17} \textit{International Covenant on Civil and Political Rights} (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).
\textsuperscript{19} \textit{Joined Cases 21 to 24/72 International Fruit Company and Others v Produktschap voor Groenten en Fruit} [1972] ECR 1219.
\textsuperscript{20} Ibid, [18].
penalties on individuals ‘coming directly from a territory where their life or freedom was threatened...enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence’.

This provision prevents penalisation of refugees who enter a territory irregularly, yet, they represent only one group of people among many who find themselves irregularly present or resident in the territory of Member States and who would ordinarily be subject to readmission. Second, Art.32 prevents the expulsion of refugees who are regularly present in the territory of the party.

The third provision, and most significant, is the prohibition of refoulement under Art.33, which prevents the expulsion or return of a refugee to another state in which their life or freedom would be threatened based on religion, race, political opinion, nationality or membership of a social group. This provision is the clearest example of how the customary law principle of non-refoulement is codified. As with the rest of the Convention, its scope and applicability are limited to those who qualify as a refugee.

As argued by Tomuschat, the EU has sought to go beyond the protections provided by the Refugee Convention through its application in secondary legislation. The Qualification Directive applies the provisions of the Refugee Convention, including protection from refoulement under Art.21. Likewise, the Return Directive also contains references to the Refugee Convention and respect for non-refoulement in its application.

The relationship between the EU and Refugee Convention was considered by the CJEU in M.M, in which the Court noted all Member States were signatories of the Convention and the Protocol yet the EU was not; the right to asylum was however guaranteed under Art.78 TFEU and the Charter ‘with due respect’ to the Convention.

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22 Ibid, 618.


26 Ibid, [8].
6.1.4 The EU and CAT

Under the reference to ‘other relevant treaties’ in Art.78(1) TFEU we may include CAT, which is wider in scope than the Refugee Convention, as its application is not restricted to a category of persons. Instead, the prohibition of refoulement under Art.3 CAT is applicable to any person ‘where there are substantial grounds for believing that he would be in danger of being subjected to torture’, with torture having a substantial definition under Art.1(1). What is arguably significant for returnees is Art.3(2) CAT, which sets out how states determine the risk of torture in a receiving state, including ‘a consistent pattern of gross, flagrant or mass violations of human rights’. Comparing non-refoulement in CAT and the Refugee Convention, Weissbrodt and Hörtreiter argue there are several key differences in how non-refoulement is defined which may create advantages for returnees. For example, an individual relying on CAT does not have to set out a specific reason why they would potentially be at risk of being tortured if returned to another state, whereas the Refugee Convention would require them to set out and evidence the relevant persecution characteristic. Furthermore, there are exceptions under the Refugee Convention, whereas the prohibition under CAT is absolute. These considerations confirm the argument returnees are faced with a choice of legal instruments on which to rely for their right to non-refoulement, each encompassing different categories of person and the nature of the treatment they may face in the third country.

The link between EU migration law and CAT was outlined in MP, concerning the return of a Sri Lankan national from the UK to Sri Lanka and his eligibility for subsidiary protection under the Qualification Directive. It was submitted that the appellant was unable to return to Sri Lanka based on his medical condition and access to treatment, as well the potential deterioration in his condition if returned. The appellant had previously been tortured in Sri Lanka. In its interpretation of the Qualification Directive and Art.4 CFR, the Court relied upon three articles contained in CAT. Reference was made to Art.1 and 2 CAT, but the most referenced was Art.14, which requires signatories to ensure their legal system provides redress to torture victims. The most interesting aspect of the Court’s reasoning is the comparison between the objectives of the Qualification Directive and CAT, with reference to the

27 CAT (n 4) art.3 (1).
30 Ibid, 16.
31 Case C-353/16 MP v Secretary of State for the Home Department [2018] 1 W.L.R. 5585.
32 Definition of torture and the obligation upon public authorities to prevent torture occurring in their territory.
Preamble and Art.2. It is argued this moves the CJEU’s treatment of CAT from the mere application of provisions to an interpretation of its objectives. This suggests the CJEU considers itself to be in position to interpret the objectives despite not being a signatory, and able to exercise some level of jurisdiction over its application. It is the role of the UN and Committee against Torture to offer interpretations of its provisions. This therefore suggests a closer relationship between the CAT and the EU than between the Union and other international instruments.

Due to the EU only being a signatory to one international convention, the majority of international human rights which pertain to readmission are applicable through general principles of EU law or customary international law. Among the range of applicable instruments, it is the Refugee Convention and CAT which have an enhanced status, either through their interpretation in secondary AFSJ legislation, or the CJEU’s reliance on them as an interpretative tool. Combined, they provide a base level of human rights protection in the EU; however, many of the protections, such as non-refoulement and the right to asylum, are duplicated in other instruments which may be preferable to a returnee.

6.2 The EU and ECHR

In comparison to other international instruments, the ECHR and ECtHR have a unique relationship with the Union. The Convention is the foremost human rights instrument in continental Europe, one to which every Member State is a party, with accession being a requirement for candidate EU states. Through its interpretation of the Convention, the ECtHR has arguably created the most prominent and detailed body of human rights jurisprudence, spanning primarily civil and political rights. Yet, the relationship between the EU and the ECHR is complex and composed of a range of different strands. Its application to readmission policy further complicates the situation due to the different roles played by the Member States and EU. As set out in the Return Directive, it is for Member States to make return decisions, the act of return is then facilitated by EURAs. From the perspective of an individual, the delineation between the decisions of Member States and the role of the EU is not always clear.

The relationship between the two, from the EU side, is governed primarily through Art.6 TEU, which sets out several aspects of the relationship. First, ECHR rights form part of the general principles and, second, the EU will accede to the ECHR. The third, and arguably most significant strand is the CFR

33 Ibid, [55].
34 TEU (n 2) art.6(3).
35 Ibid, art.6(2).
has the same legal value as the Treaties, the significance being that a number of the rights contained in the CFR correspond directly to the same rights contained in the ECHR and their accompanying ECtHR interpretation. This aspect of the CFR helps to partly bridge the gap created by the EU not being a party to the ECHR. In order to examine the EU-ECHR relationship we must begin with the extent the ECtHR exercises jurisdiction or engages with EU acts.

6.2.1 The ECtHR Reviewing EU Measures

As a non-contracting party, the EU is not subject to the obligation under Art.1 ECHR to respect human rights, ECtHR jurisdiction under Art.32, nor the territorial application provisions of Art.56 ECHR. These provisions instead apply to the Member States. However, the ECtHR has on several occasions had cause to examine Member State applications of EU law, forming part of the ECtHR’s jurisprudence concerning human rights protections of international organisations outside of its jurisdiction, but whose measures are applied by contracting parties.

In this area, a key case is Bosphorus, which concerned Ireland’s application of a UN Security Council Resolution against Yugoslavia which was implemented via an EU regulation. The requirement to implement the regulation led to Ireland impounding a Yugoslavian-registered aircraft which was on lease to a Turkish airline. As the Court stated, it ‘recognised the growing importance of international cooperation and of the consequent need to secure the proper functioning of international organisations’. In addition to this:

‘The Convention does not, on the one hand, prohibit Contracting Parties from transferring sovereign power to an international organisation in order to pursue cooperation in certain fields of activity. Moreover, as the holder of such transferred sovereign power, that organisation is not itself held responsible under the Convention...as long as it is not a Contracting Party’.

Yet, Contracting Parties are still responsible under the Convention even where implementing a measure of an international organisation. In order to resolve this, the Court created the equivalent protection presumption; where an international organisation’s human rights protection is at least equivalent to those provided under the Convention, the actions of a Contracting Party to comply with

36 Ibid, art.6(1).


38 Ibid, [150].

39 Ibid, [152].

40 Ibid, [153].
an act or measure of said international organisation are presumed to be compliant with their ECHR obligations. An act or measure of said international organisation are presumed to be compliant with their ECHR obligations. Such a presumption can be rebutted in the situation of a ‘manifest deficiency’ in the protection of rights. In the Court’s opinion, the EU’s human rights standards, and enforcement mechanism through the CJEU, were sufficient for the EU’s rights protection to be considered equivalent to those provided for under the Convention.

However, in *Michaud*, the ECtHR rebutted the presumption of comparable protection. The Court recognised that since *Bosphorus*, Art.6 TEU had elevated the CFR to the same status as the primary treaties, as well as cementing fundamental rights resulting from the ECHR and Member State constitutions as general principles. However, in rebutting the equivalence of protection, the Court distinguished *Michaud* from *Bosphorus* on two grounds. First, France was implementing a directive, which therefore allowed France a ‘margin of manoeuvre’ in complying with its obligations, and, second, EU enforcement mechanisms had not been fully utilised. In particular, the Conseil d’Etat did not request a preliminary ruling from the CJEU, even though the Court had not considered the question before. As the Court stated, this meant ‘the Conseil d’Etat ruled without the full potential of the relevant international machinery for supervising fundamental rights – in principle equivalent to that of the Convention – having been deployed’. This does not mean it is a requirement for the CJEU to rule on every issue in order offer equivalent protection, rather, it can do so where it is appropriate, such as where the Court has not interpreted a particular provision or measure. As well as being an instance in which a manifest deficiency was found, the ECtHR in *Michaud* clarified ‘equivalent’ protection means comparable protection, not identical.

The ECtHR further clarified aspects of the equivalent protection regime in *Avotins*, which concerned an alleged violation of Art.6(1) ECHR. In its examination of whether the EU offered equivalent rights protection, the Court referenced Art.52(3) CFR, which states that where CFR articles correspond to the ECHR, the meaning and scope of those CFR rights are the same as those under the Convention.

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41 Ibid, [155]-[157].
42 Ibid, [156].
43 Ibid, [159]-[165].
46 Ibid, [113].
47 Ibid, [114].
48 Ibid, [115].
49 Ibid, [103].
50 *Avotins v Latvia* (2017) 64 EHRR 2.
Referring back to the *Michaud* criteria, the Court established the EU did provide equivalent protection.\(^{51}\) In considering whether this could be rebutted, on the issue of discretion, the Court found, in examining a mutual recognition mechanism created under the Brussels I Regulation, that it must ensure that it did not ‘leave any gaps or particular situation which would render the protection of the human rights guaranteed by the Convention manifestly deficient’.\(^{52}\)

Specific to EU migration policy, the ECtHR has heard arguments on related regulations and directives. In *M.S.S.*,\(^{53}\) the Court was asked to examine a transfer under the Dublin Regulation between Belgium and Greece, with the applicant submitting, due to the detention conditions in Athens airport and general living conditions in Greece, the Belgian authorities’ decision to return him to Greece was contrary to Art.2 and 3 ECHR, and conditions in Greece breached Art.3 ECHR, which the Court accepted. As part of its deliberations on the responsibilities of Belgium under Art.2 and 3 ECHR, the Court relied on the *Bosphorus* principle as Belgium was applying the procedures contained in Dublin II.\(^{54}\) Although the Court accepted the EU’s human rights protections were equivalent to the Convention,\(^{55}\) it ruled Belgium was afforded sufficient discretion (it could have examined the asylum application itself) under the Regulation for the applicant’s return to Greece not to fall within Belgium’s international obligations under EU law, meaning Belgium was responsible under the Convention.\(^{56}\)

Not only did the case turn on the conditions which the applicant would have encountered on return, but also his ability to access asylum procedures in Greece, with a fear of direct or indirect refoulement back to Afghanistan via Turkey. The Court described the prospect of refoulement from Greece to Turkey as a ‘constant concern’, with evidence that returnees from Greece to Turkey had indeed been refouled to Afghanistan without an examination of their asylum claims.\(^{57}\)

These cases, taken together, demonstrate the importance of the instrument through which the challenged measure has been applied, particularly when assessing the margin of manoeuvre. Furthermore, it demonstrates the important role of the ECtHR in interpreting, overseeing and

\(^{51}\) Ibid, [106]-[112].

\(^{52}\) Ibid, [116].

\(^{53}\) *M.S.S. v Belgium and Greece* (2011) 53 EHRR 2.

\(^{54}\) Council Regulation No 343/2003/EC of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L50/1.

\(^{55}\) *M.S.S. v Belgium and Greece* (2011) 53 EHRR 2, [338].

\(^{56}\) Ibid, [339]-[340].

\(^{57}\) Ibid, [192].
enforcing EU law. These aspects together have two implications for EU readmission policy, the first being the initial return decision is taken under the Return Directive, therefore affording Member States a margin of manoeuvre to the same degree as in *Michaud*. In the same vein, it can be argued EURAs restrict the margin of manoeuvre of Member States when applying the provisions of such agreements, which would then lead the ECtHR to examine, depending on the article an appeal was relying upon, the protections and processes contained in the EURA. The second implication is the requirement that the full machinery of human rights protection be applied. The CJEU has thus far only examined aspects surrounding readmission, either the legislative basis for the inclusion of readmission obligations within a mixed agreement or the EU-Turkey Statement. It has not given any ruling on the substance of an EURA. As a result, it must be presumed that in order to satisfy the *Bosphorus* presumption, any challenge relating to an aspect of an EURA before a domestic court would require a reference for a preliminary ruling to the CJEU in order to satisfy the ECtHR that the EU’s rights protection was equivalent.

6.2.2 Applicable ECHR Rights
An examination of the readmission process reveals that, among the Convention rights, four are directly applicable, the most pertinent being Art.3, followed by Art.2, Art.4 of Protocol No.4 and Art.1 of Protocol No.7. It is possible other rights may be relied on in order to prevent returns in limited circumstances.

6.2.2.1 Article 3 ECHR
Art.3 ECHR states ‘no one shall be subjected to torture or to inhuman or degrading treatment or punishment’ and is the most often relied upon right to challenge the return of individual to a third country and represents one of the ‘fundamental values of the democratic societies making up the Council of Europe’. Before proceeding to examine how this right has been applied, we must consider the Court’s interpretation of ‘torture’, ‘inhuman’ and ‘degrading’ treatment or punishment, with the primary authority being *Ireland v United Kingdom*. The Irish Government alleged a breach of Art.3 and 5 ECHR in relation to the conduct of the UK in Northern Ireland during the early 1970s. The Court was required to differentiate between torture, inhuman and degrading, finding the primary determinate was the intensity of the suffering. On inhuman treatment, the Court observed the five techniques applied by UK armed forces were premeditated, lasted for hours and caused ‘if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also

58 For example, *N v Finland* (2006) 43 EHRR 12, [160].
59 *Ireland v United Kingdom* (1979-80) 2 EHRR 25.
60 Ibid, [167].
led to acute psychiatric disturbances during interrogation’ and therefore constituted inhuman treatment.\textsuperscript{61} The degrading element was ‘they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance’.\textsuperscript{62} On torture, the Court reasoned a ‘special stigma’ is attached to it and found the five techniques constituted inhuman and degrading treatment rather than torture.\textsuperscript{63} Therefore, Art.3 ECHR is hierarchical in terms of severity, with torture at the top.

For treatment to fall within the three categories, the suffering must reach a minimum level of severity, determined by the circumstances of the case as well as the characteristics of the individuals involved.

Having set out the definitions of the terms contained in Art.3 ECHR; the question is how a Contracting Party’s jurisdiction is engaged when returning an individual to a third country. The case of Soering,\textsuperscript{64} concerning the extradition of a German national from the UK to the USA, is a key authority on how such state responsibility is engaged. While the Court acknowledged the UK possessed no control over the Virginia authorities, and the potential exposure to the death penalty, this did not exhaust the UK’s obligations.\textsuperscript{65} In seeking to interpret Art.3, the Court relied upon the nature and objective of the Convention and the need to interpret it within ‘the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of the democratic society’.\textsuperscript{66} Making reference to Art.3(1) CAT, the Court suggested such protections preventing the expulsion, return or extradition of an individual to a state where they may be in danger of torture is inherent in Art.3 ECHR.\textsuperscript{67} In conjunction with this, the Court ruled:

‘It would hardly be compatible with the underlying values of the Convention, that “common heritage of political traditions, ideals, freedom and the rule of law” to which the preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture... would plainly be contrary to the spirit and intendment of the Article, and in the Court’s view this inherent obligation not to extradite also extends to cases in which the

\textsuperscript{61} Ibid.
\textsuperscript{62} Ibid.
\textsuperscript{63} Ibid [167]-[168].
\textsuperscript{64} Soering v United Kingdom (1989) 11 EHRR 439.
\textsuperscript{65} Ibid, [86].
\textsuperscript{66} Ibid, [87].
\textsuperscript{67} Ibid, [88].
fugitive would be faced in the receiving state by a real risk of exposure to inhuman or degrading treatment or punishment’. 68

Having established such an obligation, the Court included a threshold, requiring a ‘real risk’ of treatment or punishment in contravention of Art.3 ECHR, and as a result ‘involves the assessment of conditions in the requesting country against the standards of Article 3 ECHR’. 69 Although this case concerned extradition, Cruz Varas 70 confirmed the same principles apply to expulsion. 71 In addition, Cruz Varas states that, in order to assess the risk to an individual in the receiving state ‘must be assessed primarily with reference to those facts which were known or ought to have been to the Contracting State at the time of the expulsion’, although it may also take into account information received after the expulsion decision. 72 It is important to recognise that the ‘real risk’ does not have to stem from public authorities; rather, it can originate from individuals and groups. 73 In such circumstances, the question for the Court then becomes the applicant’s ability to seek protection and redress from such a threat. 74

The risk assessment is comprised of two elements, first, an examination of the general situation in the receiving state and second, the specific circumstances of the individual. 75

On the general situation in the receiving state, the Court has been reluctant to find a general situation sufficient to prevent expulsions. In Vilvarajah, 76 concerning the return of Sri Lankan nationals to Sri Lanka from the UK, the UK submitted that when assessing whether the general situation is sufficient to prevent return, a balance needs to be struck between individual rights and ‘the general interest of the community’. 77 The UK feared that, by allowing the general situation in Sri Lanka to prevent returns, it would allow ‘the entry of a potentially very large class of people with the attendant serious social

68 Ibid.
69 Ibid, [91].
70 Cruz Varas v Sweden (1992) 14 EHRR 1.
71 Ibid, [70].
72 Ibid, [76].
73 HLR v France (1998) 26 EHRR 29, [40].
74 See Abdolkhani and Karimnia v Turkey App no 30471/08 (ECtHR, 22 September 2009).
75 See Sufi and Elmi v United Kingdom (2012) 54 EHRR 9, [216].
77 Ibid, [105].
and economic consequences’. 78 While the Court recognised the situation in Sri Lanka, it ruled the ‘mere possibility’ of suffering in contravention of Art.3 is not sufficient to prevent return. 79

SHH 80 prescribes the circumstances in which the Court would consider a general situation to be enough to prevent return. Regarding the return of an Afghan national from the UK, it was ruled the general situation approach applies ‘only in the most extreme cases of general violence, where there was a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return’. 81 Such a finding was reached in two key cases on return: Sufi and Elmi 82 (Somalia) and L.M. 83 (Syria). Although the principle was applied in Sufi and Elmi, the Court considered three different possibilities. First, it found the general situation in Mogadishu was sufficiently severe that a returnee would face a real risk of suffering treatment in violation of Art.3. It then considered the UK’s submission that internal flight was possible and found this was contingent on the characteristics of the returnees (family connections) and was not open to the returnees. Third, it heard evidence on the condition of refugee and IDP camps in Somalia and found these would also violate Art.3. 84 Therefore, the ruling was a partial prohibition on returns to Somalia. In L.M., the Court, relying on Sufi and Elmi, found the general situation in Syria to be sufficient to constitute a violation of Art.3. 85 An interesting aspect of the approach in L.M. was the recognition that the reason why a return to Syria had not appeared before the Court was due to most Contracting Parties not returning Syrians to Syria, 86 which in itself indicates the severity of the violence in the country and of the unusual course of action pursued by the Russian authorities. In substantiating the general situation in the receiving state, the Court is not reliant solely on the submissions of the Contracting Party and appellant, but also those of relevant international organisations and other governments. 87

Where the general situation in a third country is not considered to be severe enough to prohibit return, the Court must examine the individual characteristics which may give rise to a substantial and real risk that they may be subject to treatment in contravention of Art.3. Where the applicant submits

78 Ibid.
79 Ibid, [111]-[116].
80 SHH v United Kingdom (2013) 57 EHRR 18.
81 Ibid, [73].
82 Sufi and Elmi v United Kingdom (2012) 54 EHRR 9
83 L.M. and Others v Russia App no 40081/14, 40088/14 and 40127/14 (ECtHR, 15 October 2015).
84 Sufi and Elmi (n 82) [219]-[312].
85 L.M. (n 83) [123]-[126].
86 Ibid, [123].
87 Saadi v Italy (2009) 47 EHRR 17, [131].
s/he is a member of a particular group which is subject to ill-treatment, the applicant is only required to show s/he are a group member, and the group is indeed exposed to such treatment. It is this second type of case which forms the majority of Art.3 expulsion cases and the Court has considered expulsions to countries ranging from Kazakhstan, Iraq, Iran, Turkmenistan and Uzbekistan to Eritrea, the Democratic Republic of Congo and Algeria. As each case turns on the circumstances of the returnee, such cases may have limited applicability beyond the initial time-frame in which they were decided. As the Court ruled in Salah Sheekh, a full and ex nunc assessment is called for as the situation in a country of destination may change in the course of time. Although the current situation is the key factor in the Court’s assessment, ‘the historical position is of interest in so far as it may shed light on the current situation and its likely evolution’. However, we may identify several important cases which concern the lack of derogations, the role of diplomatic assurances and the internal flight option. As in other international treaties, there is no right to derogate from the prohibitions under Art.3. Therefore, a number of Contracting Parties have found themselves in a difficult situation in which they are attempting to expel an individual who they believe poses a threat to public order, to a state in which they may face a real and substantial risk of treatment in violation of Art.3. The Court, while acknowledging these concerns in cases such as A v Netherlands (Libya) and Chahal (India), does not allow states to engage in such a balancing act. In part to avoid such situations, states have sought diplomatic assurances from third countries. In Mamatkulov, the Turkish government obtained assurances from the Uzbek authorities that the applicant would not be

88 See NA v United Kingdom (2009) 48 EHRR 15, [116].
89 Baysakov and Others v Ukraine App no 54131/08 (ECtHR, 18 February 2010).
90 FH v Sweden (2010) 51 EHRR 42 and Moghaddas v Turkey App no 46134/08 (ECtHR, 15 February 2011).
91 RC v Sweden App no 41827/07 (ECtHR, 9 March 2010).
93 Mamatkulov v Turkey (2005) 41 EHRR 25.
95 N v Finland (2006) 43 EHRR 12.
96 X v Sweden App no 60959/00 (ECtHR, 22 October 2002).
98 Ibid, [136].
99 Ibid.
100 A v Netherlands (2014) 59 EHRR 33.
101 Chahal v United Kingdom (1997) 23 EHRR 413.
subjected to treatment in violation of Art.2 and 3 ECHR. In finding the applicants did not face a real risk of treatment prohibited under Art.3, the Court relied on both the diplomatic assurance, given by the Uzbek public prosecutor, as well as Uzbekistan being a signatory to CAT. These two factors combined were sufficient to satisfy the Court, with the latter being the more critical element.

The ‘internal flight’ option rests on the presumption that an individual may avoid the possibility of treatment in contravention of Art.3 if they moved internally. For example, in *Hilal*, the UK submitted that the applicant, although at risk of ill-treatment in Zanzibar, could instead be returned to mainland Tanzania which they considered to be safer and more stable. However, the Court did not consider this to be a guarantee against the risk of ill-treatment and therefore return to Tanzania would be in breach of Art.3. In ascertaining whether the ‘internal flight’ option was credible, the Court had recourse to examine the relationship between Zanzibar and Tanzania, prison conditions, available medical treatment and cooperation between police forces. In *Husseini*, the Court detailed its requirements necessary for the ‘internal flight’ option to offer sufficient protection, which included the ability of the individual to travel to the area, be admitted to it and the individual’s ability to settle. Of course, the ‘internal flight’ option is only realistically available to applicants in certain conditions. For example, if it was national legislation which exposed an individual to ill-treatment then it is unlikely to be available. Therefore, the risk to an individual must be regional and can also be affected by where the risk originates. It can be argued that ‘internal flight’ is more of an option where the risk stems from non-state actors than state authorities. As demonstrated in *Husseini*, state bodies do engage with each other, police forces cooperate and as a result it is less likely an individual can avail themselves of the protection of the state.

6.2.2.2 Article 2 ECHR

An examination of the Court’s case law reveals that, in a substantial number of return cases, the applicants do not solely rely on Art.3 but combine it with other applicable rights such as Art.2, which protects the right to life. Although a separate right, it ‘should be construed in harmony’ with Art.3

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103 Ibid, [75]-[77].


105 Ibid, [67].

106 Ibid, [68].

107 Ibid, [67].

108 *Husseini v Sweden* App no 10611/09 (ECtHR, 13 October 2011).

109 Ibid, [97].
ECHR\textsuperscript{110} and there are broadly two scenarios in which Art.2 may be engaged in an expulsion case. First, where an individual is being expelled to a third country which applies the death penalty and second, where the general situation is severe enough to pose a threat to life. In the first scenario, it is important to recognise Art.2 ECHR does not prohibit expulsion to a third country applying the death penalty under Art.2(1) ECHR. Rather, as it can be observed in \textit{Bader and Kanbor},\textsuperscript{111} the Court reasoned that the nature of the trial which could potentially lead to the death penalty being administered is the determining factor. If the trial was to be unfair, with the applicant suffering a flagrant denial of a fair trial which could lead to loss of life, Art.2 ECHR would be engaged as it would constitute an arbitrary deprivation of life. Art.3 would be engaged following the sentencing in respect of mental anguish and fear.\textsuperscript{112} The Court’s position on Art.2 and expulsions can be observed in cases such as \textit{Abdolkhani}, \textit{Moghaddas}\textsuperscript{113} and \textit{Mamatkulov}, all of which concerned Turkey expelling individuals to Iran or Uzbekistan, both of which apply the death penalty.

In the second scenario, Art.2 and 3 ECHR may be engaged under the general situation criteria of Art.3 or other specific circumstances. In \textit{L.M.}, the general situation in Syria was considered sufficiently severe to pose a risk to life and therefore return would contravene Art.2. In \textit{FH},\textsuperscript{114} the applicant argued that the risk to life stemmed not from the general situation but rather a non-state group (Shi’a militia) on the basis of his Christian faith and his previous involvement with the Republican Guard.\textsuperscript{115} In dismissing the appeal, the Court found the general situation in Iraq had improved sufficiently enough to remove any real risk of sectarian violence.\textsuperscript{116}

The combined application of Art.2 and 3 serves to illustrate that they function as a spectrum of harm, with applicants relying on both in situations where they cannot be certain of the treatment or punishment they may receive.

\textbf{6.2.2.3 Art.4 of Protocol No.4 ECHR}

Art.4 of Protocol No.4 prevents the collective expulsion of non-nationals from a Contracting Party. As the Convention does not describe in detail what constitutes collective expulsion we must look to the

\textsuperscript{110} \textit{Soering} (n 64) [103].

\textsuperscript{111} \textit{Bader and Kanbor v Sweden} App no 13284/04 (ECtHR, 8 November 2005).

\textsuperscript{112} Ibid, [42].

\textsuperscript{113} \textit{Moghaddas v Turkey} App no 46134/08 (ECtHR, 15 February 2011).

\textsuperscript{114} \textit{FH v Sweden} (2010) 51 EHRR 42.

\textsuperscript{115} Ibid, [94].

\textsuperscript{116} Ibid, [102].
ECtHR’s interpretation. In *Becker*, collective expulsion was defined as ‘any measure of the competent authority compelling aliens as a group to leave the country, except where such a measure is taken after and on the basis of a reasonable and objective examination of the particular cases of each individual alien of the group’. Therefore, each individual must have their claims considered, individual circumstances taken into account and be able to present evidence and arguments as to why they should not be expelled. However, even where an individual assessment has been made, it does not preclude the possibility of a collective expulsion, as demonstrated in *Conka*, which concerned the expulsion of Slovakian Roma from Belgium to Slovakia. Although assessments were carried out individually, the Court was not satisfied that the Belgian authorities did not conduct a collective expulsion based on the procedure used. The applicant, along with other Roma, were required to attend a police station for reasons other than their asylum applications. The Court identified five relevant factors upon which they were satisfied that a violation of Art.4 of Protocol No.4 had taken place. First, prior to the events the political authorities had announced such an operation would take place. Second, all the Slovakian Roma concerned had to attend the police station at the same time, third, the reasons for their arrest and subsequent expulsion were identical, fourth, they could not contact a lawyer and last, the asylum application process had not been completed. Similar reasoning was applied in *Georgia v Russia* regarding the expulsion of Georgian nationals from Russia.

In applying Art.4 of Protocol No.4 to readmission, there are a number of cases in which the ECtHR was asked to examine the possibility of collective expulsions where a Contracting Party was implementing returns via an agreement, either legal or political, with a third country. As the EU places an increasing emphasis on concluding political arrangements with third countries, with the procedures for readmission being unclear, these cases may have a substantial impact on the future development of the policy and the extent it is congruent with respect for human rights. In *Hirsi Jamaa*, Italy intercepted vessels in the Mediterranean which had previously left Libya bound for Italy. The intercepting Italian ship returned the applicants to Tripoli under a bilateral Italy-Libya agreement. Alongside the violation of Art.3, the Court also found a violation of Art.4 of Protocol No.4. In finding a violation, the Court expanded the scope of Art.4 of Protocol No.4 extraterritorially as a restrictive approach.

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117 *Becker v Denmark* App no 7011/75 (ECtHR, 3 October 1975).

118 Ibid, 235.


120 *Conka v Belgium* (2002) 34 EHRR 54.

121 Ibid, [61]-[62].


interpretation would exclude the majority of migration flows. The applicants were not subject to any form of interview before being transported back to Tripoli, and the crew of the Italian vessel were not trained to do so. Therefore, there was no individual examination of their circumstances and no opportunity in which to challenge return.

The case of *Khlaifia* concerned returns from Italy to Tunisia, facilitated by an agreement between the two states. A key omission is the Court did not consider it necessary to examine whether the Italy-Tunisia Agreement could be defined as an RA under the Return Directive. Although the CJEU may be a more appropriate arbiter for such a question, this has not been considered by the CJEU. With the proliferation of political arrangements, this question may become more important in the future, particularly if the balance between formal agreements and political arrangements tips in favour of political arrangements. As well as finding a violation, *Khlaifia* is also significant as the applicants were returned via a simplified procedure under the Italy-Tunisia Agreement. As the Agreement is not public it is not clear what this procedure consisted of, other than the identification by the Tunisian authorities. This leaves open the question as to how similar the procedure being employed by Italian authorities was to those contained in EURAs. Furthermore, it could also raise questions as to how returns under Art.13 Cotonou Agreement are implemented given the lack of procedural detail.

6.2.2.4 Other Convention Rights

When examining how other Convention rights may apply to readmission we must first distinguish between the different stages of the process. Readmission only occurs after a return decision has been made, followed by the Requesting State making a readmission application to the Requested State, which, if accepted, means the individual is returned. During the decision process, an individual may seek to rely on Art.1 of Protocol No.7 (procedural safeguards relating to expulsion of aliens), rather than Art.6 ECHR. In *Maaouia*, the ECtHR ruled that the expulsion process does not constitute the determination of civil rights as required under Art.6(1). Part of the Court’s reasoning was, if Contracting Parties considered Art.6 to apply to such situations they would not have adopted Art.1 of Protocol No.7.

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124 Ibid, [177]-[180].
125 Ibid, [184]-[186].
126 *Khlaifia and Others v Italy* App no 16483/12 (ECtHR, 15 December 2016).
127 Ibid, [156].
129 Ibid, [35].
130 Ibid, [36]-[38].
Instead, Art.6 can be raised to challenge expulsion decisions, as demonstrated in cases such as *Einhorn,¹³¹* *Al-Saadoon,¹³²* *Soering* and *Bader and Kanbor*. In *Othman,¹³³* the applicant submitted that his rights under Art.3 and 6 would be violated if expelled to Jordan, with a key issue being whether evidence obtained under torture would be admitted into the applicant’s trial. The Court was satisfied that this possibility raised the prospect of a flagrant denial of justice.

It is theoretically possible that other Convention rights may be capable of precluding expulsion. However, as the Court ruled in *Z and T,¹³⁴* in the situation of a right such as Art.9 was sufficiently violated to raise the prospect of prohibiting an expulsion, it is likely protections such as those under Art.3 would also have been engaged.

6.3 The EU and Human Rights Law

Aside from the incorporation of international human rights law and the ECHR into its legal order, the Union has slowly developed its own ‘domestic’ human rights instruments. The development of this area of law can be distinguished between pre-Lisbon and post-Lisbon eras, with the most important factor being the CFR moving from a non-binding instrument pre-Lisbon to enjoying the same status as the primary treaties post-Lisbon.

6.3.1 Pre-Lisbon EU Human Rights

In the absence of its own binding human rights instrument, the EU institutions, particularly the CJEU, drew on outside sources of human rights and gradually incorporated them into the EU legal order. As previously highlighted, the ECHR enjoys a unique status within this legal order, and the CJEU has relied upon ECtHR rulings to fill gaps in human rights protection. However, the CJEU approaches the issue of human rights from a different perspective, having additional concerns around the creation and maintenance of the internal market,¹³⁵ and as the market develops and EU competence expands, human rights become increasingly interwoven with social and economic concerns.

The EU’s pre-Lisbon approach began with the creation of economic rights in the Treaty of Rome, such as the right to a pension or the right of establishment. Such rights helped to create an effective internal market which allowed and encouraged individuals and economic actors to exercise their rights under

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¹³¹  *Einhorn v France* App no 71555/01 (ECtHR, 16 October 2011).


¹³⁴  *Z and T v United Kingdom* App no 27034/05 (ECtHR, 28 February 2006).

the four freedoms. Therefore, in the absence of express reference of the protection of human rights between the Treaty of Rome and Maastricht, human rights had to be read into the Treaties in the form of general principles. This process can be observed in cases such as Stauder, in which the Court recognised human rights form part of the general principles of EU law. The 1977 Joint Declaration cemented the position of the ECHR and rights stemming from the constitutional traditions of Member States, with the institutions highlighting the importance of these to the EU. This commitment from the institutions functioned in tandem with the CJEU’s approach, which used the substance and principles of the Convention rights in its decisions, recognising them as general principles. Such an approach was confirmed in cases such as Johnston and Cinéthèque. However, the CJEU could not supplant the role of the ECtHR and determine whether national law was compatible with the Convention. Yet, when Member States implemented EU law they must also respect and the general principle of the protection of human rights, which allowed the CJEU to refer to ECtHR jurisprudence and apply it where EU law was being applied, as shown in cases such as ERT.

With the introduction of the Treaty of Maastricht, and the expansion of EU competence in the Second and Third Pillars, in Article F(2), the Union committed to respecting human rights derived from the ECHR and Member State constitutions as general principles of EU law, thereby cementing their position as part of primary EU law. As argued by van den Berghe, this approach helped to nullify the possibility that, as the EU’s competence increased, human rights protection at the Member State level could be lost. Furthermore, it has been argued by Muraviov and Sviatun that the EU also needed to respond to increasing number of challenges in Member States to the legitimacy of EU law in the absence of comprehensive human rights protection. However, there is a substantial difference

137 Ibid, [7].
140 Case C-60/84 Cinéthèque v Fédération nationale des cinémas français [1985] ECR I-2605, [25]-[26].
141 Case C-12/86 Demirel v Stadt Schwäbisch Gmünd [1987] ECR I-3719, [28].
between respecting such rights and formulating a human rights policy. This distinction was raised in Portugal v Council,\(^{146}\) in which Portugal submitted that the references to human rights in the Treaty were ‘programmatic’; ‘they define a general objective but do not confer on the Community any specific powers of action’.\(^{147}\) Therefore, the EU was left with a commitment to upholding human rights in the Member States as well as its external action, but with no human rights policy or document of its own which it could refer to.

This landscape didn’t develop until 2000, with the introduction of the then non-binding CFR,\(^{148}\) which acted to catalogue the numerous rights which may apply to EU law, drawing from international law, Member State traditions and the ECHR. Yet, as Landau has described, the CFR is ‘not just a restatement of existing EU written law or of EU common law created by the ECJ’.\(^{149}\) Although non-binding, the CJEU was able to use the Charter as an interpretative instrument in cases such as Lindqvist,\(^{150}\) Pergan Hilfsstoffe,\(^{151}\) Parliament v Council\(^{152}\) and Unibet\(^{153}\) among others, often alongside the corresponding Convention right.

6.3.2 The Lisbon Treaty

The introduction of the Lisbon Treaty led to numerous developments in EU human rights. Although the absence of an EU human rights policy still exists, respect for human right was recognised as a founding value of the EU under Art.2 TEU. Furthermore, the Charter became legally binding, with the same status as the Primary Treaties under Art.6(1) TEU, as well as the commitment by the EU to accede to the ECHR under Art.6 (2). With Charter rights now enjoying primary law status, the CJEU was now free to refer solely to Charter rights, rather than the ECHR.

6.4 The Charter of Fundamental Rights

The creation of its own catalogue of legally-binding rights allowed the EU the opportunity to move beyond the political rights of the ECHR and assess economic and social rights which have developed over the course of the EU’s development, as stated in the Preamble, ‘it is necessary to strengthen the


\(^{147}\) Ibid, [16].


protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter’. The EU’s approach has been described as ‘modernising’ the rights contained in other international human rights instruments.\footnote{154}{J.C. Piris, The Lisbon Treaty: A Legal and Political Analysis (CUP 2012) 152.}

It has been argued that the Charter is structured in a different way from other human rights instruments, the idea is that there is an ‘essence’ in each right, and this essence cannot be violated.\footnote{155}{T. Ojaren, ‘Making the essence of fundamental rights real: The Court of Justice of the European Union clarifies the structure of fundamental rights under the Charter’ (2016) 12 (2) European Constitutional Law Review 318.}

Such differences in structure may also have an impact on the instruments from which the Charter draws, with Callewaert arguing the Charter and CJEU have distorted the ECHR and ECtHR,\footnote{156}{J. Callewaert, ‘Do we still need Article 6 (2) TEU? Considerations on the absence of EU accession to the ECHR and its consequences’ (2018) 55 (6) Common Market Law Review 1685, 1696.} as the CJEU interprets which ECtHR rulings it considers to be relevant for the interpretation of the Charter. Furthermore, the Charter is a combination of rights and principles, which has the potential to complicate their interpretation by the CJEU.\footnote{157}{See K. Lenaerts, ‘Exploring the Limits of the EU Charter of Fundamental Rights’ (2012) 8 (3) European Constitutional Law Review 375, 403.}

This close relationship between the Charter and ECHR is made clear in Art.53 CFR, with the Convention, as well as other international human rights instruments and Member State constitutions, acting as the minimum level of protection afforded by the Charter. Where a Charter right corresponds directly to a Convention right, the meaning and scope of the Charter right is the same as the Convention, but the CJEU may offer further protection if considered necessary.\footnote{158}{CFR (n 148) art.52(3).} Therefore, the Charter allows for the possibility of divergence on the same right from the ECHR. However, an important restriction is the Charter only applies when EU law is being applied,\footnote{159}{Ibid, art.51 (1): (The provisions of this Charter are addressed...to the Member States only when they are implementing Union law). See Case C-617/10 Akerberg Fransson (CJEU, 26 February 2013) [17]-[19]; Case C-2015/15 Toma (CJEU, 30 June 2016) [23]-[24]; Case C-265/13 Torralbo Marcos (CJEU, 27 March 2014) [28]-[30].} in comparison to the wider scope of the Convention rights, which apply to any Contracting Party action. Furthermore, the
application and effects of the Charter are not universal across the EU, with Protocol No.30 restricting its scope to only correspond to those provided under domestic law in the UK and Poland.\footnote{Protocol (No 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom [2008] OJ C115/313.}

As the Charter contains a wide range of economic, political and social rights drawing from a range of sources beyond the ECHR, only a limited range are applicable to readmission. Specifically, those contained in Art.4, 19 and 18 CFR.

6.4.1 Article 4 CFR

Art.4 CFR, incorporating the prohibition of torture and jurisprudence of Art.3 ECHR, is closely linked in the Charter with respect for human dignity under Art.1, a link which is not explicit in the Convention, as confirmed by the CJEU in \textit{Aranyosi and Căldăraru}.\footnote{Case C-404/15 \textit{Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen} [2016] ECR I-198, [85].} The absence of a human dignity provision in the ECHR means there is a slight divergence in approach between the ECtHR and CJEU, with the latter having respect for human dignity as a constitutional value and constitutional right which solidifies the absolute character of Art.4 CFR, as well as providing a tool for interpretation. Unlike Art.3 ECHR, Art.4 CFR is subject to the restriction that it only applies where EU law is being applied, thereby limiting its protection. The prohibition of torture is most associated with matters pertaining to the AFSJ, an area of shared competence, which further restricts its applicability.

In \textit{N.S},\footnote{Joined Cases C-411/10 and C-493/10 \textit{N.S v Secretary of State for the Home Department and M.E and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform} [2011] ECR I-13905.} the CJEU was requested to give a preliminary ruling on the return of an Afghan national from the UK to Greece, with the UK arguing it was not the responsible state for examining the asylum application under Regulation 343/2003. Art.4 CFR arose as conditions in Greece may fall short of its prohibitions, with systemic deficiencies in the asylum and reception procedures and facilities. According to the Court, Art.4 CFR prevents the transfer of an individual under the Regulation ‘where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions in that Member State amount to substantial grounds for believing that asylum seeker would face a real risk of being subjected to inhuman or degrading treatment’.\footnote{Ibid, [106].} However, the Court was balancing not only the right of an individual under Art.4 CFR, but also wider concerns of EU policy, the creation of the CEAS and AFSJ relying on the idea of mutual confidence and presumed compliance.\footnote{Ibid, [80]-[83].} \textit{N.S} is presented by Callewaert as an example of where the CJEU has differed in its
approach from the ECtHR, highlighting that the Court employed a collective approach, rather than the ECtHR’s individual approach, concerned not only with the rights of the individual but also the efficiency of the CEAS. A similar situation arose in *Puid*, which saw Germany seek to transfer an Iranian national to Greece under the same Regulation and saw the same application of Art.4 CFR. There are two interesting aspects of this case, first, the Court relied only on *N.S* in its ruling and second, the Court did not consider it appropriate to refer to any of the similar preceding ECtHR cases such as *M.S.S.* or indeed Art.3 ECHR. This serves to demonstrate how the Charter operates as the EU’s primary human rights instrument, and the Court is no longer reliant on recourse to the ECHR or ECtHR rulings in its judgments. The Court further developed its case law in this vein in cases such as *Abdullahi*, *A.S.*, *Jafari* and *M.A.*

In *Aranyosi and Căldăraru*, concerned with the European Arrest Warrant, the Court saw fit to refer to both Art.4 CFR and Art.3 ECHR, describing them as enshrining a fundamental value of the EU and Member States, as well as referring to the approach of the ECtHR. Here, the Court’s approach may be described as referring to Art.4 CFR as the binding element of law, with Art.3 ECHR as an interpretative instrument. However, it would also be perfectly possible for the Court to rely solely on the Convention. This relationship between the CFR and Convention may also observed in the previously mentioned case of *MP*. However, the approach in the later case of *Generalstaatsanwaltschaft*, concerning the execution of a European Arrest Warrant by Hungary, differs in that the CJEU relied primarily on Art.4 CFR, instead using Art.3 ECHR and case law to address the issue of minimum cell size, which had already been addressed by the ECtHR. Therefore, the

165 J. Callewaert (n 156) 1702.
166 Case C-4/11 Bundesrepublik Deutschland v Kaveh Puid [2013] ECR I-740.
168 Case C-490/16 A.S. v Republic of Slovenia (CJEU, 26 July 2017).
169 Case C-646/16 Jafari (CJEU, 26 July 2017).
172 Ibid, [84]-[90].
173 Case C-353/16 MP v Secretary of State for the Home Department [2018] 1 W.L.R. 5585, [36]-[46].
175 Ibid, [90]-[93].
ECHR was not providing the general context for Art.4 CFR, but rather addressing a specific legal question which the CJEU itself had not yet ruled on.

The case of C.K.\textsuperscript{176} was the first time Art.4 CFR was employed in a medical context; an individual with a serious illness may not be transferred under the Dublin Regulation. In this context, the CJEU referred to Art.3 ECHR as the ECtHR had already created a body of case law in this area. Therefore, the ECtHR provided a guide for the CJEU in developing its Art.4 CFR jurisprudence.

An interesting distinction was raised in the case of X and X\textsuperscript{177} in which the referring court distinguished how jurisdiction operates under the Charter and the Convention, arguing that the Charter is only restricted to where EU law is being applied, which is not necessarily determined by territorial jurisdiction as it would be under the Convention.\textsuperscript{178} However, the Court did not address this point in its judgment.

As it can be observed from these cases, Art.4 CFR differs from Art.3 ECHR in its lack of application to refoulement cases. Most Art.4 CFR cases have concerned the transfer of individuals between Member States, whether under the European Arrest Warrant or the Dublin Regulation. It has not been applied to the transfer of individuals from a Member State to a third country, and there are several reasons why this may be the case. The first is the conditions for an individual to establish standing are more difficult to meet than before the ECtHR, as noted by Nowak and Charbord,\textsuperscript{179} who argue a new individual complaint mechanism may need to allow individuals access in a similar manner as the ECtHR.\textsuperscript{180} Second, and more significantly, Art.3 ECHR has actually been split in the Charter between two articles, Art.4 and Art.19 CFR. Therefore, the scope of Art.4 CFR is limited to the extent it does not actually cover expulsions or returns as there are separate articles for these.

6.4.2 Article 19 CFR

Incorporating the expulsion and return elements of Art.3 ECHR in paragraph two, and Art.4 of Protocol No.4 ECHR in paragraph one,\textsuperscript{181} Art.19 CFR prohibits collective expulsions and prevents removals to a

\textsuperscript{176} Case C-578/16 PPU C.K. and Others v Republika Slovenija [2017] 3 C.M.L.R. 10.

\textsuperscript{177} Case C-638/16 PPU X and X v État belge (CJEU, 7 March 2017).

\textsuperscript{178} Ibid, [26].


\textsuperscript{180} Ibid, 98.

\textsuperscript{181} Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17.
third country where an individual is at ‘serious risk’ of torture, inhuman or degrading treatment or punishment.

Paragraph one includes the ECHR case law outlined in section 6.2.2.3 and is also linked to Art.47 CFR (right to an effective remedy) as it concerns a procedural right.\(^{182}\) Guild goes further, and also links Art.19(1) CFR with Art.13 (right to an effective remedy) and Art.1 of Protocol No.7 (procedural safeguards relating to expulsion of aliens) ECHR.\(^{183}\) At the time of writing, the CJEU has not had recourse to Art.19(1) CFR, instead, the majority of Art.19 cases concern the second paragraph. The second paragraph encompasses the entirety of the Art.3 ECHR case law in respect of returns and removals and has been referred to by the CJEU on several occasions.

Although not explicitly referred to in N.S, the opinion of AG Trstenjak\(^{184}\) references Art.19(2). First, Trstenjak recognised that both Art.4 and 19 form part of the protective functions of Art.1 CFR\(^{185}\) and furthermore, a violation of Art.3 ECHR may correspond to a breach of Art.1, 4 and 19 (2) of the Charter.\(^{186}\) Arguably the most significant aspect of the Opinion is to be found in footnote 46, where it is proposed that, where Art.1, 4 and 19(2) overlap, it is 19(2) which prevails.

As with Art.4 CFR, the CJEU has referred to Art.19(2) CFR and Art.3 ECHR in tandem, using the Convention as either an interpretative tool or to fill in a gap in its jurisprudence. An example of the former is the case of Petruhhin,\(^{187}\) which concerned the extradition of an Estonian national by Latvia to Russia. Art.19 CFR was interpreted in line with the ECtHR’s approach in Saadi to recognise that being a signatory of an international human rights treaty is not sufficient in itself to provide adequate protection to a returnee.\(^{188}\) An example of the second use is M’Bodj,\(^{189}\) where the Court had recourse to Art.3 ECHR, rather than Art.19(2) CFR, as the case concerned subsidiary protection and whether the


\(^{183}\) Ibid, 552-553.


\(^{185}\) Ibid, [112].

\(^{186}\) Ibid, [157].

\(^{187}\) Case C-182/15 *Aleksei Petruhhin v Latvijas Republikas Ģenerālprokuratūra* (CJEU, 6 September 2016).

\(^{188}\) Ibid, [57]-[58].

\(^{189}\) Case C-542/13 *Mohamed M’Bodj v État belge* [2015] 2 C.M.L.R. 16.
applicant’s return to Mauritania could be prevented by their ill-health dependent on the level of treatment available in the country.\(^{190}\)

In *MP*, the Court had recourse not only to Art.19(2) CFR and Art.3 ECHR, but also Art.4 CFR and Art.14 CAT. These examples serve to demonstrate how rarely Art.19(2) is referred to on its own. In order to replicate the suspensive effect of Art.3 and 13 ECHR, which prevent a returnee from being removed during the course of their appeals, the CJEU has used Art.19(2) alongside Art.47 CFR, as can be seen in cases such as *Tall\(^{191}\)* and *Abdida\(^{192}\)*.

The Court’s use of Art.19 CFR very much replicates the ECtHR’s use of Art.3 in removal and return cases. Due to the effective separation of the rights and obligations contained in Art.3 ECHR into two articles in the Charter, Art.19(2) is seldom used on its own. It can be argued that in this area the CJEU has not diverged or gone further than the ECtHR, despite having the scope to do so. It has, however, drawn in other relevant instruments such as CAT to aid its interpretation, meaning even where Charter rights correspond to Convention articles, the Convention is still not the only source which can be drawn on. The situation becomes more complex where a Charter article does not correspond directly to the Convention or any other international convention or treaty.

6.4.3 Article 18 CFR

Of the Charter articles most relevant to readmission, Art.18, the right to asylum, does not have an ECHR parallel, instead, according to the *Explanations*, it draws on the Refugee Convention/Protocol and Art.78 TFEU. The immediate issue raised by this is one of interpretation, with the Refugee Convention lacking a single interpretative body from which the CJEU could draw. The CJEU has been described as the first international court to give rulings on its interpretation.\(^{193}\) Importantly for the CEAS, the Refugee Convention is explicitly referred to in the Reception, Qualification, Return and Asylum Procedures Directives, as well as the Dublin III Regulation. Therefore, the Court’s engagement with the right to asylum and the Refugee Convention has not been dependent on Art.18 CFR. In this respect, den Heijer raised an important point, that the interpretation of EU primary law should not be subordinate to secondary EU law; rather, the references to the Refugee Convention in secondary law,

190 Ibid, [38]-[40].
191 Case C-239/14 Abdoulaye Amadou Tall v Centre public d’action sociale de Huy (CPAS de Huy) (CJEU, 17 December 2015) [52]-[60].
192 Case C-562/13 Centre public d’action sociale d’Ottignies-Louvain-La-Neuve v Moussa Abdida (CJEU, 18 December 2014) [50]-[52].
and the CJEU’s interpretation of it, form part of the scope of Art.18 CFR, not necessarily its definition. Den Heijer further questioned the added protection of Art.18, adding that there are question marks as to how it may interact with the gradual externalisation of EU border control as this may step outside the scope of the regulations and directives which make up the CEAS, which are predicated on being within EU Member State territory. This issue links back to the territorial scope of the entire Charter.

Interpreting Art.18 CFR is further complicated by the separation of the non-refoulement principle in Art.19, which has led to the Court often referring to both in combination. Taking this into account, it is difficult to demarcate the precise scope of the right to asylum, particularly as EU law allows for refugee, subsidiary and temporary protection. In Cimade and GISTI, Art.18 was referenced alongside respect for human dignity in the interpretation of the purpose of the Reception Directive, but the Court did not consider the exact requirements of Art.18. Instead, in AG Sharpston’s opinion, Art.18 was interpreted to include ‘the applicant’s ability to exercise his right of challenge to the transfer decision...failure to make those rights available may risk undermining the principle enshrined in Article 18 of the Charter’.

The CJEU had an opportunity to provide further definition in Halaf, in which the referring Court’s second question asked what is the content of Art.18 in conjunction with Art.53 CFR? The case concerned an Iraqi national who sought asylum in Bulgaria after having already applied in Greece. The Bulgarian authorities requested the applicant be returned to Greece, and therefore the authorities did not allow the applicant to begin the refugee application process in Bulgaria. The Bulgarian authorities did not consider his case to have sufficient humanitarian grounds for Bulgaria to consider his application, rather than Greece. However, the Court did not consider it necessary to define Art.18.

195 Ibid, 540-541.
198 Ibid, [56].
200 Ibid, [25].
However, in its public statement on the case, UNHCR offered its own definition of the content of Art.18 CFR with eight elements:

i) Protection from refoulement;
ii) Access to a state to make an asylum claim;
iii) Assessment of the asylum claim through an effective procedure, including access to legal assistance, interpreters and an effective remedy (including access to legal aid);
iv) Access to UNHCR;
v) Adequate reception conditions;
vi) Granting of refugee or subsidiary status if the conditions are met;
vii) Ensuring the exercise of human rights and freedoms and;
viii) Receiving a secure status in the receiving state.

Although non-binding, it does offer an insight into how the right to asylum is perceived, a right which is primarily procedural, and this is reflected in the Court’s case law. The case of El Kott is significant in this respect as it sets out the relationship between the various directives and regulations which make up the CEAS, and the Refugee Convention. First, the directives and regulations ‘were adopted to guide the competent authorities of the Member States in the application of that convention’, meaning the various pieces of legislation exist to ensure Member States compliance with the Refugee Convention. Furthermore, they must also be interpreted consistently with the Charter. Therefore, when read alongside the text of Art.18, the right to asylum ensures those seeking protection are treated in a manner congruent with the Refugee Convention, which is achieved through the proper implementation of the procedures set out in the directives and regulations which make up the CEAS.

AG Cruz Villalón further explored this idea in Abdullahi, outlining a broad view on the CEAS, that its creation allows for the right under Art.18 CFR to be exercised, stating ‘like all the other provisions which make up the system guaranteeing the fundamental right to asylum, must therefore be

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202 Ibid, para.2.2.9.


204 Ibid, [42].

205 Ibid, [43].

206 Case C-394/12 Shamso Abdullahi v Bundesasylamt [2013] ECR I-813, Opinion of AG Cruz Villalón.
understood ultimately as an instrument operating in the service of that guarantee’. 207 This has aided in the creation of the EU as a ‘safe territory’ for those seeking international protection, with the essence of the right not being affected by the Member State in which an individual seeks protection. 208 Therefore, Art.18 CFR is often used in combination with other Charter rights, such as 19(2), where there is a potential shortcoming in the application of the regulations and directives of the CEAS. For example, in HT, 209 both Art.18 and 19(2) were used for non-refoulement. 210 On this issue, the CJEU has been inconsistent; the approach in HT can be contrasted with the more recent case of Gnandi. 211 While in the former case Art.18 and 19(2) were used together as protection from refoulement, in the latter case, the Court ruled that it was Art.18 CFR in conjunction with Art.33 Refugee Convention or Art.19(2) CFR. 212 Despite what appears to be a clear delineation, and indeed a conscious need to separate protection from refoulement and the right to asylum, in reality it appears the Court is willing to use the two articles interchangeably.

It is argued that Art.18 is used as a ‘catch-all’ provision which both the Court and applicants use to address or challenge shortcomings in the CEAS, with several examples of this. In A, B and C, 213 the Court ruled that the competent Member State authority is entitled to assess an applicant’s credibility, in this case an application on the grounds of sexual orientation. 214 In the Court’s ruling in Slovakia v Council, 215 Slovakia and Hungary sought to annul Council Decision 2015/1601 establishing a mandatory relocation scheme in order to relieve the pressure on Italy and Greece due to the high number of arrivals during the ‘migration crisis’. In this context, the Court recognised the ‘crisis management measure’ was justified on the grounds of Art.18 as it would ensure every individual was effectively able to exercise their right to asylum. 216 Such a position was further explained in the opinion...

207 Ibid, [41].
208 Ibid, [41]-[42].
210 Ibid, [65].
211 Case C-181/16 Sadikou Gnandi v État belge (CJEU, 19 June 2018).
212 Ibid, [54]-[56].
214 Ibid, [44]-[49].
216 Ibid, [343].
of AG Bot, who concluded that the relocation of irregular arrivals from Italy and Greece to Member States ‘in a better position to process their applications’ preserved their rights under Art.18 CFR.\textsuperscript{217}

In effect, the substance of Art.18 CFR is the right to the effective implementation of every provision which makes up the CEAS, from access to the initial asylum process, an effective assessment of their claim, the right to appeal and for that appeal to have suspensory effect, the right to adequate reception conditions among others, all in-keeping with the requirements of the Refugee Convention/Protocol. This is a process described by Ippolito as the ‘constitutionalisation’ of the right to asylum, a right which does not produce direct effect.\textsuperscript{218} Where necessary, Art.18 is used in combination with other rights, including Art.4, 19 and 47.

Although it must be recognised that the Charter is a relatively young instrument, in comparison to the ECHR and the various applicable UN conventions, the CJEU has gradually created its own body of case law in respect of the prohibition of torture, protection from refoulement and the right to asylum. Indeed, a significant percentage of cases where the Charter has been referenced concern issues of asylum and migration.\textsuperscript{219} However, there are three possible limitations to this development. First, the ECHR and ECtHR are still the preferred means and venue for human rights cases for individuals in Member States, even where an element of EU law is being applied. The EU Fundamental Rights Agency has described the ECHR as a ‘especially prominent twin source’,\textsuperscript{220} meaning even where the Charter is being referred to in domestic courts, it is referred to alongside the ECHR.\textsuperscript{221} Describing this approach, ‘the continuing mixture of sources might signal that judges are aware of its scope and the potential value of individual Charter provisions, so they ‘package’ various human rights sources in order to ‘play it safe’’.\textsuperscript{222} However, it has been noted that national courts have been repeatedly referring to Charter rights outside the scope of EU law. Therefore, it can be argued that use of the Charter could be improved through training of the judiciary in Member States, particularly to recognise when EU law is being applied and the Charter corresponds to ECHR rights, which could help to reduce the instances of packaging rights together. A second restriction thus far has been that many of the EU regulations

\textsuperscript{217} Joined Cases C-643/15 and C-647/15 Slovak Republic and Hungary v Council of the European Union (CJEU, 6 September 2017), Opinion of AG Bot, [335].
\textsuperscript{218} F. Ippolito, ‘Migration and Asylum Cases before the Court of Justice of the European Union: Putting the EU Charter of Fundamental Rights to Test?’ (2015) 17 (1) European Journal of Migration and Law 1, 20.
\textsuperscript{220} Ibid.
\textsuperscript{221} Ibid.
\textsuperscript{222} Ibid.
and directives which the CJEU is interpreting make explicit reference to the ECHR, not the Charter. Therefore, the starting point for the Court is the ECHR, which removes the need to rely on the Charter. However, it is possible this situation may change in the future as the regulations and directives forming the CEAS are recast, which presents an opportunity for references to the Charter, either alongside or instead of the ECHR, to be added.

6.5 Human Rights and Readmission

Having established the range of applicable rights which apply to readmission at the international, regional and EU levels, there are two aspects of the readmission process which give rise to human rights concerns. The first, and most often commented, is the issue of refoulement, the potential for a returnee to suffer harm upon return to their country of origin or transit. Therefore, this encompasses the relationship between the requesting Member State and requested third country. However, there is also a more complex relationship which has become increasingly more common over the past decade, which is the Member State-Third Country and Third Country-Third Country relationship, which encompasses several areas. First, for a returnee, particularly to a country of transit, there is the prospect of chain-refoulement from the transit state to their country of origin or another transit state. Second, there is EU and Member State influence over the behaviour of the first third country in the chain. As it will be demonstrated, the EU has advised and aided in the conclusion of third country RAs, leading to the creation of the Readmission Network. The third aspect is the legal and moral responsibility of the requesting Member State, whether their legal and moral responsibility is fully extinguished once a returnee has been returned, can the EU or its Member States be responsible for any further removals? It is argued that the potential for further removals is inbuilt in the EU’s readmission policy, the result of a deliberate policy choice to encourage third countries to concluding their own RAs or arrangements with neighbouring states, many of which the EU does not have its own agreements with.

The second element to be examined are the human rights provisions contained in EURAs. It has been argued, such as by Coleman,\(^2\) that human rights concerns don’t arise in the readmission process itself as they have been considered as part of the preceding return decision. However, it will be argued such an approach is insufficient. EURAs contain human rights clauses which broadly require the parties to uphold their human rights obligations under the treaties to which they are signatories. However, it will be argued these guarantees are weak as there is no available enforcement mechanism. Furthermore, the ability of returnees to enforce their rights is entirely dependent on the legal situation

in the requested third country and its accessibility, which may be more problematic if returned to a transit state.

6.5.1 Refoulement

In examining the prospect of refoulement we are concerned with two types of relationship: EU-Third Country and EU-Third Country-Third Country. These capture the issue of direct refoulement from the EU to a third country and chain refoulement, the onward return of a third country national from one third country to another, which may not necessarily be their country of origin. As set out by Bouteillet-Paquet, ‘this new generation of readmission agreements raises serious concerns owing to the humanitarian and political situation prevailing in the countries that are generating forced displacement’. However, Coleman has argued the expansion in EURAs does not necessarily equate to an increased likelihood of refoulement as the applicable legal obligations are the same regardless of whether an individual is returned via an agreement or not. It is argued here that this doesn’t take into account the EU’s wider readmission approach, particularly towards RAs and cooperation between third countries, which is where the prospect of chain refoulement enters the discourse. Before proceeding to consider the issue of chain refoulement, it is important to set out the various arguments which have been presented around EU readmission policy and refoulement.

While EURAs may be characterised as ‘purely technical agreements’, the wider context of increasing externalisation and the use of safe third country policies cannot be excluded from the examination of the issue of refoulement. Such agreements are concluded by the EU in the context of an aim to increase the number and speed of returns, to be achieved by increasing the number of agreements, as highlighted by Carrera and Allsopp in their critique of the meaning of ‘effectiveness’ in EU return policy. Combined, these factors and policies conspire to prevent migrants from reaching EU territory, through the passing of responsibility to third countries, interceptions at sea and soft law arrangements facilitating cooperation between the EU and third countries on irregular migration, with a particular emphasis on the means of travel from third countries to the EU. As Ryan has argued, ‘some combination of these elements - avoidance of problems with return, non-refoulement obligations and

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225 N. Coleman (n 223) 286-ff.
Assessing the prospect of refoulement and EU readmission policy is further complicated by issues of jurisdiction which differ depending on the legal instrument being referred to.\textsuperscript{229} While we may accept the text of EURAs themselves do not give rise to the issue of refoulement, greater emphasis must be placed on the wider EU readmission policy. For example, while the risk of ill-treatment in contravention of non-refoulement may be assessed prior to the act of return, how much is known of what happens to returnees? The current approach has been characterised as ‘out of sight out of mind’, lacking a long-term view on the issue of return.\textsuperscript{230} The obligation under Art.8(6) Return Directive, which states Member States ‘shall provide for an effective forced-return monitoring system’ ceases to apply once a returnee has been received by a third country. There is no EU-wide system for monitoring and assessing the treatment of those individuals returned through EURAs. Instead, Member State authorities produce sporadic County of Origin Information reports on third countries. The absence of coordinated monitoring and evidence gathering is crucial when assessing non-refoulement and RAs, as the ECtHR has ruled, we must look beyond the legal framework in a third country and assess the reality.

Although its political arrangements have not yet reached the depth and scale as those deployed by Member States such as France, Italy and Spain,\textsuperscript{231} the EU has increasingly sought to conclude informal arrangements with third countries. It is unclear what effect these arrangements may have on the issue of refoulement, in part because they suffer from the same flaws as EURAs, for example, not distinguishing between categories of migrants.\textsuperscript{232}

The key question for non-refoulement and readmission policy is with which states is the EU concluding EURAs, do they provide adequate human rights protection, how do they treat returnees etc, and it is here where we may doubt the extent to which EURAs comply with non-refoulement. In part, this question is influenced by the use of the safe third country approach as outlined in Art.38 of the Asylum

\begin{thebibliography}{9}
\item B. Ryan, ‘Extraterritorial Immigration Control: What Role for Legal Guarantees’ in B. Ryan and V. Mitsilegas (eds), \textit{Extraterritorial Immigration Control: Legal Challenges} (Brill 2010) 35.
\item S. Carrera and J. Allsopp, ‘The Irregular Immigration Policy Conundrum’ (n 227) 76.
\item M. Giuffre, ‘Readmission Agreements and Refugee Rights: From a Critique to a Proposal’ (2013) 32 (3) Refugee Survey Quarterly 79, 81.
\end{thebibliography}
Procedures Directive.\textsuperscript{233} In the absence of an agreed EU list of safe third countries, Member States inform the Commission which countries they are applying the concept to,\textsuperscript{234} which may alter over time. Such safe third countries do not necessarily respond to those with which the EU has an EURA. Furthermore, there is also divergence between Member States. This situation is demonstrated by the case of \textit{Ilias and Ahmed},\textsuperscript{235} which examined both the safe third country approach and chain-refoulement. The applicants were two Bangladeshi nationals who originally entered the EU in Greece, before moving through Macedonia and Serbia to a transit zone on the Serbia-Hungary border, where they applied for asylum.\textsuperscript{236} Hungary considered Serbia to be a safe third country as an EU accession state and signatory to the Refugee Convention, and therefore expelled the applicants.\textsuperscript{237} Furthermore, since 2008, the EU has an EURA with Serbia. The Court noted that Serbia’s classification as a safe third country meant the burden of proof was placed on the applicants to effectively demonstrate there was a real risk of chain refoulement from Serbia to FYROM Macedonia and then to Greece.\textsuperscript{238} The key element of the Court’s judgment is that ‘it is incumbent on the domestic authorities to carry out an assessment of that risk of their own motion when information about such a risk is ascertainable from a wide number of sources’.\textsuperscript{239} In effect, it is the domestic authorities which must consider the risk of chain refoulement from one third country to another where there is evidence of this, and which forms part of the ECtHR’s case law on Art.3 ECHR and is therefore included in the corresponding Charter rights.

While recognising the individual assessment procedures which take place prior to readmission, the obligation created by \textit{Ilias and Ahmed} to consider the possibility of chain refoulement is interesting because, if we consider the rationale behind concluding an RA, then it can be argued the existence of one between two third countries could, depending on the states involved, increase the chances of chain refoulement. If the rationale behind concluding an RA is to make it easier and quicker to return individuals to a country of origin or transit by providing a legal framework around which to identify nationality, provide travel documents and mode of transport, it must therefore increase the


\textsuperscript{234} Ibid, art.38 (5).

\textsuperscript{235} \textit{Ilias and Ahmed v Hungary} App no 47287/15 (ECtHR, 14 March 2017).

\textsuperscript{236} Ibid, [9]-[10].

\textsuperscript{237} Ibid, [110].

\textsuperscript{238} Ibid, [118].

\textsuperscript{239} Ibid.
probability of chain refoulement as those procedures have been simplified in comparison to where an RA does not exist.

It is argued that this risk of chain refoulement is heightened by the construction of the Readmission Network, which has taken place through several different avenues. First, the EU has previously requested EU accession states consider or conclude RAs with specific third countries, often with states which the EU does not have its own agreements. For example, the Commission noted in 2018 that Serbia ‘cannot return people if asylum decisions are negative, due to the lack of readmission agreements’ and goes on to identify Afghanistan, Iraq, Iran and Pakistan as the main countries of origin. It then goes on to propose ‘Serbia needs to conclude RAs with those countries’ as well as ongoing negotiations with Algeria, Morocco, Ukraine and the UAE among others. Similarly, Albania had a low return rate while negotiating RAs with Morocco, Russia, Iraq, Iran and Afghanistan. Despite the EU-Albania Agreement being in force, it was observed ‘most of the irregular migrants were returned to the country from which they entered Albania (mainly Greece) via informal return’. On Turkey, the Commission noted Turkey had concluded agreements with Nigeria, Kosovo and Yemen.

As all EURAs include obligations towards third country nationals and stateless persons, the conclusion of RAs by third countries increases the probability of onward return and chain refoulement, particularly where the EU lacks an RA of its own. For example, it may be easier for a Member State to return a Nigerian national who arrived via Turkey back to Turkey, with the likelihood Turkey would further return them to Nigeria, than it may be for the same Member State to return them directly to Nigeria, particularly in the absence of an EU-Nigeria RA. The responsibility for the returnee and their return to their country of origin has been shifted to the transit state, who may enjoy better diplomatic ties and employ different readmission procedures, with fewer or no guarantees as to human rights protection and respect for non-refoulement.

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241 Ibid, 35.
242 Ibid, 36.
244 Ibid.
Figure 7 The EU’s Readmission Network
The second way the EU has sought to create a Readmission Network is through influencing and encouraging third countries to cooperate with each other on readmission. This may not necessarily lead to the conclusion of RAs, but it may assist to improve wider relations and cooperation on irregular migration. This may yield results in the long term, raising readmission up the policy agenda in third countries and ultimately aid the Union in externalising migration management. As set out in the European Council Conclusions of June 2014, ‘a sustainable solution can only be found by intensifying cooperation with countries of origin and transit, including through assistance to strengthen their migration and border management capacity’.

1 The latter part of the paragraph has in part been achieved through the Khartoum Process, in which participating states aim to develop ‘cooperation at bilateral and regional level between countries of origin, transit and destination to tackle irregular migration’ to include ‘a regional framework for return’. The Marrakesh Action Plan 2018-2020 for the Rabat Process includes the objective of strengthening cooperation on return and readmission under Domain 5. These political processes, framed by the 2015 Valletta Action Plan and the 2017 and 2018 Joint Valletta Action Plan conclusions, allows the EU to not only raise the issue of readmission between third countries but also tackle political issues, particularly the return of third country nationals from a transit state. This may aid the EU in negotiating EURAs with those countries.

The primary way through which the Readmission Network is expanded is by the EU concluding a greater number of EURAs, a policy objective which can be found in many Council and Commission documents. While aware of the criteria which is used to identify appropriate third countries for future

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agreements, it is less clear how third countries themselves identify other states for agreements. If we accept, at least at the political level, the EU attempts to influence the behaviour of such third countries by raising readmission and return up their migration policy agenda, is there a transfer of the identification criteria used by the EU as well? When we examine several states which third countries within the Readmission Network have concluded further RAs, several of them had already been identified by the EU as states it should approach for an agreement. For example, the Turkey-Nigeria RA or the identification of Afghanistan, Iraq, Iran and Pakistan as states which Serbia should seek to negotiate RAs. Of those states, the EU only has an agreement with Pakistan, and is currently negotiating with Nigeria. Were those states identified or negotiated with due to domestic necessity in Turkey and Serbia, or because they would be more beneficial to the EU? If it is the latter then, in effect, transit states such as Serbia and Turkey are being encouraged by the EU to conclude RAs to allow the EU to return third country nationals to those states in the full knowledge it is likely that they will then be further returned to their countries of origin. This process raises the possibility of chain-refoulement.

6.5.2 Human Rights and Other Provisions in EURAs
One way through which the possibility of chain-refoulement could be reduced is through human rights clauses contained in the text of EURAs. The current inclusion of references to human rights in EURAs is mixed, in part dependent on the relevant treaties and conventions which the parties are signatories. It is argued the status quo in this area is insufficient in protecting the human rights of returnees and can be substantially strengthened. It has been argued that requiring respect for human rights and access to asylum procedures in third countries for EURAs may give those countries an incentive not to guarantee those protections.\(^7\) Although accepting there is some logic to the argument, it presupposes readmission and migration policy exists in a vacuum, rather than alongside the EU’s objective under Art.3(5) TEU to promote human rights in its external relations. Instead, the EU already engages with a substantial number of countries on human rights through various legal and political instruments.\(^8\) Furthermore, it presupposes the Union has no political leverage or legal means by which to raise the level of compliance with human rights.

Currently, EURAs include non-affection clauses, which set how the EURA interacts with other agreements or conventions the parties are signatories to, with the precise content differing between

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\(^{7}\) M. Giuffre, ‘Readmission Agreements and Refugee Rights: From a Critique to a Proposal’ (n 232) 99.

agreements. These clauses typically state ‘this agreement shall be without prejudice to the rights, obligations and responsibilities’ of the parties, with agreements such as EU-Russia, EU-Cape Verde and EU-Montenegro listing international conventions and treaties which are applicable to readmission such as the ECHR, CAT and the Refugee Convention. On the other hand, agreements such as Ukraine and Pakistan do not refer to specific treaties. The reasons for this are unclear, however, these non-affection clauses set out that the obligations/rights under the EURA do not interfere with the rights/obligations of the returnee and the state under applicable international law. A similar situation exists in the preambles, those agreements which specify treaties and conventions in the non-affection clauses do so in the preamble; where they are missing in the non-affection clause, they are also absent in the preamble. These differences cannot be attributed to the time period the agreements were concluded in. It is also difficult to argue these differences are due to the human rights standards in the third countries. The EU-Turkey RA (under Art.18) contains the most detailed non-affection clause as it also lists the applicable rights and obligations under EU law on family reunification, return, qualification and reception, as well as rights created under the EU-Turkey Association Agreement. This is the only agreement where the EU refers to its own regulations and directives, but there is no reference to the CFR.

The EU-Belarus EURA, although not yet signed or entered into force, includes a new clause under Art.2 entitled Fundamental Principles. This appears to have shifted the international instruments listed in the Preambles of previous EURAs to the legally enforceable text of the Agreement. Within it, the UDHR, ECHR, ICERD, ICCPR, CAT, Refugee Convention and Protocol are listed as relevant legal instruments to which the parties must apply and adhere to. However, the non-affection clause in

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Art.18 is less detailed than the EURAs which preceded it, referring only to international treaties on extradition, readmission and for the responsibility for examining asylum applications.

*Figure 8 References to Human Rights Instruments in EURAs*

<table>
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<td>International law.</td>
<td>(Art.15) International law.</td>
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Turkey
1 October 2014
(Art.18) ECHR; CAT; Refugee Convention and 1967 Protocol; European Convention on Establishment; international conventions on extradition, readmission and responsibility for asylum applications.

Cape Verde
1 December 2014
International law, Refugee Convention and 1967 Protocol
(Art.17) CAT; Refugee Convention and 1967 Protocol; ECHR; international conventions on extradition, readmission and responsibility for examining asylum applications.

6.5.2.1 Suggestions for Reform

The level of human rights protection in EURAs can be described as patchy, with the agreements not creating new obligations themselves but rather restating pre-existing ones. It is clear from the above that there is no discernible pattern to where, what and how human rights are referenced in EURAs. The enforcement of those obligations by returnees is limited by separate issues such as access to legal advice and aid, access to courts and the domestic legal process. Furthermore, EURAs do not create a dialogue on human rights between the parties. From this, there are two ways in which human rights protection could be improved, the first of which is the EU engaging in a human rights dialogue alongside the negotiation of the EURA or a provision in the agreement facilitating a dialogue. Such a provision could be modelled around Art.8 and 9 Cotonou Agreement, and would aid the transition of the EU’s readmission policy from one which is almost entirely for the benefit of the Union to a ‘readmission partnership’ in which the parties cooperate not only on readmission but additional policy areas. This may be particularly useful where the existing human rights dialogue is relatively weak, thereby furthering the Union’s commitment to promote human rights in its external relations under Art.3(5) TEU.
The alternative approach would be for EURAs to create enforceable rights and obligations before the domestic courts of the parties, including non-refoulement. The precise wording of these provisions would be based on the conventions to which the parties are signatories to or are recognised under customary international law. This approach doesn’t then expand the rights which are already applicable, but instead may give returnees a further legal basis on which to challenge their treatment during the readmission process, rather than the ‘without prejudice’ approach which means EURAs do not interfere with the applicable rights listed. It is argued that this is the preferential approach, particularly if it does not necessarily expand the scope of the available rights beyond those to which the parties are already signatories to. Moving beyond the scope of existing rights may mean third countries are reticent to conclude EURAs as they are unwilling to accept further human rights obligations. However, creating rights in EURAs targets the issue of enforcement, which in many instances is the most compromised element of human rights protection.

It would then be the role of the Joint Readmission Committee of each agreement to engage in the human rights dialogue and monitor the application of the human rights obligations by the parties, in the same way they already monitor the application of the whole agreement. The difficulty of this approach lies in whether the Joint Readmission Committee should be able to suspend the agreement in instances of systematic human rights abuses, particularly of returnees. First, the return decision is made by Member States, and a returnee appeals this decision before domestic courts. Second, as it has already been established, the threshold for considering the general situation to be severe enough to prevent returns is very high, and is a legal judgment based on all the available evidence. Suspending a EURA would not necessarily prevent returns to a third country, but rather change the mechanisms through which it is done. Instead, Joint Readmission Committees could produce reports for Member States which would then form part of their country guidance.

6.6 Conclusion
The EU’s conception of respect for human rights is prima facie the easiest of its founding values to determine. It guides the EU’s interactions with third countries, shaping every policy area in which the EU has competence. With the CFR now enjoying the same status as the Treaties, we now have an EU catalogue of rights enforceable against EU institutions and Member States when EU law is being applied. Yet, when we delve deeper into its contents, respect for human rights draws on a range of complex international and regional human rights instruments, each with slightly different jurisdictions, focuses and enforcement mechanisms. These often contain very similar overlapping rights and obligations.
This chapter has been structured to move through these layers of human rights protections, particularly those most pertinent to readmission. This examination started with the customary international law right of non-refoulement, meaning states will not return individuals to countries where they may face conditions such as torture. This is the second customary international law obligation which interacts with readmission; that states accept the return of their own nationals. Therefore, there are two internationally recognised rights and obligations which govern the operation of readmission. Acting as a base, there are numerous UN conventions which provide further rights. The most pertinent of these being the Refugee Convention and CAT. In the case of the former, the Refugee Convention and its 1967 Protocol govern the legal construct of a refugee, including non-refoulement under Art.33. The Convention is incorporated in its entirety into EU law, with Art.78(1) TFEU providing the overarching basis with specific rights incorporated into secondary EU legislation. Therefore, not only is the text of the Convention incorporated but also the spirit in which it was created. However, its application is of course limited to those who qualify as refugees. As it has been demonstrated above, the Refugee Convention’s conception of non-refoulement requires the returnee to demonstrate on what grounds they may face threats to their life or freedom, which, as Hörtreiter and Weissbrodt have shown, is a more stringent test than required by the CAT. While CAT removes the requirement to establish a ground of persecution, its non-refoulement protection is absolute, whereas Art.33(2) Refugee Convention provides an exception.

While most states are signatories to the Refugee Convention and CAT, in the EU context there are two legal instruments which expand on those rights and are accompanied by more stringent and effective enforcement mechanisms. The first instrument is the ECHR, to which all Member States are signatories and the EU itself is committed to acceding under Art.6 (2) TEU, as well as forming part of the general principles of EU law under Art.6 (3). As Europe’s principal human rights document, the ECtHR has had cause to rule on many of the human rights issues around readmission. Return/expulsion cases before the Court have most often concerned the rights under Art.2, 3 and Art.4 of Protocol No.4, with a smaller number concerning the right to a fair trial under Art.6 or Art.1 of Protocol No.7. Using these rights, the Court has ensured the Convention is a truly living document, which has led to the Court reviewing the legality of EU measures when being applied by its Member States. As this chapter has shown, the Court has taken two approaches to return/expulsion cases: (1) to consider the individual characteristics of the appellant to examine whether their return may breach their Convention rights and (2), to consider the whether the general situation in a third country is sufficiently severe enough to prevent return.

In many cases, the ECtHR has taken the first approach, which means that for returnees it can be difficult to argue by analogy from previous cases as the ruling is entirely dependent on the individual.
However, in its Art.3 ECHR jurisprudence, the Court has created obligations on the returning state including the necessity of a full assessment of the conditions in the third country concerned in comparison to the protections offered under the Article. However, for the appellant, they must demonstrate a ‘real risk’ of treatment in contravention of Art.3 ECHR. Furthermore, the Court employs a very high burden in establishing that a general situation is severe enough to prevent return. It can be argued the burden is too high, effectively ruling out any situation short of war from being severe enough, whereas there are many examples of systematic, state-wide, indiscriminate human rights abuses in several third countries. In recent years, it can be argued a situation such as in Eritrea should have qualified as sufficiently severe under Art.3 ECHR. In conjunction, the right to life under Art.2 effectively creates a continuum of treatment which prohibits return. There is little case law under Art.4 of Protocol No.4 ECHR, however, such a situation could be envisaged under an informal arrangement or ‘push-back’ process between neighbouring states. Therefore, the ECHR effectively maintains a legal responsibility on the returning state, an ‘out of sight, out of mind’ approach is not congruent with its legal obligations.

The rights contained in the CFR directly incorporate rights from a wide range of sources, including the ECHR. For example, Art.4 CFR incorporates Art.3 ECHR. As the younger human rights instruments, and the relatively new and expanding role of the CJEU as an adjudicator of human rights issues, the case law relating to the issues around readmission is substantially smaller than the ECHR and ECtHR. However, under Art.52 CFR, the CJEU may go further than the ECtHR in providing more extensive protection. In relation to Art.3 ECHR, in the Charter this right is split across two rights: Art.4 and 19 (which also incorporates Art.4 of Protocol No.4 ECHR). The Charter also contains a right to asylum under Art.18, yet this right is not as comprehensive or as generous as it could presumed. The right to asylum is effectively the right to the effective application of the EU’s asylum acquis, rather than an actual right to asylum. Like the Refugee Convention, from the perspective of a returnee, the main shortcoming of the Charter is its limited application to Member States to situations where EU law is being applied. From this examination it can be concluded that, for a returnee from the EU, the ECHR remains the principal human rights instrument for challenging a return decision.

Respect for human rights has numerous implications for the EU’s readmission policy. First, as a policy area which involves external relations, the EU’s conduct is guided by Art.3(5) TEU. Human rights also come into play in the area of development, which is often implemented alongside EURAs and arrangements as part of the ‘root causes of migration approach’. The second implication is those rights do not automatically extinguish once an individual has left the territory of the Union. There is a legal and moral responsibility to consider the treatment which a returnee may face prior to their return, and the returnee can rely on their legal rights to challenge a return decision. Third, readmission policy
cannot develop in a vacuum, respect for human rights means there should be some form of dialogue on human rights between the EU and third country.

This chapter has focused on two areas of readmission policy. The first of these is the prospect of refoulement, particularly chain-refoulement. It has been argued that the EU’s approach to readmission increases the likelihood of chain-refoulement occurring through its encouragement of third countries to conclude further readmission agreements or arrangements. This can be observed with states in the near neighbourhood, such as Albania, as well as African states of origin and transit through initiatives such as the Khartoum Process. Improving cooperation between these states means readmission is elevated in the migration policy agenda, meaning it may be easier for the EU to return third country nationals and stateless persons to those countries. Neighbouring states such as Turkey have concluded or are negotiating RAs which would facilitate the return of the largest nationality groups who arrive irregularly. It is important to consider states which the EU does not have EURAs with. Therefore, by creating the Readmission Network, the EU can shift responsibility for irregular migrants with the knowledge there is a possibility of return to their country of origin from a transit state.

The second area of focus was the inclusion of human rights in EURAs, their form and legal effect. It has been shown that there is no standardised approach to the inclusion of references to respect for human rights in the texts of the agreements, it is not dependent on when it was concluded or the nature of the wider relationship. The current approach is for human rights/non-affection clauses and the preamble to affirm that the obligations contained in EURAs do not affect relevant human rights. In some agreements these are listed, with the EU-Turkey RA even referring to relevant EU secondary law. This chapter has argued non-affection clauses should be strengthened to include enforceable rights, with the wording based on those conventions which the parties are signatories. This would create a further layer of human rights protection. It also calls for an enhanced role for the Joint Readmission Committees, including a human rights dialogue and the production of monitoring reports on the human rights situation. However, the Committee should not have the power to suspend the agreement.

Its readmission policy can act as a test case for the extent to which the EU is committed to respecting human rights. The issue of irregular migration has risen up the policy agenda and public discourse across the EU over the last decades. This pressure to act meant the EU was approaching the issue from a reactive standpoint, with the primary objective being to reduce the number of irregular migrants entering the EU. This rapid expansion of policy has raised numerous human rights concerns. In the balancing between the objective of reducing irregular migration and protecting the rights of these
individuals, the balance was too far in favour of the former. From the EU’s perspective, readmission policy is difficult as it requires close cooperation with third countries which do not meet or share the same human rights standards, and within this cooperation it is easy for human rights to fall down the agenda. Many individuals left these same countries in order to escape human rights abuses, and yet the EU must cooperate with them to address those root causes and facilitate the return of their nationals. It is clear from the examinations above, and in previous chapters, that the EU can and should improve its adherence to its founding values of respect for human rights and human dignity as well as externalising these values to third countries. Respect for human rights in its readmission policy can only really be achieved if those rights are respected and protected at every stage of the process, from reception to determination through to return.

Through the realisation of the congruence of its readmission policy with its founding values, the EU may also more readily fulfil the conditions of Levinasian ethics. While accepting the limits of its legal liability for the conditions and potential treatment which returnees may face, it is clear from the case law of the ECtHR and CJEU that the legal system recognises that a state’s responsibilities for an individual do not extinguish at its external border or legal jurisdiction. Indeed, the scope of legal responsibility has expanded as the case law and Courts’ reasoning has developed. For Levinasian ethics, the creation of moral obligations occurred in the interaction with the ‘other’, in the case of readmission, the non-citizen, who may have entered or been resident irregularly in the territory of a Member State. It is insufficient to return the individual with no care for their welfare, the state has taken on a responsibility which it cannot expect to be reciprocated. It is clear from the development of political rhetoric in specific Member States that, for them, the other is to be feared, to be returned regardless of the cost. However, if such rhetoric took hold, it would be a dereliction of Member State and EU legal and moral responsibility for the human rights and welfare of all individuals who find themselves affected by the return process.
Chapter 7: The Rule of Law, Democracy and Readmission

Respect for the rule of law and democracy act as facilitating values, and are interlinked with respect for human dignity and human rights under Art. 2.\(^1\) It is proposed in the structure of Levinasian ethics, the precise nature of the obligations towards the other are created through a form of democratic process, with their enforceability assured through adherence to the rule of law. Indeed, in *Strengthening the Rule of Law Within the Union*,\(^2\) the Commission stated ‘no democracy can thrive without independent courts guaranteeing the protection of fundamental rights and civil liberties, nor without an active civil society and free media ensuring pluralism’.\(^3\) Therefore, it is proposed that strengthening the level of respect and congruence of readmission policy with one founding value may have a positive impact on adherence to the others. Likewise, a deficiency in one value is difficult to contain and isolate. Indeed, in *A New Strategic Agenda 2019-2024*,\(^4\) ‘the rule of law, with its crucial role in all our democracies, is a key guarantor that these values are well protected, it must be fully respected’.\(^5\)

As it has been argued in the previous chapters on human dignity and human rights and readmission, there are areas in which readmission policy may be considered lacking, with proposals put forward to rectify or improve this situation. However, ultimately, the full realisation of respect for human dignity and human rights may only be achieved through the full adherence to the rule of law and democracy. Indeed, in the EU context, full adherence to the rule of law and democracy is reliant on the fulfilment of respect for human rights, as set out by AG Stix-Hackl in her opinion in *Omega*\(^6\) ‘respect for fundamental rights is a condition of the legality of Community acts’\(^7\) and ‘all human rights ultimately

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\(^2\) European Commission, ‘Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: Strengthening the Rule of Law Within the Union – A Blueprint for Action’ (Brussels, 17 July 2019) COM (2019) 343 Final.

\(^3\) Ibid, 1.


\(^5\) Ibid, 6.

\(^6\) Case C-36/02 Omega [2004] ECR I-9609.

\(^7\) Case C-36/02 Omega [2004] ECR I-9609, Opinion of AG Stix-Hackl [54].
serve to achieve and safeguard human dignity’. Therefore, the founding values are interwoven throughout the EU and its legal order and cannot be considered to be entirely separate entities and concepts.

As noted in the previous chapter, readmission involves three relationships between the Union, the individual and third countries, requiring movement between different jurisdictions. Due to these factors, it is important to examine the context in which readmission relationships are created, EURAs are concluded and in which individuals may seek to challenge and uphold their rights. It is proposed the nature of these relationships, the rights involved, and the wider implications of readmission policy necessitate an examination of the congruence of this policy against the founding values of respect for the rule of law and democracy.

This chapter seeks to examine how those rights and values may be enforced by an individual against the EU or a third country in the readmission process, thereby meeting the latter two requirements of ‘respect, protect and fulfil’. An individual may seek to challenge not only the act of return but the legal framework through which it is facilitated. Furthermore, a citizen or policy maker in the Union may be concerned with how the legal framework has been created, its democratic legitimacy and the accountability of the decision makers. The creation of the ‘Readmission Network’ means these same issues and discussions occur in third countries, having in effect been imported from the EU.

While respect for the rule of law and democracy do not appear in the text of EURAs, such agreements are concluded in the context of Art.21 TEU. Within this, there are three provisions which are most pertinent to the issues of respect for the rule of law and democracy. First, ‘the Union’s action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law’. Second, ‘the Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations in order to: (b) consolidate and support democracy, the rule of law, human rights and the principles of international law’. Finally, ‘the Union shall ensure consistency between the different areas of its external action and between these and its other policies’. The first two of these provisions are clear: the Union should support and cooperate with third countries on the rule of law and democracy; however, the third provision is of interest as it will be argued a tension exists between the approach to readmission policy and the

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8 Ibid, [81].
9 TEU (n 1) art.21 (1).
10 Ibid, art.21 (2) (b).
11 Ibid, art.21 (3).
It will be argued this inconsistency is due to two factors. The first is an issue of definition. Unlike human rights and human dignity, for the rule of law and democracy, there are no obvious international conventions which the EU may rely. Indeed, what is arguably more important is the lack of international sources to bind or inform. As argued by Williams, in the EU context the rule of law consists of a supranational dimension, an institutional dimension and an extra-territorial one, meaning between the EU-Member States, EU institutions-individuals and EU-Third Countries. These dimensions do not directly correlate to the understanding of the rule of law in the Member States. This leads to the second proposed factor, which is one of legitimacy. As argued by Wolff, ‘to be a credible rule of law promoter abroad, rule of law standards at home need to match what the EU preaches abroad’. This situation is mirrored in the area of democracy, which has been the subject of much academic discussion. Linking with the first factor, in the absence of a shared definition, the legitimacy of EU action is open to question.

This chapter will address the EU’s understanding of these two values, while recognising the difficulties of establishing clear definitions. Therefore, this chapter will not provide definitive definitions, but rather identify aspects of them. Indeed, with the rule of law, ‘any review of the concept of the rule of law will reveal a tension between the rule of law as a value in its own right and as a set of values that are designed to accomplish another value designation’. Therefore, we must take into account the role of democracy and the rule of law in readmission policy, which may give more prominence to particular aspects of these concepts in comparison to what may be the case in other policy areas.

This chapter will first examine the applicable theoretical approaches to the EU’s rule of law. This will allow us to understand the scope of the rule of law in the Union, where it may differ from Member States and how a common conception may be identified. This will be followed by how the rule of law is defined by the CofE, particularly the Venice Commission and applicable ECHR rights. It will be

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12 A. Williams, *The Ethos of Europe: Values, Law and Justice in the EU* (CUP 2010).
13 Ibid, 71-72.
16 A. Williams, *The Ethos of Europe: Values, Law and Justice in the EU* (CUP 2010) 73.
argued the EU’s approach is significantly influenced by the CofE. The final aspect will consider the EU’s understanding of the rule of law; evidenced by Treaty references, with an examination of Art.7 TEU, which has been exercised to remedy persistent violations of the rule of law in Hungary and Poland. Having established the Union’s understanding of the rule of law, the second question is its understanding of democracy. This section will draw on a range of EU sources, starting with the text of the Treaties to the Union’s approach to democracy promotion. It will be argued the EU does not directly refer to democracy in its external relations, instead, referring to democratic principles. Beyond EU documents, the issues of the Union’s understanding will draw on the output of the CofE and ECHR jurisprudence, which identifies several Convention rights pertaining to democracy.

The application of these two values to readmission will proceed as follows. First, the rule of law will be applied to the ability of returnees to access the courts and challenge not only return decisions but the underlying agreements and arrangements which facilitate returns. It will be argued the increasing use of political arrangements raises questions as to what extent they fall within CJEU jurisdiction and what avenues of challenge and redress are available to appellants. Second, democracy will be applied to the creation readmission policy. Furthermore, this chapter will examine the implications of the EU’s readmission policy on third countries. It will be argued the EU’s approach has implications on the functioning of democracy in the countries concerned, creating political difficulties for third countries and their domestic political agendas. This process has the effect of influencing third country migration and border policies and converging them with the EU’s approach.

7.1 The Theoretical Basis of an EU Rule of Law

When examining how the rule of law may be defined, we must acknowledge the words of Bedner, who states: ‘the common ground of definitions is rather thin’. In defining the rule of law, there are two levels of questions which must be answered. First, should the definition be a ‘thin’ or ‘thick’ conception, which can be exchanged for ‘formal’ or ‘substantive’. For Tamanaha, in general terms, ‘formal theories focus on the proper source and form of legality, while substantive theories also include requirements about the content of the law’. In a similar fashion, the second level of question, proposed by Bulmer and Bisarya, is ‘either (a) the definition of the rule of law must be broadened to

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19 Ibid, 53.
22 Ibid, 92.
include consideration of the substantive content of law, or (b) the rule of law must be placed in a
basket of desired attributes, alongside others such as human rights, democracy, good government and
accountability'.

This chapter will establish a ‘thick’ conception of the rule of law, with the ‘thin’ definition lacking
sufficient detail and depth to apply in the context of a supranational organisation such as the EU.
However, the answer to the second question is more difficult as it is clear from the text of Art.2 TEU
that respect for the rule of law is alongside other ‘desired attributes’. On the other hand, we must
consider the substantive content of the law. Therefore, this section - and those following - will define
the rule of law with reference to the areas of overlap it shares with the other values.

Many ‘thick’ definitions of the rule of law share a common basis of protecting citizens from the state
and from each other, building on the idea of formal legality which lies at the heart of ‘thin’
definitions. For Bedner, formal legality requires the law is ‘clear and certain in its content, accessible
and predictable for the subject, and general in its application’. Importantly, the law applies equally
to the actions of the state and its agents, as well as to citizens. For Sellers, the rule of law means ‘we
remove the private will of public officials as much as possible from the administration of justice in
society’, thereby including the elements of clarity, certainty and predictable. It serves to protect the
individual from the arbitrary exercise of state power, serving the common good.

Building on this, Grant argues the rule of law contains two ideals: the rule of authority and the rule of
reason. The rule of authority means official’s decisions are restricted by legal rules, ‘an official’s
decision should be able to be justified by the application of an existing, authoritative legal rule’.
Developing this, Grant provides the following definition:

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25 Ibid, 56.
27 Ibid, 6.
28 Ibid, 5-6.
‘if conduct ought to be guided by an authoritative legal rule, then that authoritative legal rule ought to be capable of guiding conduct. A law that is capable of guiding conduct enables the law’s subjects to know where they stand and make decisions accordingly, and in that way may be said to promote liberty. Freedom under the law, in this sense, is the freedom that comes with the knowability of precise rules laid down in advance of the particular circumstances’.  

From Grant, Bedner and Sellers, we can identify requirements for an EU rule of law. First, the law must be sufficiently precise and predictable to govern behaviour, for the individual to understand their position in relation to the law. The law is there to serve a purpose, to serve the good of society and to protect the individual.

The idea of guiding conduct is advanced by Krygier, who places the rule of law alongside principles such as sovereignty, due process, legality, justice and constitutionalism in ‘well-ordered states and societies’. From this, it’s important to note while recognising an overlap between them, Krygier distinguishes between legality and the rule of law, and highlights the importance of protection from arbitrariness. Referring to the role of the rule of law in society, ‘a society in which law contributes to securing freedom, confidence, coordination, and dignity, is some great and positive distance from many available alternatives...ways of serving these values are goods immeasurably harder to attain without institutionalising constraints on arbitrariness’. This links to the rule of law as a facilitating value, with Krygier explicitly referring to dignity and freedom, both which feature in Art.2 TEU. In this vein, Ginsburg and Versteeg describe the rule of law as ‘the central political ideal of our time a lynchpin of democracy, justice and development’, further reinforcing the idea of the rule of law as a facilitator for the fulfilment of other values.

In describing the ‘common sense’ of the rule of law in Western societies, Tamanaha includes formal legality, human rights and democracy as part of the rule of law. However, going further, Tamanaha describes the thickest conception as adding ‘social welfare rights’. As it will be shown, when we

31 Ibid, 389.
33 Ibid, 233.
37 Ibid, 112.
examine the EU’s rule of law based on the Treaties, many of these elements are present. While Tamanaha’s first three elements of a ‘thick’ rule of law are present in Bedner’s definition, where they diverge is in the inclusion of the ‘subordination of all laws and its (the law) interpretation to fundamental principles of justice’. This speaks to the role of the rule of law as a value which serves to satisfy a wider condition or principle. It can be argued this relates back to Grant’s rule of reason and the restriction of arbitrariness. Furthermore, it speaks to the role of those tasked with the interpretation of these laws, in the EU context, the CJEU. Indeed, Bedner includes ‘controlling mechanisms’ in the definition of the rule of law, with an independent judiciary and other safeguarding institutions being the principal mechanisms.

This brief examination of the theoretical aspects of the rule of law reveals several common themes and aspects which are shared across the academic discussion. Starting with formal legality, we may also add equality before the law, methods of control/enforcement, protection from arbitrary decision-making and individual rights which serve the higher purposes of serving a functioning society and the effectiveness of the ideal of justice.

7.2 The CofE and the Rule of Law
Respect for the rule of law is a founding value of the CofE, while also being a membership requirement. Recognising its proximity to the Union in terms of values and principles, the Memorandum of Understanding between the Council of Europe and the European Union seeks to enhance cooperation. From this, there are several elements which affect the EU’s own conception of the rule of law. First, it is affirmed that the CofE is the ‘benchmark for human rights, the rule of law and democracy in Europe’. The parties seek to create common standards on the rule of law to ensure coherence between the two, as well as a method of consultation. Therefore, while the EU is able to go beyond the common standards, the CofE’s conception of the rule of law acts a baseline for the EU. Furthermore, with the close relationship between the CFR and ECHR, where the ECtHR has

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40 Statute of the Council of Europe (5 May 1949) ETS No.001, preamble.
41 Ibid, art.3.
42 Memorandum of Understanding between the Council of Europe and the European Union (2007).
43 Ibid, para.10.
identified and interpreted aspects of the rule of law in its case-law those aspects also form part of EU law.

In identifying the CofE’s conception of the rule of law, we are primarily concerned with two sources: the Venice Commission and the ECHR.

7.2.1 The Venice Commission

The Venice Commission acts as an independent body within the CofE serving to promote the rule of law and democracy in its members. This is achieved through the production of reports and legal opinions. Although only a participant rather than a member, the Venice Commission and European Commission enjoy a close relationship.\textsuperscript{46} It can be argued that this enlarged membership aids in the EU’s efforts to export its values, including respect for the rule of law, as states with which it has EURAs are also members of the Venice Commission.\textsuperscript{47} This provides for a base level of understanding of the rule of law.

The \textit{Report on the Rule of Law}\textsuperscript{48} requires individuals to be ‘treated by all decision-makers with dignity, equality and rationality and in accordance with the law, and to have the opportunity to challenge decisions before independent and impartial courts for their unlawfulness, where they are accorded fair procedures’.\textsuperscript{49} Therefore, we are not only concerned with decision-makers abiding by the law, but also how the recipients of the decisions are treated. Individuals should have the opportunity to challenge decisions before independent and impartial courts, which gives us the requirements of access to legal challenges and appropriate remedies. The report further provides six elements of the rule of law: (1) legality, (2) legal certainty, (3) prohibition of arbitrariness, (4) access to justice before independent and impartial courts, (5) respect for human rights and (6) non-discrimination and equality before the law.\textsuperscript{50}

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\textsuperscript{47} Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Georgia, Moldova, Montenegro, North Macedonia (formerly FYROM Macedonia), Russia, Serbia, Turkey and Ukraine.


\textsuperscript{49} Ibid, para.16.

\textsuperscript{50} Ibid, para.41.
The meaning of these elements of the rule of law has been further elucidated in the *Rule of Law Checklist*,\(^{51}\) which provides a comprehensive examination of the rule of law, as well as confirming the close relationship between democracy, the rule of law and human rights.\(^{52}\)

The *Checklist* presents five headings for the elements the rule of law, the first of which is legality, which is broken down into eight further sub-elements. The first element of legality is supremacy of law, which means state actions must be authorised and congruent with the law,\(^{53}\) and which links closely with compliance.\(^{54}\) Interestingly, the third sub-element is the relationship between domestic and international law, requiring adherence to the application of international law.\(^{55}\) The fourth and fifth elements are control over the power of the executive\(^{56}\) and law-making, which must be democratic, accountable, inclusive and transparent.\(^{57}\) The sixth outlines that provisions and derogations in times of national emergencies must be provided by law and be proportionate to the aim, with limitations on the scope, duration and circumstances in which they can be used.\(^{58}\) The seventh is the duty on public authorities to implement the law, including potential remedies and sanctions in the event they do not and last, where private actors carry out actions normally associated with those of the state authorities, they also adhere to the rule of law.\(^{59}\)

Legal certainty includes access to legislation, court decisions and the foreseeability of the law.\(^{60}\) These factors, alongside legitimate expectations and the consistency and stability of the law,\(^{61}\) enable individuals to live their lives, with knowledge of the law, its interpretation, and the ability to rely on...
the law and the promises of public authorities. To this, the Venice Commission adds non-retroactivity, ‘no crime, no penalty without a law’ - and respect for final appeal rulings of the courts.\(^{62}\) Third, the abuse or mis-use of powers requires reasons to be given for a decision and limits on an authority’s exercise of power.\(^{63}\)

Defining equality as an element of the rule of law, the Venice Commission states that commitments to equality and non-discrimination should be included under the constitution as well as under the law.\(^{64}\) This is to be applied equally and universally, including an effective remedy to address instances of discrimination.\(^{65}\)

Access to justice requires an independent judiciary and judges, impartiality and autonomy of the prosecution service and of the legal profession.\(^{66}\) The EU’s ability to satisfy these elements is limited as it is reliant on Member State adherence. For example, the EU has limited scope to legislate on matters affecting the legal professions. Access to justice also requires access to a fair trial. This includes standing before the courts, the right to a defence and access to legal aid where required.\(^{67}\) It also requires the presumption of innocence, right to be heard, equality of arms, judgments to be public and the effective execution of court rulings.\(^{68}\)

The Checklist provides the most comprehensive catalogue of the elements of the rule of law produced by the CoFE. Due to the close cooperation and relationship between the CoFE and EU, it is proposed the Checklist, and its five elements provide the basis for the EU’s own interpretation of the rule of law. To this, we may add the resolutions and studies of the Parliamentary Assembly and ECtHR jurisprudence.

7.2.2. The ECHR and the Rule of Law

The Convention Preamble states that the signatories share a common identity including adherence to the rule of law, and is considered inherent to be in every Convention article.\(^{69}\) However, the Venice Commission lists Art.6, 7, 8, 9, 10, 11 and 14 as elements of the CoFE’s understanding of the rule of law.

\(^{62}\) Ibid, p.16-17.

\(^{63}\) Ibid, p.17 (‘an exercise of power that leads to substantively unfair, unreasonable, irrational or oppressive decisions’).

\(^{64}\) Ibid, p.18.

\(^{65}\) Ibid, p.19.


\(^{67}\) Ibid, p.25.

\(^{68}\) Ibid, p.26-27.

\(^{69}\) Amuur v France (1996) 22 EHRR 533, [50].
However, we must also consider instances where the ECtHR has relied on elements of the rule of law in its interpretation of the rights other than those identified by the Venice Commission, such as in Art.5 ECHR.

7.2.3.1 Article 5

Art.5 ECHR prescribes the conditions which must be met if an individual is to be deprived of their right to liberty and security. These include that the arrest or detention must be lawful based on a conviction, non-compliance with a court order, custody based on suspicion of an offense, preventing the spread of disease, prevent unlawful entry to the state or prior to deportation/extradition. These all require a competent legal authority or court. An individual who has been detained or arrested has the right to a trial within a reasonable time as well as access to legal proceedings to challenge the lawfulness of their detention.

In Winterwerp, the Court examined the meaning of ‘lawfulness’ in the context of deprivation of liberty. In this regard, it was stated lawfulness requires conformity with the applicable domestic law (procedural and substantive) as well as Art.18 ECHR (limitation on use of restrictions of rights). This was then tied to respect for the rule of law when the Court stated ‘in a democratic society subscribing to the rule of law, no detention that is arbitrary can ever be regarded as lawful’. The importance of protecting the individual from arbitrary detention has further been confirmed in Kurt v Turkey, Amuur v France, Assanidze v Georgia, McKay v UK and Buzadji v Moldova. The case of Kurt is significant as the Court links the scrutiny and accountability provided with the prevention of treatment and punishment contrary to Art.2 and 3 ECHR. In order to prevent this possibility, Art.5 ECHR must allow the competent judicial authorities to intervene in an individual’s detention. As the Court states, underlining the fundamental importance of this access, ‘what is at

71 ECHR (n 17) art.5 (1).
72 Winterwerp v The Netherlands (1979-80) 2 EHRR 387.
73 Ibid, [39].
74 Ibid.
75 Kurt v Turkey App no 24276/94 (ECtHR, 25 May 1998).
78 McKay v The United Kingdom (2007) 44 EHRR 41.
79 Buzadji v The Republic of Moldova App no 23755/07 (ECtHR, 5 July 2016).
stake is both the protection of the physical liberty of individuals as well as their personal security in a context which, in the absence of safeguards, could result in a subversion of the rule of law and place detainees beyond the reach of the most rudimentary forms of legal protection’.\textsuperscript{80} In Amuur, the Court in its assessment of the interpretation of ‘in accordance with a procedure proscribed by law’ in Art.5(1) ECHR, concluded the rule of law requires the Court to not only consider the text of the domestic legislation but also the ‘quality of law’, its content.\textsuperscript{81}

The Art.5 aspects of Assanidze (see also Baranowski v Poland\textsuperscript{82} and Jecius v Lithuania)\textsuperscript{83} are significant for stating detention for an indeterminant time without judicial authorisation engages not only non-arbitrariness but also legal certainty. The significance of the judgments in McKay and Buzadji is not only the relationship between the rule of law and Art.5 but also the relationship between Art.2, 3, 4 and 5 ECHR. In both, the Court refers to these articles as ‘in the first rank of the fundamental rights that protect the physical security of the individual’.\textsuperscript{84} Furthermore, they introduce the term ‘scrupulous adherence’\textsuperscript{85} to the rule of law, with the Court in Buzadji emphasising aspects of the Checklist such as the limitations on the scope of the exceptions to Art.5 and their strict interpretation and thereby limiting the powers and discretion of public authorities.

7.2.3.2 Article 6

Applying in instances of the determination of a civil right or of criminal offences, Art.6 ECHR encompasses every element identified by the Venice Commission.

In Golder v UK,\textsuperscript{86} in which the applicant alleged violations of Art.6 and 8 ECHR, the Court ruled on the significance of the reference to the rule of law in the ECHR Preamble. This reference is not rhetorical but is of substance, and to be used in the correct interpretation of Art.6(1) ECHR.\textsuperscript{87} Indeed, the Court stated ‘in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts’.\textsuperscript{88} Relying on the rule of law as an interpretation tool, the Court

\begin{itemize}
  \item \textsuperscript{80} Kurt v Turkey App no 24276/94 [ECtHR, 25 May 1998], [123].
  \item \textsuperscript{81} Amuur v France (1996) 22 EHRR 533, [50].
  \item \textsuperscript{82} Baranowski v Poland App no 28358/95 [ECtHR, 28 March 2000], [56]-[58].
  \item \textsuperscript{83} Jecius v Lithuania (2002) 35 EHRR 16, [62].
  \item \textsuperscript{84} Buzadji v The Republic of Moldova App no 23755/07 [ECtHR, 5 July 2016], [84]; McKay v The United Kingdom (2007) 44 EHRR 41, [30].
  \item \textsuperscript{85} Ibid.
  \item \textsuperscript{86} Golder v United Kingdom (1979-80) 1 EHRR 524.
  \item \textsuperscript{87} Ibid, [34].
  \item \textsuperscript{88} Ibid.
\end{itemize}
interpreted Art.6(1) as including the right to a court, requiring the right of access to an independent and impartial court or tribunal within a reasonable period of time. In *Al-Adsani v UK*[^90], not only did the Court reiterate Art.6(1) ECHR does not pertain to the content of the civil rights concerned[^91], but it would violate the rule of law if a signatory state was able to remove a whole range of civil claims or create immunities to claims from the jurisdiction of the courts[^92].

Independence encompasses several aspects. The court/tribunal must be seen to be independent[^93], the manner of the appointment of the judges[^94], the conditions of their term in office[^95] and the guarantees against outside interference in proceedings[^96]. Furthermore, on the question of the impartiality of the court/tribunal, in *Findlay v UK*[^97] the Court outlined two requirements: (1) ‘the tribunal must subjectively free of personal prejudice or bias’ and (2) ‘impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt’.[^98]

The rule of law also requires limitations to be in place to control the ability of non-judicial bodies to interfere with rulings. In *Cooper v UK*,[^99] the Court was concerned with the military court-martial process but found the final decision was reached by a judicial body[^100]. In *Assanidze* however, the Court interpreted Art.6 ECHR as preventing interference by the legislature or another non-judicial authority in legal proceedings[^101], including the outcome and execution of the ruling[^102].

### 7.2.3.3 Article 7

Closely linked to Art.6 is no punishment without law under Art.7 ECHR, forming an element of legal certainty. The Court has highlighted the significance of this protection and pointed to the fact no

[^89]: Ibid, [36].
[^91]: Ibid, [46].
[^92]: Ibid, [47].
[^93]: *Delcourt v Belgium* (1979-80) 1 EHRR 355, [31].
[^94]: *Campbell and Fell v United Kingdom* (1985) 7 EHRR 165, [78].
[^95]: *Langborger v Sweden* (1990) 12 EHRR 416, [32].
[^96]: *Bryan v United Kingdom* (1996) 21 EHRR 342, [37].
[^97]: *Findlay v United Kingdom* (1997) 24 EHRR 221.
[^98]: Ibid, [73].
[^100]: Ibid, [131]-[133].
[^101]: *Assanidze* (n 77) [129].
[^102]: Ibid, [130].
derogation is permitted under Art.15(2) ECHR. This protection only applies in the event of a conviction; it does not extend to the entire criminal judicial process.

The first aspect is it prevents the retroactivity of criminal offences in situations where it is to the detriment of the individual, which helps to fill the legal certainty aspect of the rule of law as well as preventing arbitrary prosecutions, convictions and punishments. Legal certainty and non-arbitrariness also requires the law alone can prescribe what is a criminal offence and provide for the necessary penalties, as well as placing limits on the discretion of the courts to interpret the offence, with the Court referencing the use of analogy as being beyond this scope. This further requires the law to be clear, as the Court stated in C.R. v UK. This requirement does not prevent the interpretation of the provisions developing over time. Here, foreseeability, clarity and accessibility are engaged as the development is required to be ‘consistent with the essence of the offence and could reasonably be foreseen’. The Court has had cause to consider these latter aspects in respect of offences committed in East Germany (GDR) following reunification and war crimes committed during the Second World War.

7.2.3.4. Article 14, Protocol No.12 and Article 4 of Protocol No.7

The prohibition of discrimination protected under Art.14 ECHR applies to the fulfilment of Convention rights, however, Art.1 of Protocol No.12 provides for a general prohibition and therefore corresponds to the equality and protection of human rights elements of the rule of law. In Sommerfeld v Germany, the Court stated the prohibition ‘only complements’ other Convention rights and ‘has no independent existence’. The prohibition on discrimination contained in Art.1 of Protocol No.12

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103 See Del Rio Prada v Spain (2014) 58 EHRR 37, [77].
104 Lukanov v Bulgaria (1997) 24 EHRR 121, [6].
105 See S.W. v United Kingdom (1996) 21 EHRR 363, [34].
106 Kokkinakis v Greece (1994) 17 EHRR 397, [52].
107 C.R. v United Kingdom App no 20190/92 (ECtHR, 22 November 1995), [33] (‘the individual can know from the wording of the relevant provision and, if need be, with the assistance of the court’s interpretation of it, what acts and omissions will make him criminally liable’).
110 Kononov v Latvia (2011) 52 EHRR 21.
112 Ibid, [84].
ECHR uses the same understanding of discrimination as Art.14. Art.4 of Protocol No.7 corresponds to the right not to be tried twice for the same crime as set out as a condition of legal certainty under the Checklist.

7.2.4. Conclusions

The CofE’s conception of the rule of law has a substantial influence on the EU. With the Venice Commission providing a comprehensive catalogue of the rule of law, the five elements identified in the Checklist, alongside ECtHR jurisprudence on Art.5-11 and 14 ECHR, provide a basis for identifying the EU’s rule of law. The Checklist highlights the close relationship between the rule of law, democracy and human rights, further enhancing the argument the rule of law and democracy within the EU structure act as facilitating values. This can be observed in Art.8-11 ECHR, the rule of law acts to prevent arbitrary interference with those rights, but those rights themselves are limited in offering an insight into the meaning of the rule of law.

7.3 The EU’s Rule of Law

Building on the theoretical aspects of the rule of law, we must consider the distinction proposed by Williams, that, in the EU context, there are three dimensions to the rule of law. It cannot be assumed the rule of law shares the same meaning across all three dimensions. As it will be argued, the EU’s conception in its external relations differs from its institutional and supranational dimensions. This may be in part due to the available enforcement mechanisms, how the EU seeks to export its value of respect for the rule of law and the limits of its influence on the values and practices of third countries.

This section on the EU’s rule of law will proceed to examine the sources of the EU’s conception, starting with the Treaties. Following this, we will consider the EU institutions, particularly the Commission, before examining CJEU jurisprudence.

7.3.1 The Treaties

It has been argued the inclusion of respect for the rule of law in the EU reflects its role as a constitutional principle which binds the Union together. Indeed, as Lautenbach proposes, ‘the rule of law is intricately bound up with the historical, ideological and institutional context in which it has developed’. A key element of this context is the increasing level of integration through each treaty revision, with Williams arguing the rule of law is necessary to ensure the EU’s objectives are

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113 Sejadić and Finci v Bosnia and Herzegovina App nos 27996/06 and 34836/06 (ECtHR, 22 December 2009), [53]-[56].
achieved.\textsuperscript{115} Therefore, as the constitutional documents of the Union, there are explicit references to the role and meaning of the rule of law in the Treaties.

Konstadinides\textsuperscript{116} contends the rule of law in the EU fits three different contexts: (1) as a common value; (2) as a ‘missionary principle’ and (3) a ‘yardstick’.\textsuperscript{117} Taking each in turn, the rule of law as a common value is located in the Preamble and in Art.2 TEU, with reference in the Preamble to respect for the rule of law being drawn from ‘the cultural, religious and humanist inheritance of Europe’ and the Member States confirming their attachment to this value. The rule of law as a ‘missionary principle’ refers to Art.21(1) TEU, which, along with Art.3(5) TEU, commits the Union’s external relations and actions to be shaped by the obligation to adhere to and export its values, which include the rule of law. In describing respect for the rule of law as a ‘yardstick’, Konstadinides is relying on Art.49 TEU, which requires prospective Member States to respect and promote the values contained in Art.2 TEU.

Referring to the requirement of enforcement mechanisms, we must also consider Art.7, 17 and 19 TEU. Art.7 TEU is a combination of political and legal enforcement in cases where there is a violation of Art.2 TEU.\textsuperscript{118} At the first stage, under Art.7(1), the Council may, on the basis of a reasoned proposal, determine ‘there is a clear risk of a serious breach’.\textsuperscript{119} The second stage requires the unanimity of the European Council, acting on the basis of a proposal from the Commission or one third of Member States, with the consent of the Parliament, in finding there has been a ‘serious and persistent breach’.\textsuperscript{120} The available remedy for such a breach under Art.7(3) is the suspension of the Member State’s voting rights in the Council.

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{115} A. Williams, \textit{The Ethos of Europe: Values, Law and Justice in the EU} (CUP 2010) 105.
  \item \textsuperscript{116} T. Konstadinides, \textit{The Rule of Law in the European Union: The Internal Dimension} (Bloomsbury 2017).
  \item \textsuperscript{117} Ibid, 19.
  \item \textsuperscript{118} TEU (n 1) art.7 (1).
  \item \textsuperscript{119} ‘(1) On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure’.
  \item \textsuperscript{120} TEU (n 1) art.7 (2).
\end{itemize}
\end{footnotesize}
From its application to Poland and Hungary, we can identify several aspects of the rule of law. In its reasoned proposal against Poland,\(^{121}\) the Commission highlighted concerns as to the independence of the Polish judiciary and the lack of independent judicial review following legislation introduced by the Polish government.\(^{122}\) In comparison to Poland, the Parliament’s reasoned proposal towards Hungary is wider in scope (corruption, independence of the judiciary, equal treatment), including democratic principles.\(^{123}\)

In the case of Art.17 TEU, describing the objectives of the Commission, it is stated ‘it shall ensure the application of the Treaties’ and ‘it shall oversee the application of Union law’.\(^{124}\) In conjunction with the role of the Commission, the role of the CJEU per Art.19 TEU is to interpret and ensure the application of EU law including the granting of appropriate remedies under the circumstances proscribed under Art.263-281 TFEU.\(^{125}\) Significantly, CFSP measures are excluded from CJEU jurisdiction,\(^{126}\) thereby restricting the scope of the rule of law in the EU. This demonstrates a disconnect between the institutional, supranational and extra-territorial dimensions and its role as a ‘missionary principle’.

Therefore, the references to the rule of law in the text of the Treaties provides a range of contexts in which it must operate. The rule of law as a guiding principle for internal and external action, with a robust enforcement and oversight mechanism in the case of the former, whereas there are deficiencies in the latter, with fewer methods of enforcement and oversight. The rule of law in the external context can be further separated into accession states and other third countries, with adherence to the rule of law a strict criteria for membership of the Union but, relying solely on the treaty text, not such a strict criteria for cooperation with the Union.

7.3.2 The EU Institutions and the Rule of Law

When we examine the instances where the institutions refer to the rule of law, we may observe the majority of these pertain to the internal dimension. Member States adherence is essential to the


\(^{122}\) Ibid, 1-2.

\(^{123}\) European Parliament, ‘Resolution of 12 September 2018 on a Proposal Calling on the Council to Determine, Pursuant to Article 7 (1) of the Treaty on European Union, the Existence of a Clear Risk of a Serious Breach by Hungary of the Values on which the Union is Founded’ (Strasbourg, 12 September 2018) 2017/2131(INL).

\(^{124}\) TEU (n 1) art.17(1).


\(^{126}\) Ibid, art.275.
proper functioning of the EU. Although it forms part of the accession criteria, recent concerns have focused on the enforcement mechanisms available against current Member States.

As Sandvig and Polakiewicz noted, the EU and CofE seek to foster greater unity among their members through adherence to a shared set of values, including the rule of law. This unity requires trust, between Member States, citizens and the EU, with trust in Member State institutions affecting trust in the EU. This also requires a functioning democracy with the effective participation of citizens, thereby further demonstrating the link between democracy and rule of law.

The Commission introduced the EU Justice Scoreboard in 2013 to examine the effectiveness of national judicial systems. Allowing for comparisons to be made between Member States, the Justice Scoreboard measures several indicators which pertain to the access to justice and independence elements of the rule of law. It is interesting to note the Commission frames the Scoreboard around the need to ensure the functioning of the Single Market, enforcement of EU economic laws and mutual trust. In comparison, the protection of citizens’ rights is given less prominence.

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132 European Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions the EU Justice Scoreboard – A Tool to Promote Effective Justice and Growth’ (Brussels, 7 March 2013) COM (2013) 160 Final.
133 Ibid, 4-6 (Length of proceedings, clearance rate for cases, number of pending cases, monitoring and evaluation of court activities).
Justice Scoreboard, the Commission has developed multiple new indicators since 2013, which represents a further refining of its conception of the rule of law as the metrics for adherence have become more detailed and precise. One important aspect to highlight is the Scoreboard includes measures which focus on the efficiency of proceedings concerning EU law, recognising the role of national courts. Mak and Taekema have argued of all the measures of the Justice Scoreboard it is the independence of the judiciary, quality and efficiency which most relate to the elements of the rule of law.

In March 2014 the Commission proposed A New EU Framework to Strengthen the Rule of Law, designed to allow the Commission to intervene at an earlier stage to prevent an escalation to the Art.7 mechanism. As stated, these were situations which were ‘likely to systematically and adversely affect the integrity, stability or the proper functioning of the institutions and the safeguard mechanisms established at national level to secure the rule of law’. Proceeding in three stages, first, the Commission undertakes an initial assessment and, if it identified a situation posing a systemic threat to the rule of law, would then initiate a dialogue with the Member State. Second, if as a result of the dialogue the situation was not addressed, the Commission would issue a recommendation including a time period for the resolution of the situation. The final stage is the monitoring and follow-up of the recommendation. If still not addressed, the Art.7 procedure would then apply. For the purposes of identifying the institutions’ understanding of the rule of law, Annex One to the

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135 European Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions The 2019 EU Justice Scoreboard’ (Brussels, 26 April 2019) COM (2019) 198 Final.
136 Ibid, 3 (spending of financial resources in each justice system; standards applied to improve the quality of judgments in the highest courts; management powers over national prosecution services; appointment and dismissal of national prosecutors; standards and practices on managing caseloads and backlogs; authorities responsible for disciplinary proceedings towards judges).
137 Ibid, 20-23 (trademarks, competition, electronic communications and money laundering).
140 Ibid, 6.
141 Ibid, 7.
142 Ibid, 8.
Communication is significant as it identifies six elements of the rule of law drawing on CJEU jurisprudence as well as explicitly referring to those in the Checklist.145

The Council further proposed Member States also agree a separate mechanism outside of the Union structures to review the rule of law in Member States through the Rule of Law Dialogue.146 Occurring each year, these dialogues have been described as ‘extremely valuable’ in allowing for issues to be raised as well as the exchange of best practices.148

Therefore, if we exclude infringement action under Art.258 TFEU, there are currently three mechanisms within the EU which apply to the rule of law: The Rule of Law Framework, the Annual Rule of Law Dialogue and Art.7 TEU. However, considering rule of law deficiencies in certain Member States, the EU has sought to further strengthen the enforcement of the rule of law in recent years. In April 2019, the Commission emphasised the central role of the rule of law in creating the AFSJ.150

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144 Ibid, 1-2. (equality before the law, legal certainty, legality, prohibition of arbitrariness of executive powers, independent and effective judicial review including respect for human rights, right to a fair trial and separation of powers).
145 Ibid, 3.
150 Ibid, 1.
its *Blueprint for Action*, the Commission argued the Union’s accession to the ECHR would further demonstrate the EU’s commitment to the rule of law.

We can observe not only how the institutions interpret the meaning of respect for the rule of law, which appears to correspond to those elements contained in the *Checklist* but also the importance of the rule of law. As the institutions have emphasised, the rule of law is essential for the effective functioning of the Union. Not only its functioning but also its legitimacy and credibility. This concern about legitimacy and credibility is not only directed towards the relationship between EU citizens and the Union, but also external relations.

Despite its importance to the institutions, they are reliant on Member States being committed to the founding values. A deficiency in respect for the rule of law in one Member State has implications for the entire Union. As stated in the *Blueprint for Action*, the primary responsibility is placed on the Member States themselves, describing the national judiciary and other bodies as ‘the first key lines of defence against attacks to the rule of law from a branch of the state’. Yet the possible mechanisms for enforcement are limited, especially when we differentiate between the legal and political processes.

7.3.3 The CJEU, the Charter and the Rule of Law

Reaffirming many of the elements previously identified, the CJEU and the Charter assist our understanding of the Union’s rule of law. As stated in *Johnston*, ‘the principles on which the

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151 European Commission, ‘Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: Strengthening the Rule of Law Within the Union – A Blueprint for Action’ (Brussels, 17 July 2019) COM (2019) 343 Final.

152 Ibid, 7.


Convention is based must be taken into consideration in Community law, including the role of the rule of law. The first stage of this analysis is to identify the corresponding ECHR and CFR rights according to the *Explanations*. First, Art.5 ECHR corresponds to Art.6 CFR, with the addition of the right to security. The right to a fair trial under Art.6 ECHR is combined with Art.13 (right to an effective remedy) in Art.47 CFR, thereby encompassing access to justice. Furthermore, Art.48 CFR contains the presumption of innocence and right to a defence element of Art.6 ECHR. On occasion, the CJEU has had cause to further specify elements of access to justice, such as the right to an independent tribunal or court. Effective judicial protection was considered by the CJEU in *DEB*, where it was ruled restrictions on access to legal aid may affect access to the courts and it is for national courts whether the conditions are onerous balanced against the aim of the proceedings, the circumstances of the person/legal person and proportionality. It can be argued Art.47 CFR is wider in scope as it is not limited to the determination of criminal offences or civil liberties as with Art.6 ECHR, yet is balanced against the Charter only applying where EU law is being applied.

Art.49 CFR refers to legality, which requires penalties must be prescribed and governed by conditions set out in law and proportionality, which requires the relevant penalty or fine to be proportionate to the offence. Respect for private and family life is split across two Charter articles, Art.7 and 8.

158 Ibid, [18].
160 Joined Cases C-293/12 and C-594/12 Digital Rights Ireland and Seitlinger and Others [2014] 3 C.M.L.R. 44, [42].
161 For the application of Articles 6 and 13 ECHR see Case C-50/00 P Unión de Pequenos Agricultores v Council of the European Union [2002] ECR I-06677, [39].
162 Right to a fair trial, effective remedies and legal aid assistance.
164 Case C-279/09 DEB Deutsch Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland [2010] ECR I-13849.
165 And/or dispensation from responsibility for the costs of proceedings.
166 Ibid, [45]-[62].
168 CFR (n 156) art.51 (1).
169 For example, Case C-105/14 Taricco and Others [2016] 1 C.M.L.R. 21, [56]-[57].
170 For example, Case T-265/12 Schenker v Commission [2014] 44.
171 Protection of personal data.
In *Schrem*,¹⁷² it was ruled the rule of law and protection of human rights requires effective judicial protection. As the Court stated, ‘the very existence of effective judicial review designed to ensure compliance with provision of EU law is inherent in the existence of the rule of law’.¹⁷³ Further corresponding articles include Art.50 CFR¹⁷⁴ to Art.4 of Protocol No.7 ECHR. The Court has had cause to apply the right under Art.50 CFR to infringements of EU competition law,¹⁷⁵ having previously acknowledged that the protection formed a general principle of EU law.¹⁷⁶

The requirement of equality is satisfied under Chapter III of the Charter, providing for equality before the law¹⁷⁷ and non-discrimination¹⁷⁸ but also respect for diversity,¹⁷⁹ equality between men and women,¹⁸⁰ the rights of children¹⁸¹ and the elderly,¹⁸² as well as the integration of persons with disabilities.¹⁸³

The right to good administration, enshrined under Art.41 CFR and recognised as a general principle of EU law,¹⁸⁴ applies solely to the EU institutions.¹⁸⁵ However, Craig has argued, relying on the CJEU’s ruling in *MM*,¹⁸⁶ these rights apply to Member States under the same conditions as other Charter rights.¹⁸⁷ Under 41(1), individuals have the right to ‘have his or her affairs handled impartially, fairly and within a reasonable time’. This is later expanded in 41(2) to include the right to be heard, the obligation on the institutions to give reasons for their decisions and the right to have access to their

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¹⁷³ Ibid, [95].
¹⁷⁴ Right not to be tried twice in criminal proceedings for the same criminal offence.
¹⁷⁵ For example, Case C-17/10 *Toshiba Corporation e.a* (CJEU, 14 February 2012), [93]-[103].
¹⁷⁶ See, Joined Cases T-217/03 and T-245/03 *FNCBV and Others v Commission* [2006] ECR II-04987, [340].
¹⁷⁷ CFR (n 156) art.20.
¹⁷⁸ Ibid, art.21.
¹⁷⁹ Ibid, art.22 (The Union shall respect cultural, religious and linguistic diversity).
¹⁸⁰ Ibid, art.23.
¹⁸¹ Ibid, art.24.
¹⁸² Ibid, art.25.
¹⁸⁴ Case C-255/90 *P Jean-Louis Burban v European Parliament* [1992] ECR I-02253, [7].
¹⁸⁵ Case C-482/19 *Cicola* [2011] ECR I-14139, [28].
¹⁸⁶ Case C-277/11 *M.M. v Minister for Justice, Equality and Law Reform and Others* (CJEU, 22 November 2012), [81]-[94].
The right to restitution for damages caused by the institutions is enshrined in Art.41(3) and corresponds to Art.340 TFEU. Art.41(4) provides for an individual to write to the institutions in any of Treaty languages and receive a response in that language. These various provisions facilitate judicial review and access to justice, legal certainty and non-arbitrary decision-making.

The CJEU has also referred to the rule of law to address deficiencies or gaps in the case-law. In *Meridionale Industria Salumi and Others*, the Court ruled the principles of legal certainty and legitimate expectation require legislation to be ‘clear and predictable for those who are subject to it’. This followed from *Racke*, where the Court ruled legal certainty and legitimate expectation also required legislation not to take effect until published unless it was necessary to achieve its purpose.

In *Les Verts*, the Court reasoned as the Union was built on respect for the rule of law the institutions and Member States could not avoid potential judicial review and remedial action to ensure the legality of any adopted measures in accordance with the Treaties. The possibility of judicial review has been described by the Court as ‘the essence of the rule of law’. Although *Les Verts* only expressly referred to the Treaties as the measure of compatibility, this was addressed in cases such as *Inuit* where the Court also referred to the general principles of EU law and fundamental rights. The Court has also commented, in reference to legality and judicial review, the Treaties provide for a complete system of review and remedies, while all EU measures are presumed to adhere to the requirements of legality. A complete system of review and remedies requires the right to access the relevant file and the right to be heard. The Court has also confirmed the application of the separation of

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190 Ibid, [10].
191 Case C-98/78 *Racke v Hauptzollamt Mainz* [1979] ECR 00069, [20].
193 Ibid, [23].
194 Case C-216/18 PPU *Minister for Justice and Equality v LM* [2019] 1 C.M.L.R. 18, [51].
197 Case C-620/16 *European Commission v Federal Republic of Germany* [2019] 3 C.M.L.R. 20, [85].
198 Case C-85/76 *Hoffmann-La Roche & Co.AG v Commission of the European Communities* [1979] ECR 461, [9].
powers and prevention of arbitrary actions or interventions and their roles as elements of the rule of law.

From this examination of the Charter and CJEU jurisprudence, we can make multiple observations as to the nature of the rule of law in the Union. First, not only does the meaning of the relevant Charter rights correspond to those of the Convention but also their role in the rule of law, even where the CJEU has not explicitly referred to the rule of law in its rulings. However, we may observe how several Convention rights are split across the Charter. Furthermore, the Charter makes more explicit reference to elements of the rule of law. For example, Art.49 CFR references legality and proportionality. These similarities in interpretation are balanced against the differences in the field of applicability. For example, the rights under Art.6 ECHR applying only to determinations of criminal offences or civil rights whereas such a restriction does not apply to Art.47 CFR. Yet, the Charter is only applicable when EU law is being applied. These nuances impact on the scope and applicability of respect for the rule of law, leaving areas of Member State activity outside the jurisdiction of the CJEU and the application of Charter rights.

7.4 The EU’s Understanding of the Rule of Law

From the above examination of the Treaties, the Charter, the EU institutions and the jurisprudence of the CJEU, in combination with the outputs of the CofE, Venice Commission and the ECtHR, we can identify the key tenets of the EU’s understanding of the rule of law. Providing a thick, holistic definition of the EU’s rule of law is a difficult task, as Merli has argued, ‘the closer you look at it, the more blurred the image becomes’. Therefore, the proposed definition will proceed as a list of the elements of the rule of law recognised by the EU. Furthermore, it must be recognised due to the close relationship between the rule of law, democracy and human rights, there are several elements which span across these values. For example, transparency, considered by Östendahl as part of the rule of law, while applicable, will instead be considered under the founding value of respect for democracy. These areas

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200 Case C-279/09 DEB Deutsch Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland [2010] ECR I-13849, [58].


of overlap also reinforce the idea the interpretation of the rule of law is not static, changing alongside the societies in which it is respect and applied.\(^{204}\)

The first identifiable element of the rule of law for the Union is legality. It is presumed all EU measures adopted in accordance with the provisions of the Treaties satisfy these criteria. The adoption of measures must respect the separation of competences, conferred powers and subsidiarity, with internal EU measures and external agreements adopted in full accordance of the Treaty provisions, including the selection and publication of the correct legal basis. For EURAs, this refers to Art.79(3) TFEU. The examination of the case-law of the E CtHR and CJEU reveals limitations placed on human rights by Member States must adhere to the permitted derogations or limitations such as public order or public health. In the EU’s definition we may also add the requirement of proportionality.\(^{205}\) Legality, as set out in the Rule of Law Checklist, requires adherence to applicable international law. Here, in the EU’s definition we may include adherence to the general principles of EU law. To this, we may also add that penalties, for offences or infringements, are prescribed and governed by EU law, incorporating the jurisprudence on Art.7 ECHR and Art.49 CFR. It also requires a system of sanctions and remedies in instances where public authorities, whether the EU institutions, Member States, individuals or legal persons do not abide by EU law. This system of judicial review and remedies is provided by the Treaties. No punishment unless provided by law is set out in the Charter and CJEU case-law, as well as being recognised as a general principle of EU law.

Legal certainty and the protection of legitimate expectations, which require legislation to be clear and accessible, is in part satisfied by the publication of all EU legal acts in the Official Journal of the Union and accessible in almost all languages spoken in the Member States. As the Official Journal also includes notices of cases before and rulings of the CJEU, which are also publicly accessible either in document form or via the Court’s website serves to satisfy the requirements of foreseeability and the consistency and stability of the law. Publication in the Official Journal, with relevant dates as to the entry into force of EU measures or external agreements. Legal certainty requires that decisions are not made arbitrarily, here, as with legal certainty, the acts of the EU institutions are governed by the conferral of powers, separation of competences, subsidiarity and each measure or decision requires an identifiable legal basis.

\(^{204}\) T. van Danwitz, ‘The Rule of Law in the Recent Jurisprudence of the ECJ’ in W. Schroeder (ed), Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation (Bloomsbury 2016) 169.

\(^{205}\) TEU (n 1) art.5(4) and Protocol No.2 On the Application of the Principles of Subsidiarity and Proportionality.
In order to ensure access to the courts and judicial review of decisions, the Treaties have established a judicial system around independent and impartial national courts and the CJEU which allows for individuals, legal persons, Member States and EU institutions to understand the correct interpretation of EU law as well as providing an avenue to challenge measures intended to have legal effects. The right to access the CJEU is governed by the standing requirements of Art.263 TFEU, while the preliminary reference and ruling procedure of Art.267 TFEU allows any national court or tribunal to request an interpretation of EU law from the CJEU. Konstadinides moves beyond the formal structures of cooperation between national courts and the CJEU, arguing national courts have become European by applying EU norms ‘with a European vision in mind’. This point relates back to the importance of respect for the rule of law as a device of European integration. The Commission, under Art.17(1) TEU and 258-260 TFEU also forms part of this legal system. However, it has been argued this system is not yet complete. We can observe this incompleteness in the exclusion from CJEU jurisdiction of CFSP measures under Art.275 TFEU and police or law enforcement operations of Member States on the grounds of validity or proportionality. In addition, there is a separate issue, pertinent to readmission policy, under Art.263 TFEU the CJEU can review external acts or agreements ‘intended to produce legal effects’, which raises questions as to the use of informal political arrangements in the area of readmission. Therefore, we may distinguish between the ability of the CJEU to review internal measures, where the Union has arguably have created an effective, complete system of judicial review, and its ability to review international agreements and arrangements negotiated by the institutions. De Baere argues the exclusion of CFSP from CJEU jurisdiction, as well as the distinction between the internal and external rule of law means for third countries, the EU may not be a predictable partner.

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206 See Protocol (No 3) on the Statute of the Court of Justice of the European Union and Article 254 TFEU for the General Court.


210 TFEU (n 125) art.276.


213 G. De Baere, ‘European Integration and the Rule of Law in Foreign Policy’ in J. Dickson and P. Eleftheriadas (eds), Philosophical Foundations of European Union Law (OUP 2012) 370.
measures in the narrowest form, recognising the possibility of judicial review as the ‘essence’ of the rule of law.\textsuperscript{214}

Translating the separation of powers to the EU context, it requires the maintenance of the institutional balance as set out in Title III of the TEU and in the TFEU. Each institution has its own constitutional role, with a system which facilitates the accountability of the institutions to each other, the Member States and to citizens. Furthermore, the institutions possess oversight powers over the activities of EU agencies.\textsuperscript{215}

Although lacking a human rights policy, the EU is bound to respect human rights as set out as general principles of EU law and the Charter. Those Charter rights may only be restricted under the specific conditions of Art.52(1) and (2) CFR, thereby satisfying the element of legality. Accession to the ECHR will offer a further level of oversight not only to the Union’s human rights compliance, \textsuperscript{216} dependent on the agreed mechanisms, but also its adherence to aspects of the rule of law.

Respect for equality and non-discrimination enjoys several bases in the EU’s legal order. First, it acts as a founding value, confirmed in Art.10 TFEU which refers to discrimination based on gender, race or ethnic origin, disability, religion or belief, age and sexual orientation. In order to facilitate the free movement of people and EU citizenship, Art.18 TFEU prevents discrimination based upon nationality. In its case-law, the CJEU recognises non-discrimination as a general principle.\textsuperscript{217} The introduction of the Charter provides a wide general prohibition on discrimination under Art.21(1)\textsuperscript{218} and on nationality under Art.21(2). This general provision is coupled with equality before the law (Art.20 CFR), between men and women (Art.22 CFR), respect for cultural, religious and linguistic diversity (Art.22 CFR) and rights of the child (Art.24) and the elderly (25). The inclusion of an obligation for integration of disabled persons illustrates the combination of positive and negative obligations which are applicable when implementing EU law to provide equality and prevent discrimination.

\textsuperscript{214} Case C-72/15 Rosneft [2017] 3 C.M.L.R. 23, [72]-[74].
\textsuperscript{215} For example, Art.85 TFEU on the mission, activities and oversight of Eurojust.
\textsuperscript{217} For example, Case C-144/04 Mangold [2005] ECR I-09981, [78]; Case C-555/07 Küçükdeveci [2010] ECR I-00365.
\textsuperscript{218} Sexual orientation, age, disability, language, race, gender, colour, ethnic or social origin, genetic features, religion or belief, property, birth, membership of a national minority, political or other opinions.
The elements of the EU’s rule of law identified above operate primarily in the supranational and institutional dimensions, governing the relationships between the Member States-EU and the institutions-citizens. However, readmission policy falls within the scope of the extra-territorial dimension, which introduces the obligations to promote and protect the value of the rule of law in its relationships with third countries.

7.5 The EU and Respect for Democracy

The final founding value to be examined is respect for democracy, which alongside the rule of law acts to facilitate the fulfilment of respect for human dignity and human rights. As it has been demonstrated above, there are many areas of overlap between the rule of law and democracy, which further supports the argument the rule of law and democracy cannot be defined. Instead, we can identify elements of these two concepts. In a similar manner to the rule of law, the EU’s respect for democracy has been questioned. For example, Müller described it as ‘fundamentally hypocritical in speaking out for and in the name of values to which it does not adhere itself’. Although discussing the ability of the Union to intervene in Member States which violate the values, this may equally be applied to the EU’s external relations, where the EU is obligated under Art.21(1) and (2)(b) TEU to adhere to the value as well as promote it in its external relations. However, in order to promote democracy, the EU must have a shared, common conception.

In order to identify this common conception, we will first examine the basis of the EU’s value of democracy. It will be argued when conceiving the meaning of democracy inside the Union, the EU offers more specifics in comparison to when the EU is promoting democracy in its external relations. Following the theoretical basis of respect for democracy, this chapter will examine the influence of the Council of Europe on our understanding of democracy. It will be shown the ECHR and case-law of the ECtHR have a substantial influence on the EU’s conception of democracy. Turning to the EU, this chapter will proceed from the Treaties to the EU institutions to the case-law of the CJEU. Examining the Treaties, it will be argued there is a general conception of what democracy is which is applicable to the Member States, but not necessarily to third countries. Furthermore, it will examine the democratic processes of the EU institutions and engage with the issue of whether there is a democratic deficit. The section on the EU institutions will focus on their role in overseeing respect for democracy and the various policies employed to promote democracy in external relations. The last section will

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219 J-W. Müller, ‘The EU as a Militant Democracy, or: Are There Limits to Constitutional Mutations within EU Member States’ (2014) 165 Revista de Estudios Políticos 141, 143.
consider CJEU’s jurisprudence on the elements of democracy in order to finally provide an outline of the EU’s understanding of respect for democracy.

7.5.1 A Theoretical Basis for the EU’s Conception of Democracy
As with the rule of law, the question of the Union’s adherence to respect for democracy ultimately pertains to the legitimacy and accountability of Union activities. Typically conceived as the ability of citizens to engage in the governance, development and policies of the state, requiring trust and confidence in the state apparatus and institutions and the ability to hold those same institutions to account. From this conception, we can identify how deficiencies in the rule of law such as corruption, restrictions on access to legal redress and arbitrary decision-making weaken the institution of democracy in parallel. When applied to the EU context, we are concerned with how citizens influence and engage with the decision-making processes at the EU level.

The supranational nature of the Union adds an additional layer of complexity to the application of and adherence to democracy. Described as a ‘composite democracy’, Héritier proposes five strands of democracy at the EU level, the first of which requires ‘a system of popular control over governmental decisions’, however, the Parliament has limited control and influence over the Commission. Second, in order to be democratically legitimate, democracy requires executive representation, which is fulfilled via the Council. Héritier argues as each Member State has the equal opportunity to represent its interests in the Council, where they are represented by ministers, this provides the EU with an element of indirect democracy through national voting processes. Third, it requires accountability not only between the institutions and citizens but the institutions themselves. Here, we look to the role of the CJEU as the ultimate legal arbiter in the EU legal order and the ability of each institutions to take proceedings to the Court on the basis of their status as privileged parties. The fourth element pertains to the decision-making process itself, conducted through deliberation and with the input of experts which leads to decisions which satisfy all those with legitimate interests. The final element links democracy to human rights, with democracy acting as a facilitator for the realisation of rights such as freedom of assembly and speech. Within this final element, it is transparency and access to

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221 Ibid, 815.
222 Ibid, 816.
223 Ibid, 817.
224 Ibid, 818.
225 Ibid, 818-819.
information in particular which facilitate the accountability of the institutions to citizens as it allows them to interrogate decision-makers, their processes and decisions.\textsuperscript{226}

In a similar vein, Nettesheim frames the process of democracy as ‘the institutionalisation of public power’, the exercise of this power should be democratically legitimate.\textsuperscript{227} The central argument presented by Nettesheim is national conceptions and systems of democracy cannot be automatically translated to a supranational organisation such as the EU. Such a supranational organisation is based on a balance between the competences conferred to it and democratic legitimacy. The greater the weight and importance of the conferred competences, the less sufficient the use of low-level public participation to provide democratic legitimacy and accountability.\textsuperscript{228} For Nettesheim, the basic elements of a democracy are the individual’s right to self-determination, equality between citizens and accountability.\textsuperscript{229} As with Héritier, Nettesheim requires the fulfilment of fundamental rights, describing their absence in a democracy as ‘unthinkable’.\textsuperscript{230} Not only do both Héritier and Nettesheim raise the elements of accountability, public participation, fundamental rights, legitimacy and exercise of public power as key elements of an EU conception of democracy, they also identify areas of deficiency.

These areas of deficiency feed into the debate as to the extent to which the EU adheres to respect for democracy, dominated by the question of whether there is a democratic deficit. First coined by Marquand in \textit{Parliament for Europe},\textsuperscript{231} the democratic deficit posits, in comparison to the powers of the Union, its structure is insufficient to hold it to account for its decisions, with Psygkas arguing the Union’s democratic model is reliant on the role of the Parliament to legitimise EU activities.\textsuperscript{232} As the only directly-elected institution, it is questionable whether the Parliament’s current role is sufficient. Nettesheim raises a more fundamental question as to whether a European people, with a shared political identity exists, arguing it does not.\textsuperscript{233} Writing in response to the arguments of Majone\textsuperscript{234} and

\begin{thebibliography}{9}
\bibitem{226} Ibid, 819-824.
\bibitem{228} Ibid, 370.
\bibitem{229} Ibid, 373.
\bibitem{230} Ibid.
\bibitem{231} D. Marquand, \textit{Parliament for Europe} (Jonathan Cape Ltd 1979) 64-66.
\bibitem{232} A. Psygkas, \textit{From the Democratic Deficit to a Democratic Surplus: Constructing Administrative Democracy in Europe} (OUP 2017) 1.
\bibitem{233} M. Nettesheim (n 227) 371.
\end{thebibliography}
Moravcsik, in establishing their argument in favour of there being a democratic deficit, Follesdal and Hix proposed six elements of a democracy. First, ‘institutionally established procedures that regulate’ refers to mechanisms which ensure that policy outcomes are acceptable. The requirements of ‘competition of control over political authority’ and ‘on the basis of deliberation’ pertains to political competition between different viewpoints, which allows citizens to formulate their views and preferences and for those in authority to respond to these. These three elements form the basis of Hix and Follesdal’s argument the EU is deficient in its adherence to democracy, arguing it lacks the political space for contested ideas in the Council and Commission to present citizens with policy alternatives. This perspective is further elucidated in the remaining three elements of democracy.

Although it is possible from the theoretical literature to identify elements of democracy applicable at the EU level, it is a separate issue to determine the extent the Union adheres to these elements. Writing in 2002, Lord proposed 12 possible indicators to examine the EU’s adherence to democracy based on the different approaches which have been applied to the issue of the democratic deficit. Under contestatory approaches, two indices to focus on are the extent to which offices in the EU institutions are subject to competitive elections and to what extent relevant elections turn on issues at the EU level. Indicators for the consensus approach focus on the recognition and representation of different groups of citizens and interests, to what extent these differences are protected through the EU’s democratic process. Deliberative approaches require indices based on participation and

237 Ibid, 548.
238 Ibid, 547.
239 Ibid, 548-549.
240 Ibid, 548-551.
241 Ibid, 547 (4) where nearly all adult citizens are permitted to participate in, (5) an electoral mechanism where their expressed preferences over alternative candidates determine the outcome, (6) in such ways that the government is responsive to the majority or to as many as possible).
243 Ibid, 647.
244 Ibid.
inclusiveness, not only of citizens but also the media and NGOs. Such indicators reveal further elements of democracy.

Taken together, we can establish a theoretical basis of the EU’s conception of democracy while simultaneously recognising its supranational nature. Democracy at such a level requires citizens, NGOs, the media and interest groups to gain knowledge of and engage in the legislative process as well as exercising control over the exercise of power. Such processes should be inclusive and transparent, with every individual enjoying the equal opportunity to engage. The democratic process underpins the fulfilment of fundamental rights and the rule of law in the Union such as freedom of association and expression. However, the institutions through which these elements are realised differ substantially from those which exist at the domestic level. As the only directly elected institution, the Parliament assumes a greater responsibility, yet its powers do not necessarily reflect this reality. As it will be shown in the following sections, beyond this theoretical underpinning we must examine how the Council of Europe conceives democracy as well as the EU Treaties and institutions.

7.5.2 Democracy and CoFE

As with the rule of law, the CoFE enjoys a unique relationship with the EU on democracy, with the ECtHR and Venice Commission defining numerous elements required in a democracy. Indeed, as the ECtHR has previously stated, ‘not only is political democracy a fundamental feature of the European public order but the Convention was designed to promote and maintain the ideals and values of a democratic society’. As stated in the Preamble to the Convention, human rights and freedoms may only be realised in states with effective political democracies. This requirement has had a substantial influence on contracting parties and their adherence to democratic values and principles.

First, a functioning democracy requires individuals to be able to express and manifest their religion, thoughts and conscience as defined by Art.9 ECHR. The Court has highlighted its importance in a democratic society on numerous occasions, including in Kokkinakis v Greece where it was stated ‘the pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it’.

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245 Ibid.
246 Gorzelik and Others v Poland App no 44158/98 (ECtHR, 17 February 2004), [89].
247 See I. Motoz and I. Ziemele (eds), The Impact of the ECHR on Democratic Change in Central and Eastern Europe (CUP 2016).
248 Kokkinakis v Greece App no 14307/88 (ECtHR, 25 May 1993), [31].
Coupled with this is a right to expression under Art.10 ECHR, including the ‘freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of authority’. As stated in *Handyside*, ‘freedom of expression constitutes one of the essential foundations’ of a democratic society. Such freedom of expression may be subject to limitation under Art.10(2), however, as the Court outlined in *Wingrove v UK* a distinction may be made between political speech or public interest and speech which is ‘liable to offend intimate personal convictions’ with the Convention providing little scope for restriction of the former. This includes the ability of members of parliament to freely express their ideas and opinions.

Behind freedom of expression in a democratic society is the ability to exchange and express ideas beyond solely the political arena. For example, in *Karatas v Turkey* the ECtHR confirmed artistic expression falls within the scope of Art.10 ECHR as it ‘affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds’. This exchange and open discussion serves several functions, including allowing citizens to hold their governments to account as it requires a degree of transparency from the authorities. The Venice Commission has emphasised freedom of expression encompasses a right to receive and access information from public authorities, an element which fits equally between rule of law and democracy. These aspects of freedom of expression are facilitated by a free press, which acts as a ‘public watchdog’ and ‘affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders’.

Alongside this is the freedom of assembly and association protected under Art.11 ECHR, which facilitates free expression, the exchange of ideas and the abilities of individuals to group together to protect their common interests. The freedom of assembly aspect encompasses all gatherings ‘except those where the organisers and participants have violent intentions, incite violence or otherwise reject

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249 ECHR (n 17) art.10 (1).
250 Handyside v United Kingdom (1979-80) 1 E.H.R.R. 737.
251 Ibid, [49].
253 Karácsony and Others v Hungary App no 42461/13 (ECtHR, 17 May 2016), [141].
254 Karatas v Turkey app no 23168/94 (ECtHR, 8 July 1994).
255 Ibid, [49].
257 Ibid, 7.
258 Animal Defenders International v United Kingdom App no 48876/08 (ECtHR, 22 April 2013), [102].
the foundations of a democratic society’. It is for those participating in the assembly to choose its time, location and methods. Freedom of association, for the Venice Commission, contains three elements:

1. Civil – ‘protects individuals against unlawful intervention by the state into the individual wish to associate with others’;
2. Political – ‘defend their interests against the state or other individuals in an organised and hence more efficient way’;
3. Economic – ‘promote their interests in the area of the labour market’.

To these interests we may add the following elements identified by the ECtHR in Gorzelik and Others v Poland:

‘associations formed for other purposes, including those protecting cultural or spiritual heritage, pursuing various socio-economic aims, proclaiming or teaching religion, seeking an ethnic identity or asserting a minority consciousness, are also important to the proper functioning of democracy’.

Taken together, the protections afforded under Art.10 and 11 ECHR allow the free exchange of ideas, opinions and information between individuals which facilitates the identification of common political, cultural, civil, social and economic interests and positions for which they have the right to advocate for the furtherance of. We can combine these Convention provisions with the right to free elections which ‘ensure the free expression of the opinion of the people’ under Art.3 of Protocol No.1. In Yumak and Sadak, the ECtHR confirmed the link as political parties are themselves a form of association.

7.5.3 The EU’s Understanding of Democracy

The Union’s own conception of democracy rests on several levels and relies on a link between national legislatures and the Union institutions as well as the ability of citizens to engage with those same institutions. However, these interactions are approached from the perspective of a broad idea of Western liberal democracy, reflective of the democratic systems of its Member States. However, as

259 Lashmankin and Others v Russia App no 57818/09 (ECtHR, 7 February 2017), [402].
260 Sáska v Hungary App no 58050/08 (ECtHR, 27 November 2012), [21].
262 Gorzelik and Others v Poland App no 44158/98 (ECtHR, 17 February 2004), [92].
263 Yumak and Sadak v Turkey App no 10226/03 (ECtHR, 8 July 2008).
264 Ibid, [107].
Müller correctly notes, even within this broad category there is still no single understanding of democracy, settling on an ‘antimajoritarian’ model of European democracy. Described as a ‘composite democracy’ which ‘does not add up to a coherent system’, the Treaties state the Union is founded on representative democracy, with Parliament being the only institution directly elected by EU citizens. Therefore, the Charter guarantees the ability of EU citizens to stand and vote for elections to the Parliament and in municipal elections ‘under the same conditions as nationals of that Member State’.

However, citizens are also indirectly represented by the membership composition of the Council and European Council. Under the Ordinary Legislative Procedure, the Parliament must provide its consent for an EU act to be adopted. In the realm of international agreements, such as EURAs under Art.79(3) TFEU, the Parliament must give its consent. That the Council must also grant the Commission a negotiating mandate for EURAs further injects a degree of democratic accountability. Alongside the Commission, CJEU, ECB and Court of Auditors, the institutions and EU agencies are overseen by, or exercise oversight over, the activities of other EU institutions in a manner which ensures a degree of accountability. For example, the European Border and Coast Guard Agency is accountable to the Parliament and Council. In this structure, the EU’s understanding of democracy has been described by Lenaerts as being:

‘individualistic in that it guarantees representation, participation in decision-making and debate...on the other hand, EU law must also reassure in the Member States that, through their national governments, they have a role to play in European integration’.


267 TEU (n 1) art.10 (1).

268 Ibid, art.10 (2).

269 CFR (n 156) art.39.

270 Ibid, art.40.

271 TFEU (n 125) art.294.

272 Ibid, art.218.


In supervising the application of the principles of subsidiarity and proportionality, national parliaments play an important and active role in the EU’s conception of democracy, providing a further link between locally elected representatives and the activities of the institutions. Pertinently for readmission policy, as part of the AFSJ, national parliaments scrutinise such measures on the basis of subsidiarity as recognised under Art.69 TFEU. Acting as an advisory body, the Committee of the Regions represents the interests of regional and local representatives to the Parliament, Council and Commission. The Economic and Social Committee represents the interests of economic and social organisations to the same EU institutions.

Art.11 TEU recognises the importance of transparency to, and engagement with citizens, associations and interest groups. As Héritier has argued, ‘transparency and access to information determine who has the right to know who the decision-makers are, what procedures they employ, what their areas of interest are, and what the consequences of their decisions are’. In order to facilitate this, Art.15(1) TFEU requires the institutions and agencies to ‘conduct their work as openly as possible’ with citizens enjoying a right of access to documents under the Treaties regardless of form and the Charter. The level of engagement extends beyond Commission consultations to include European Citizens’ Initiatives, which allows over one million citizens to put forward proposals for new EU legal acts. Citizens and legal persons are also able, if resident or registered in a Member State, to petition the Parliament.

In the case of Netherlands v Council concerning the right of access to information, the Court recognised there was growing trend among the Member States to open up and allow citizens access to information, which was beginning to be reflected by the Council. In the opinion of AG Tesauro, openness is linked to how democratic an institution is, later concluding ‘the right of access to official

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275 TEU (n 1) art.12; Protocol (No 1) on the role of National Parliaments in the European Union; Protocol (No 2) on the application of the principles of subsidiarity and proportionality.
276 TEU (n 1) art.13 (4); TFEU (n 125) arts.305-307.
277 TFEU (n 125) arts.301-304.
278 A. Héritier, ‘Composite Democracy in Europe’ (n 266) 819.
279 TFEU (n 125) art.15 (3).
280 CFR (n 156) art.42.
281 TEU (n 1) art.11 (3).
282 Ibid, art.11 (4); TFEU (n 125) art.24.
283 TFEU (n 125) art.227; CFR (n 156) art.44.
285 Ibid, [36].
The significance of the right to access information for the democratic legitimacy of the EU institutions was further confirmed in *Interporc v Commission*. Coupled with access to information is protection of data as safeguarded by Art.8 CFR, which includes a right to access this data.

Corresponding to Art.9 ECHR, the Charter recognises freedom of thought, conscience and religion under Art.10. As with the ECHR, the CJEU has stated that this freedom ‘is one of the foundations of a democratic society and is a basic human right’. The CJEU has had greater cause to consider freedom of expression and information under Art.11 CFR, which differs in its meaning and scope from that in Art.10 ECHR. First, Art.11(1) includes reference to ‘without interference by public authority and regardless of frontiers’, thereby recognising the interconnected nature of the Member States and the ease in which information, opinions and interests are no longer restricted by the nature of borders as they may have been when the Convention was originally drafted. Art.11(2) CFR corresponds to the importance to which the Convention has placed on the role of the free press and media as a conduit for the transmission of interests and viewpoints across societies. In cases such as *Tele2 Sverige* and *Patriciello*, the CJEU has repeatedly emphasised the importance of freedom of expression as an ‘essential foundation of a pluralist, democratic society’.

Corresponding to the cultural element of freedom of expression, Art.13 CFR ensures respect for the freedom of the arts and sciences. Art.12 CFR is in part wider in scope than its corresponding Convention article. As argued by Dorssemont, as the Charter only applies to the EU institutions or where EU law is being applied by Member States, freedom of assembly and association under the Charter is also directed towards employees of the institutions, ‘they relate to ‘organic’ or institutional EU law, as opposed to material

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287 Case C-41/00 P *Interporc v Commission* [2003] ECR I-02125, [38].

288 CFR (n 156) art.8 (2).

289 Joined Cases C-71/11 and C-99/11 *Bundesrepublik Deutschland v Y and Z* (CJEU, 5 September 2012), [57].

290 ‘The freedom and pluralism of the media shall be respected’.

291 Case C-203/15 *Tele2 Sverige* (CJEU, 21 December 2016), [93].


293 Ibid, [31].

294 Freedom of assembly and association.
EU law. Art.12(2) CFR corresponds to Art.10(4) TEU and is therefore more declaratory in nature than 12(1) CFR. In relation to associations and the ECtHR’s interpretation of Art.11 ECHR, we may also tie Art.28 CFR (right to collective bargaining and action) to this right.

As with the corresponding Convention rights, Charter rights are subject to the same limitations in scope: the rights and freedoms under Art.10, 11, 12 and 13 CFR are subject to restrictions prescribed by law and necessary in a democratic society. However, these aspects of the EU’s conception of democracy apply to its internal operation. As with the other values, respect for democracy shapes the nature of EUs external relations including the commitment to ‘consolidate and support democracy’.

In the arena of democracy promotion, sitting within its development policies, it is beneficial for the EU not to have a single conception of democracy. Instead, we may observe a focus on democratic principles which allow for flexibility in the exact model of democracy which third countries pursue. For Cardwell, the emphasis in the EU’s external relations on respect for human rights requires a liberal and representative form of democracy. Such a position recognises the interdependent nature of democracy, human rights and the rule of law. For example, the European Instrument for Democracy and Human Rights (EIDHR) lists one of its objectives as assisting in democracy promotion ‘through support for civil society organisations, providing support and solidarity to human rights defenders and victims of repression and abuse, and strengthening civil society active in the field of human rights and democracy promotion’. In its scope, Art.2(1)(a) focuses on promoting ‘participatory and

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296 ‘Political parties at Union level contribute to expressing the political will of the citizens of the Union’.
298 Ibid.
299 CFR (n 156) art.52(3).
300 TEU (n 1) art.21(2)(b).
305 Ibid, art.2(1)(a).
representative democracy, including parliamentary democracy’ through the fulfilment of a number of rights recognised by EU law and the CoFE under subsections one, four, five and nine. The focus on civil society reflects what Kurki described as targeting the general public in particular states rather than the political actors and institutions, ‘pushing them in the direction of the right kind of freedoms and democracy-enhancing activities’. While the majority of the elements in the EIDHR correspond to the internal understanding of democracy, the ‘unhindered’ movement of people does not appear in any of the literature related to the EU’s conception of democracy. It could be argued the free movement of people acts to facilitate the free movement of ideas, beliefs and cultural expression.

Combining these elements together, the EU’s conception of democracy is reliant on the ability of citizens to freely exchange, within legitimate restrictions, ideas, opinions, culture and beliefs in a society which allows them to group together and advocate for their common interests. Such citizens should have the ability to vote for their elected representatives on an equal footing and engage in the legislative and policy-making processes through their elected representatives. They should furthermore possess the ability to bypass their local representatives and petition the relevant political institutions directly.

306 ‘promoting freedom of association and assembly, unhindered movement of persons, freedom of opinion and expression, including political, artistic and cultural expression, unimpeded access to information, a free press and independent pluralistic media, both traditional and ICT-based, internet freedom and measures to combat administrative obstacles to the exercise of these freedoms, including the fight against censorship, particularly through the adoption and implementation of relevant legislation’.

307 ‘supporting the transition to democracy and reforms to achieve effective and transparent democratic and domestic accountability and oversight, including in the security and justice sectors, and strengthening measures against corruption’.

308 ‘promoting political pluralism and democratic political representation, and encouraging political participation by women and men, in particular members of marginalised and vulnerable groups, both as voters and as candidates, in democratic reform processes at local, regional and national level’.

309 ‘supporting measures to facilitate the peaceful conciliation of group interests, including support for confidence-building measures relating to human rights and democratisation’.

7.6 Readmission and the Rule of Law

Among the many intersections between readmission policy and the rule of law, the increasing trend towards the use of political arrangements by the Union raises several concerns as to EU adherence to the rule of law. Molinari, Carrera and others have highlighted the issue of informalisation of third country cooperation, which places these agreements outside the scope of EU law and thereby, its oversight mechanisms. As Molinari has argued, ‘it links with a strategic avoidance of accountability in sensitive areas of the Union’s actions that has the potential to exempt them almost entirely from the rule of laws mechanisms proper to the Union’s constitutional order’. In many respects, these new forms of political arrangements more closely align with other international instruments used to manage migration than formal readmission agreements.

One possible avenue of argument is the Union’s readmission policy does not adhere to the rule of law as its political arrangements do indeed produce legal effects, which can be established in part by identifying the intentions of the Parties as well as the outcomes. The most prominent effect of the use of political arrangements is the removal of CJEU jurisdiction as demonstrated by the EU-Turkey Statement. As well as exercising jurisdiction over EU international agreements, the CJEU also enjoys jurisdiction under Art.218(11) TFEU to give an opinion ‘as to whether an agreement envisaged is compatible with the Treaties’. Such an opinion can be requested by Member States, the Council, Commission or Parliament. Here, we are most concerned with the exclusion of Parliament, which is not limited to its ability to request an CJEU opinion. It also applies to the obligation that Parliament is informed at every stage of the negotiation process and for Parliament to have the opportunity to

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313 Molinari (n 311) 827.
315 Molinari (n 311) 835-ff.
317 TFEU (n 125) art.218(10).
express its views. Most importantly, they do not require Parliament’s consent. This situation engages the rule of law as it interferes with the institutional balance, which in the definition of the rule of law proposed in this chapter correlates to the separation of powers. The exclusion of the Art.218 TFEU procedure also means the Commission does not require a formal mandate from the Council as per Art.218(2). To this, we may also add the increasing use of political arrangements means that the policy area is gradually becoming absent from the Official Journal, in which legal certainty and legitimate expectation both require publication of formal readmission agreements.

Alongside the interference with the institutional balance resulting from the exclusion of readmission arrangements from the scope of EU law, the arrangements do not include many procedural provisions found in EURAs. One of these is the readmission in error provision, which allows within a specified period for the return of individuals who did not meet the requirements for readmission back to the Requesting State. For example, the EU-Turkey Agreement allocates a three-month period, whereas the EU-Armenia Agreement allows for six months. In contrast to this, the EU-Afghanistan Joint Way Forward does not contain any such provision. Here, it is argued the absence of such a provision denies individuals who may have been returned by error a means of legal redress. From the text of EURAs, it is not clear as to which party the individual would make representations to. It is however clear the provision applies to own nationals as well as third-country nationals and stateless persons. For a direct comparison to the Joint Way Forward, we must presume the individual is an Afghan national. In the instance of the return in error of an Afghan national, or an individual mistakenly identified as Afghan, which could occur for a multitude of reasons, to whom would they make representations? On what legal basis would their challenge occur and on what legal basis could Afghanistan rely on in order to oblige the Member State concerned to accept the return of that individual? In the absence of a formal agreement, the Member State concerned is under no obligation to accept the return. Making legal presentations before the relevant Afghan bodies may also require

319 TFEU (n 125) art.218(6)(a).
access to legal advice and potentially access to legal aid. These are both elements identified in the EU’s conception of respect for the rule of law, yet adherence is far from guaranteed.

While the EU may seek to comply with the rule of law, the above example demonstrates how, from the perspective of the returnee, adherence is required from the Requesting and Requested State. Therefore, it is possible to link the level of adherence to the rule of law in the readmission process as in part reliant on the Union’s wider efforts to promote its founding values in its external relations.

It can be argued the governance provided for under the political arrangements raises further questions as to adherence to the rule of law. The application and interpretation of EURAs is the responsibility of the Joint Readmission Committee established by the agreements, with the Union represented by the Commission. The scope and responsibilities of the Committee are clearly defined in the relevant provisions. However, this can be contrasted with the Working Group established by the EU-Bangladesh Standard Operating Procedures, which monitors its application. The lack of clear definition in the latter political arrangement raises questions as to the scope of the Commission’s competence under the arrangement and oversight of its exercise.

The increasing use of political arrangements by the EU to manage the readmission process, while allowing for increasing flexibility to enhance cooperation, comes at the expense of the EU’s rule of law adherence. The increasing informalisation of this policy area is a concern for many elements of the rule of law, the underlying basis being the removal of CJEU jurisdiction. Removing jurisdiction by acting in the political arena is significant in preventing the institutions, Member States or individuals from challenging the validity and interpretation of the arrangements at every stage of the process. From here, it can be argued the move towards political arrangements interferes with the institutional balance of the Union, particularly as the expense of the Parliament. It also removes, or at the very least severely limits, the ability of those who have been returned to challenge the reliability of the decision from the third country concerned. This is exemplified by the absence of readmission in error clauses in the EU’s political arrangements. Furthermore, due to their political nature, they are not required to be published in the Official Journal, which affects the ability of individuals subject to the readmission process to understand the procedures by which they are being transferred.

Through this examination it can be argued there are significant deficiencies in the level of adherence to the rule of law exhibited by the EU’s readmission policy which stem primarily from the use of political arrangements, which allow the Commission to effectively side-step the Parliament and

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Council in the negotiation and conclusion of such arrangements. Furthermore, as they are not legal acts or intended to produce legal effects, the CJEU is not able to exercise its jurisdiction, which closes off the ability of the other institutions, Member States and individuals to hold the Commission to account in this policy area as well as an avenue of interpretation. It has been argued this affects elements such as legal certainty, legitimate expectation and the institutional balance intended by the Treaties.

7.7 Readmission and Democracy

Although we can acknowledge EU political arrangements on readmission are generally negotiated where an EURA is not possible, the informalisation of the policy still has implications for both rule of law and democracy adherence. This is particularly acute where the political arrangements are detailed in procedural terms to a similar level as a formal agreement. The primary concern here is the effective side-stepping of the Art.218 TFEU process, which applies to effectively all international legal agreements of the Union. The CJEU has interpreted this provision as being ‘an autonomous and general provision of constitutional scope’ which is designed to maintain the institutional balance between the Council, Parliament and Commission and provides clarity and consistency.

The exclusion of the Parliament in the process of formulating these political arrangements, it is proposed, damages the democratic accountability of the process. Not only is the Parliament the only directly elected body, but in comparison to the Art.218 process, its right to scrutinise and to information provided under Art.218(10) are curtailed. This right to information applies at every stage of the process. This is not to presume the Commission does not provide any form of information to the Parliament on political arrangements, there is however a distinction between a right to information and the information being shared through discretion. Furthermore, the Parliament is not required to give its consent to the conclusion of the political arrangements. Indeed, taking account the lack of a requirement for a Council negotiating mandate as required under Art.218(2), the only directly elected body and the indirectly representative body are both being excluded to a substantial degree from the policy-making process in comparison to EURAs. In this respect, Reslow and Vink have described the Council and Parliament as ‘veto-players’ whose exclusion gives the Commission greater

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324 Case C-425/13 Commission v Council (CJEU, 16 July 2015), [62]
325 Ibid.
326 Case C-658/11 Parliament v Council (CJEU, 24 June 2014), [52].
327 Ibid, [75]-[81].
Such a line of argument is reliant on a distinction being made as to the contents of EURAs. These can be separated into obligations on the readmission of own nationals, third-country nationals and stateless persons, and the procedures by which the readmission is to take place. The political arrangements concluded by the Union do not replicate the third-country national and stateless person obligations, instead relying on customary international law on the return of own nationals. However, they do often replicate the procedural elements such as data transfers and the identification processes. In this respect there is little to distinguish between political arrangements and EURAs. The nature of the obligation is altered, but the outcome is effectively the same. There is an argument to be made therefore the Parliament and Council should play some role in the realisation of these political arrangements beyond ‘coordination’\(^{329}\) in order to improve its adherence to elements of democracy such as transparency and representation.

When assessing the extent to which EURAs, and their role within the Union’s wider irregular migration approach, adhere to respect for democracy, we are concerned with two elements. First, the extent the Union’s negotiating approach takes account of third country interests and second, the extent cooperation on migration alters the political priorities and relations of third countries with other third countries.

In the first instance, the EU has sought to present EURAs as forming but one part of a migration relationship or partnership with a third country, which may also comprise of a visa facilitation agreement\(^{330}\) or other types of incentive which are in proportion to the proposed obligations.\(^{331}\) The portrayal of this as a partnership recognises implementing EURAs may come at a cost for the third country concerned, either political or economic.\(^{332}\) At a lower level, cooperation on the readmission of own nationals has been combined in political arrangements such as Partnership Compacts with

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\(^{330}\) Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Cape Verde, FYROM Macedonia, Georgia, Moldova, Montenegro, Russia, Serbia and Ukraine.

\(^{331}\) Council of the European Union, ‘Council Conclusions Defining the European Union Strategy on Readmission’ (Brussels, 8 June 2011) 11260/11, 6.

development cooperation. Yet the cooperation in the Compacts extends beyond readmission to include border management and control, reintegration, counter-smuggling and addressing the root causes of migration. In particular, it is the combination of the emphasis placed on readmission alongside border controls which is of concern at the political level in these arrangements, and the inclusion of third country nationals and stateless persons in formal readmission agreements. It is argued that this combination alters the political priorities of the third country concerned. For own nationals, the requirements for identification, which presume some of form of data collection and registration system can be burdensome for third countries. There may also be cultural concerns, for example, in Senegal returning migrants have negative connotations attached to them. Bernardini further noted that 13.6 per cent of Senegalese GDP was comprised of migrant remittances. The extent the Commission takes into account these factors when identifying and negotiating with third countries can be questioned.

The link with border controls and the inclusion of third-country nationals stretches across both areas of concern as they can affect both domestic politics and priorities, and the state’s own relations with third states. First, there are domestic difficulties with potentially being obligated to accept the readmission of third country nationals and stateless persons, as was raised by Morocco during its negotiations with the EU. Morocco was concerned by the absence of EURAs with other parties to the Cotonou Agreement, ‘fearing to become the country of return by default for African countries’. Furthermore, Moroccan citizens were concerned with what they saw as an unfairness in the level of obligations placed on Morocco in comparison to the EU. Even cooperation through RAs on the

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334 Ibid, 2-6.


337 Ibid.


readmission of own nationals suffers from unpopularity before domestic audiences. In Albania, similar concerns were raised by the Albanian population, with concerns that a large number of Albanians could be returned from the EU under the EURA. However, through a combination of a Visa Facilitation Agreement and the ability of Albanian politicians to sell the EURA, the Albanian authorities were able to placate the population.

The inclusion of third-country nationals has proven to be problematic in negotiations, particularly for transit states such as Morocco and Turkey, increasing the costs of negotiations. This is due to them being effectively asked to potentially accept responsibility for third country nationals and stateless persons who pass through on their journey to the EU. This may result in numerous policy responses including the strengthening of their own borders in order to reduce the number of irregular migrants able to enter the country. The second policy response is the third country concerned may seek to conclude its own RAs with neighbouring countries to ensure that such individuals are returned to their country of origin. Although Turkey has been able to conclude RAs with states it has identified as significant countries of origin, for Morocco the cost is considered too high for its foreign policy objectives. First, Morocco needs to ensure positive relations with its neighbour Algeria, with that border being a significant border crossing, demonstrated by the 95 per cent of returnees to Morocco who originally entered via the Morocco-Algeria border. Furthermore, surrounding African states have been reluctant to engage on readmission with Morocco, making it more difficult to conclude agreements for the return of their nationals, thereby Morocco would be left with a larger share of the

responsibility. Interestingly, the EU requested Morocco alter its visa policy towards a number of its close neighbours.

The argument here is that the EU is not considering the significant political considerations of the third countries that it seeks to negotiate EURAs with. Although it recognises the agreements are accompanied by costs, it is my argument this approach interferes with the democratic accountability and transparency of the third country authorities. In the example of Albania, it could be argued transparency assisted in the “selling” of the agreement. However, it can be argued Albania can be distinguished as an EU candidate state which seeks to match the EU’s standards on democracy and the rule of law as part of the accession process. On a prima-facie reading, a state which suffers from a lack of transparency is less likely to be transparent about the conclusion of an international agreement which may incur political and economic costs. Particularly with the inclusion of third country nationals and stateless persons, not only may it require the state in question to shift economic and political resources to the development of border management facilities and databases, but also the international capital required to negotiate its own readmission agreements.

In order to address these deficiencies, we may propose several reforms to improve a state’s adherence to respect for democracy. First, although all negotiating mandates include third-country nationals and stateless persons, it is argued here that this should no longer be standard practice, and instead be dependent on geographical proximity to the EU. The focus on third country nationals should be on those states closest to the EU’s borders. With states geographically distant, the focus should be on own nationals and procedures. This may potentially make it easier for the EU to conclude EURAs with states such as Nigeria. Second, in order to ensure that RAs are easier for third countries to sell to their home populations, readmission obligations and visa facilitation should be included in a single agreement, with a single governance structure, which allows for the suspension of visa cooperation in the event the third country does not effectively implement its readmission obligations. Third, the negotiation of political arrangements should occur with the consultation of the Parliament to allow the involvement and oversight of the only directly elected institution in the process. However, this should not necessarily extend to requiring the Parliament’s consent.

7.8 Conclusion

Examining them together, this chapter has approached respect for democracy and the rule of law as two of the founding values which facilitate the fulfilment of respect for human dignity and human rights, providing the method of recognition, interpretation and enforcement of societal and individual obligations towards the other. Both are contested concepts, with their precise meaning or acceptance being the subject of substantial academic discussion, meaning it is not possible to construct a single, accepted definition. On this basis, this chapter sought to identify elements of the rule of law and democracy specifically at the EU level, arguing the EU’s conception of these values may not correspond to Member States or international organisations. This has been achieved by examining the sources which arguably have the most significant impact on the EU, primarily the CofE, with which it enjoys a particularly close relationship. This is in part recognition of the separate roles of the two bodies, with the CofE maintaining its position as the primary adjudicator and interpreter of human rights, the rule of law and democracy in continental Europe. The difficulty and inconsistencies in the various potential interpretations of the two values means the definitions or outlines in this chapter are not conclusive and are not intended as such. Instead, the chapter details elements which are most widely recognised in the literature and indeed by the EU institutions.

Pursuing a ‘thick’ understanding of the rule of law, operating across the institutional and supranational planes, it has been proposed in large part that the EU’s understanding of the rule of law closely aligns with the Venice Commission’s Rule of Law Checklist and the elements identified by the ECtHR. This includes legality, access to justice, respect for human rights, equality, access to justice, legal certainty and prevention of the misuse of powers.

The existence of layers of internal rule of law enforcement mechanisms highlights the importance of a common understanding of the rule of law and the examination of the Treaty texts, CFR and CJEU jurisprudence demonstrates how various elements of the Rule of Law Checklist have been incorporated in a manner which accounts for the unique nature of the EU’s structure. For example, the requirements of legality include adherence to the general principles of EU law as recognised by the CJEU and Treaties. The separation of powers element instead transposes into maintaining the institutional balance determined by the Treaties. This chapter has highlighted the precise level of rule of law adherence at the supranational level is in part dependent on Member States. For example, in creating an effective system of judicial control, independent and impartial national courts have an important role to play. National rule of law adherence ultimately affects the entire functioning of the Union. From the examination of the EU’s conception of the rule of law, it is argued at the supranational
and institutional level, the Union does appear to adhere to its own understanding of the founding value but with scope for reform. For example, the exclusion of CFSP acts from CJEU jurisdiction.

It is in area of readmission and the extra-territorial plane where we question whether the EU ‘practices what it preaches’, and it is proposed EU action is inconsistent. As has been established in previous chapters, readmission policy is in large part reactive and driven by a series of trade-offs in pursuit of the objective of increasing the rate of effective returns. For example, the conclusion of EURAs or obligations with states with arguably poor human rights records or migration management systems which may not be suitable. The pursuit of this prime objective has in recent years led to the Union taking on the behaviours of its Member States, including the use of political arrangements to foster cooperation. It is this informalisation which has been shown in this chapter to raise questions as to adherence to the rule of law when acting externally. Political arrangements, such as the EU-Afghanistan Joint Way Forward and EU-Bangladesh Standard Operating Procedures, in many respects replicate the procedures contained in EURAs, with the question of whether they produce or were intended to produce legal effects open to discussion. From the perspective of the rule of law, the increasing use of political arrangements circumvents the jurisdiction of the CJEU, and the institutional balance maintained by Art.218 TFEU when negotiating international agreements. Not only is the ability of the CJEU to rule on the legality of these arrangements and provide a binding interpretation of the provisions curtailed, but the role and rights of the Parliament under Art.218 are compromised. It has been further submitted the use of political arrangements compromises the legal certainty and ability or returnees to challenge not only the arrangements themselves but aspects of them. One example highlighted in this chapter is the possibility of a readmission in error. These clauses appear in EURAs but not in EU political arrangements. These provide the procedure by which a returnee may be returned to the original Requesting State if there has been an error in identification. The lack of procedure and avenue for challenge compromises the rights of the returnee and the rule of law. Any such challenge by a returnee may also rely on access to legal advice and legal aid in the Requested State.

As with the rule of law, the EU’s understanding of respect for democracy is also open to interpretation and may produce inconsistencies. The supranational nature of the EU means its conception of democracy is not only reliant on Member States themselves adhering to it but also the involvement of national parliaments and representatives in the EU decision-making process. As well as national institutions and representatives, the EU’s conception relies on the ability of individuals within the Union to freely exchange ideas, religion, thoughts, beliefs and opinions and to act to protect their own interests, with the ability to hold the institutions accountable and to petition them when appropriate. Therefore, it requires respect for, and enforcement of, the rights contained in Art.10-14, 39, 42 and
44 CFR. Based on a representative, participatory Western form of liberal democracy, the Union reflects many of the democratic values and norms of its Member States. As it has been argued in this chapter, relying on elements of democracy, rather than a fixed definition means the EU has been able to promote democracy in its external relations.

When we examine the adherence of its readmission policy to this founding value, we can identify weaknesses which also stem from the use of political arrangements. The primary weakness being the exclusion of Parliament from the entire process. This chapter has also argued the way the EU identifies and approaches third countries for negotiation has implications for democracy in those third countries and indeed their own relations other third countries. It has been argued that the Commission does not sufficiently consider such aspects. The examples of Morocco, Turkey and Albania serve to demonstrate how regional dynamics, the associated costs and the inclusion of third country national obligations means that third countries may be reluctant to conclude formal readmission agreements. Such agreements can have a substantial impact on the domestic political situation, altering the priorities of the government towards issues such as border management which may impact their relations with neighbouring countries. On this basis, it has been argued that the EU’s readmission policy suffers from deficiencies in its adherence to respect for democracy as set out in Art.2 TEU.

Having identified these issues, this chapter has proposed several reforms in this policy area which may improve adherence, including the removal of third country national and stateless persons provisions from the standard Council negotiating mandates, to instead be included on a selective basis dependent on geographical proximity. Second, it has been proposed readmission and visa facilitation should be negotiated together and included in the same agreement, with one governance structure, allowing for the suspension of visa cooperation in the event of issues with readmission. In respect of democracy, arguably the most significant is the provision of a role for Parliament in the negotiation of future political arrangements, with the minimum involvement being at the level of consultation.
Conclusions

This thesis has examined the interaction between the EU’s founding values of respect for human dignity, human rights, rule of law and democracy and its readmission policy. The primary research question has been the extent to which the EU’s readmission policy is congruent with these founding values and throughout this thesis, I have demonstrated and highlighted the incongruence of readmission policy, in some areas substantial gaps exist between the values as written and the values as implemented. As it is highlighted in the thesis, a deficiency in one value is hard to contain due to their interconnected nature. In many respects, particularly democracy and the rule of law, there are significant overlaps. It is difficult to achieve the fulfilment of one value without the others. Although these values are designed to shape the creation of EU measures, through examining readmission policy it has been shown that implementation of the values competes against political expediency and reality which requires action from the EU and Member States to address what they have perceived as a ‘migration crisis’.

The initial motivation for this thesis was human rights compliance and readmission, with a body of literature focusing on issues such as refoulement and the rights of returnees. However, I recognised the EU founding values, of which human rights is but one, had not previously been applied as a lens to EU policy development, despite the Treaties requiring all measures to be congruent with these values. It was clear readmission policy was being designed as a reaction to events, not proactively anticipating future migration movements. Here, I identified the potential for a fast-developing policy area to potentially lead to compromised values in the pursuit of political objectives. In order to bridge this gap, I have proposed several reforms for the future development of EU readmission policy.

In order to apply the values to readmission, I first established the EU’s understanding of them, selecting human dignity, human rights, rule of law and democracy from those listed in Art.2 TEU as the most substantial values. The EU’s understanding is important as the Treaties contain an enforcement mechanism in the event of violations in Art.7 TEU. Therefore, this thesis proceeds on the basis a common understanding of the values exists, or at least elements of a common understanding in the absence of a precise definition. In Chapter Five, I considered the value of human dignity, and proposed it is interpreted as the foundation upon which human rights are based, with its application and interpretation taking place alongside specific rights. Here, it is proposed, in the absence of references to human dignity in the ECHR, the EU draws to a greater extent on Member State constitutions. The inclusion of the right to human dignity under Art.1 CFR, I propose, is also used as a tool of interpretation by the CJEU and EU to address gaps in understanding and jurisprudence.
With human rights, considered in Chapter Six, it is not possible to produce an encompassing definition due to the scope of civil, political, economic and social rights recognised by the EU, reflecting its nature as a political and economic supranational organisation. Therefore, I have highlighted those areas most relevant to readmission, drawing on the international sources recognised by the EU such as the CofE. Respect for democracy and the rule of law are the most contested values of the four included in this thesis. In response to this, this thesis has focused on those elements most closely applicable to the EU, creating an EU specific conception of democracy and the rule of law in recognition that it is not possible to create a single, accepted definition.

Defining or identifying elements of the founding values is important not only for the EU’s internal understanding but also how it promotes them in its external relations as required under Art.3(5) and 21(2) TEU. This thesis proposes the understanding is not consistent between the internal and external spheres, particularly on the rule of law and democracy. This is in part due to its sui generis nature as well as the exportability of these two values. Here, the advantages of using elements rather than definitions can be observed in taking account of third country approaches and understanding of these same values.

In conjunction with the analysis of the values, I examined the EU’s readmission policy, beginning with its historical development in Chapter Two. Here, I argue it has transitioned from an area very much in the bailiwick of Member States as an essential role of the state to determine who is able to enter the state, to one in which the EU is used to facilitate this state function as well as exercise its own competence to expand its role alongside the Member States. This movement, I propose, is the result of the recognition that many Member States encounter the same issues with readmission, identifying third country nationals, and engaging with third countries reluctant to accept their nationals. By acting together, to exert positive and negative leverage against third countries, EU readmission policy has effectively supplemented the objectives of its Member States in increasing the number of effective returns.

As EU readmission competence has developed, so has the role and importance of its institutions. Here, I have also explored the operation of principles such as subsidiarity, competence and the application of conditionality. I propose that the application of subsidiarity and competence in readmission is atypical, it does not conform to how those principles are commonly conceived, and this is driven by the ultimate objective of increasing returns. Here, I argue the landscape is complicated by the reliance on political arrangements in the absence of EURAs, which, despite not producing legal effects, mirror the legal obligations contained in EURAs in outcome. Recognising EURAs are not the only form of
readmission obligation, Chapter Four considers the inclusion of readmission obligations in other agreements and arrangements.

Having established the basis of readmission and the founding values, I have examined elements of readmission policy through the lens of the values. Human dignity is applied to the treatment of migrants and returnees in Turkey, which has grown in prominence for EU readmission policy due to its geographical location and the nature of migration movements in the Mediterranean. As a key transit state, the EU-Turkey EURA allows for the return of third country nationals and stateless persons. The nature of conditions in Turkey, access to refugee status, legal advice and accommodation, I propose, demonstrate how EU readmission policy is not congruent with the value of human dignity as it facilitates expulsions to states in which they face conditions which fall below those required by human dignity.

In order to assess congruence with respect for human rights, I have examined the issue of refoulement and the prospect of chain-refoulement. This means, upon expulsion to a third country, the returnee is returned onwards to another third country where they may face treatment or punishment in violation of their rights as recognised by EU and international law. This thesis proposes the possibility of chain-refoulement is an inbuilt risk of the EU’s Readmission Network, which is constructed through encouraging and assisting third countries to conclude their own RAs, often with states which the EU does not have its own agreement, as well as concluding an increasing number of EURAs. The ultimate outcome of the Readmission Network is shifting responsibility to third countries. The examination of ECtHR jurisprudence shows Member State obligations are not exhausted, they must consider the possibility of chain-refoulement in the return process. However, I argue this aspect of readmission policy does not adhere to the requirements of respect for human rights. Alongside this, I examined human rights clauses in EURAs and their effectiveness, arguing they need to be reformed to provide an avenue of rights protection, rather than restating existing rights obligations, which are dependent on the ratification statuses of the parties.

As shown in Chapter Seven, in respect of the rule of law and democracy, there are deficiencies in readmission policy. These stem from the increasing prevalence of EU political arrangements, which distort the institutional balance established by the Treaties. They exist outside of CJEU jurisdiction and parliamentary scrutiny and consent. They limit the avenues for challenge for returnees and exclude essential clauses such as readmission in error procedures. With democracy specifically, I propose the EU’s treatment of third countries contravenes its democratic principles by altering their international relations and shifting their political priorities to issues such as border control and migrant reception facilities.
The approach to the values and readmission has been guided by Levinasian ethics, which relies on the concept of the ‘Other’ in a primarily religious context. For Levinas, engaging with the Other creates non-reciprocal responsibilities towards the individual. This thesis proposes the interaction between the EU, Member States and the individual in the readmission process engages moral and legal responsibilities which are not extinguished once they have left their jurisdiction. The founding values describe the process in which those responsibilities are interpreted, recognised and enforced. Human dignity and human rights set out the content of those responsibilities. Their precise interpretation is decided by the process of democracy, with enforcement ensured through the rule of law.

Contribution and Findings

In applying the founding values to readmission policy, this thesis contributes to our understanding of the meaning and application of the Art.2 TEU values as well as the rationale behind EU readmission policy.

In the historical account of Chapter Two, I have presented how readmission policy has developed from the intergovernmental era of the late 1970s and 1980s through each Treaty provision. The previously most detailed account was provided by Coleman. This thesis provides more detail and explains the rationale behind its development. It is proposed that readmission policy developed in response to the recognition Member States were experiencing the same problems in returning third country nationals and agreed to group their leverage over third countries at the EU level. Furthermore, this chapter has demonstrated the trend towards the use of political arrangements and conditionality which has transformed readmission into a hybrid legal-political policy area.

The third chapter, on the EU institutions, focuses on the dynamics between Parliament, Commission and the Council. I propose that readmission has been an area of contention between the institutions, seen in cases such as Commission v Council on the legal basis for readmission obligations in an EU-Philippines Agreement. Aside from the institutions, it is proposed readmission policy has resulted in new bodies such as Joint Readmission Committees, and enhanced roles for bodies and agencies such as EASO and EEAS. Turning to the principles of competence, subsidiarity and conditionality, I argue that competence and subsidiarity do not operate in readmission policy as in other areas as EURAs and Member State RAs are applied in parallel. The example of this being cooperation with Turkey, operating through an overlapping EURA, Greece-Turkey Protocol and EU-Turkey Statement: two legal and one political arrangement. This is symptomatic of the overriding objective of increasing the return rates to Turkey. As the EU has been faced with reluctant third countries, the importance of conditionality has increased.
The fourth chapter focused on readmission obligations in other agreements and arrangements. The primary example is the Cotonou Agreement with ACP States. I argue the operation of the readmission obligations is an area of contention but should be considered operational. This argument centres on the meaning of ‘without further formalities’ in Art.13(5), with Koeb and Hohmeister arguing readmission requires further arrangements to be operationalised. However, my argument rests on the EU’s treatment of the provision, with calls for ACP States to implement their obligations under the Article. Despite the failed 2015 negotiations, I argue the provision is fully operational from the EU’s perspective. In assessing the role of Mobility Partnerships and Association Agreements, I argue these are primarily used to augment EURAs, either facilitating their negotiation or reaffirming the obligation to effectively implement the obligations contained therein. Therefore, these agreements ensure readmission remains on the policy agenda and allows the Union to approach third countries for future negotiations.

Examining the values in turn, this thesis has taken account of many approaches to their formulation and impact. First, I have engaged with the role of the values, whether they are indeed legally enforceable or values to aspire to, arguing the values are indeed legally enforceable despite the areas of contention. Although Art.7 TEU is a political process, it is argued the values become legally enforceable through the elements set out in the Treaties and CJEU jurisprudence. One example being Art.19 TEU, an element of the rule of law which has been applied by the Courts. It is accepted that it may be difficult to litigate based on Art.2 TEU, instead, it can be combined with identifiable elements. It is proposed that this is the logical approach, for example, it would be difficult to litigate a violation of respect for human rights without specifying the rights concerned. However, Kochenov’s contention, that the EU has ‘overwhelming difficulties’ in defining the content of the values, questioning the EU’s ability to ensure adherence, must also be recognised. Although we can recognise these difficulties, the vagueness of the values can be to the EU’s advantage, particularly in its external relations, where a single definition may alienate third countries who approach the same concepts from different social, cultural and political perspectives.

In defining respect for human dignity, this thesis approaches it as a constitutional value and a constitutional right, drawing on a range of sources. This includes drawing on Member State constitutions, identifying similarities and differences, some of which provide lists of characteristics. Furthermore, in constructing the theoretical framework, this chapter engages with the approaches of McCrudden, Düwell and Dupré by applying their criteria for a conception of human dignity, therefore adding to the understanding of EU human dignity. Based on these tests, I have proposed a conception of EU human dignity:
inherent in all human beings, regardless of nationality, requiring respect for autonomy, psychological wellbeing and bodily integrity throughout their lives. It creates a minimum relationship between one individual to another, shaping not only society and the structure of the state but also the state’s relationship with the individual. It acts as the foundation for all human rights applicable within the EU’s jurisdiction, allowing for the development of existing rights and the creation of new ones. It is pervasive in all human rights, with its precise scope limited only by judicial process and argument. It is most commonly found in issues of equality, discrimination, the loss of liberty and all relationships which allow the state, a private actor or another individual to exercise, or attempt to exercise, influence over an individual, providing a minimum standard of respect regardless of whether the influence is physical or mental.

Applying this to the situation of migrants and returnees in Turkey, it is established that readmission policy does not fully adhere to respect for human dignity, thereby also adding to the literature in this area by demonstrating how it can be applied practically.

Chapter Six, on human rights, provides a comprehensive account of the influences on the EU’s conception of human rights applicable to readmission, from the UN to CofE, examining ECtHR jurisprudence applicable to returns and expulsions. The primary applicable Convention rights are Art.2, 3 and Art.4 of Protocol No.4. The possibility of preventing returns based on the violation of other Convention rights is also explored. The primary EU human rights document is the Charter, with a wider scope than the Convention including a right to asylum in Art.18. Where this chapter adds to the literature is the application of human rights to readmission through refoulement and chain-refoulement. Here, I propose the EU has created a ‘Readmission Network’ through encouraging and supporting third countries to conclude their own RAs. This encouragement does not have to be direct, instead, the inclusion of third country nationals in EURAs means these states seek to conclude their own agreements to further shift responsibility. I argue the Network increases the likelihood of chain-refoulement in violation of a returnee’s rights. The second element of readmission is the use of non-affection or human rights clauses in EURAs, which I argue are insufficient for the protection of rights. These clauses reaffirm the commitments to existing human rights obligations, with variations between each agreement. I propose moving beyond this to include the rights each party already recognises in an operationalised form. It is important for my proposal not to create new rights as this may prove problematic to negotiate. This would be augmented by the Joint Readmission Committees monitoring human rights compliance and producing country reports to be considered in asylum applications and return decisions. This also offers a degree of external oversight but short of the ability to suspend the agreement.
The final chapter on the rule of law and democracy proposes that they act as facilitating values for human dignity and human rights. They assist in establishing society’s understanding and ability to enforce those recognised rights. Here, I establish an EU-specific form of the rule of law and democracy, taking account of the different levels they operate on as a supranational organisation and the extent compliance is reliant on Member States. This chapter argues the Venice Commission has a strong influence on the EU in defining the rule of law and democracy, with the Rule of Law Checklist providing the foundations. This chapter adds to the literature in tailoring those elements to the EU, for example, separation of powers is translated in part into EU institutional balance. The contested nature of the definition of the rule of law means this chapter may not adhere to its typical understanding. For example, whether human rights should be considered part of the rule of law. In response, I delineate between the values, while accepting there are substantial areas of overlap. An example is transparency, which arguably falls within democracy and the rule of law. This thesis discusses democracy as the ability of individuals to engage in the political process, hold decision-makers accountable, access information, express ideas and beliefs and take action to protect common interests. This chapter briefly considers the democratic deficit as an area of contention, can the EU claim to be democratic, can it export this value if it is not democratic itself?

In their application to readmission, the primary focus was on the increasing reliance on political arrangements. Although the rationale behind them, in the absence of an EURA a political arrangement can be negotiated to improve cooperation, is logical, it is proposed they compromise readmission policy’s adherence to the rule of law and democracy. With the former, these arrangements arguably do not produce legal effects, yet their provisions mirror those in EURAs. They sit outside the Union’s structures, outside of CJEU jurisdiction and parliamentary scrutiny, with the Parliament circumvented outside of the Art.218 TFEU negotiation process. More concerning for a returnee is the absence of provisions present in EURAs such as readmission in error obligations, which means it is harder for an individual returned in error to return to the Requesting State. On what legal basis could the Requesting State be asked to accept an individual returned in error? How would the returnee challenge the process, are they likely to have access to legal advice and aid in the Requested State? These questions, and their uncertain answers, I propose, interfere with rule of law elements such as access to legal redress. These political arrangements also apply different governance structures, such as the Working Group of the EU-Bangladesh Standard Operating Procedures, whose procedures and responsibilities are ill-defined in comparison to Joint Readmission Committees. Political arrangements engage democracy primarily through the circumvention of Art.218 TFEU, which thereby excludes the ‘veto-players’ of the Council and Parliament. This exclusion interferes with accountability and democratic legitimacy. Externally, I argue readmission policy, whether political or legal, interferes in the domestic
and international politics of third countries, particularly third country national obligations. Citing the examples of Morocco and Turkey, readmission comes at an economic and political cost. It may mean the prioritisation of border control or require changes to visa policies towards other states. I argue the EU does not sufficiently take account of these negative impacts on democracy in third countries.

Future Research

Despite creating conceptions or identifying elements of the founding values, the first area for future research is further exploring these values, drawing on a wider range of applicable sources. In defining respect for human dignity, this thesis has drawn on UN conventions, the CofE and Member State constitutions, and it is the latter of these which could be explored in future research. This would involve identifying relevant national cases where human dignity has been applied or interpreted by the courts. Not only would this add to the conception itself but also demonstrate how alleged violations of human dignity are litigated. This could potentially contrast with how the CJEU treats Art.1 CFR. For example, national courts may not combine human dignity with other provisions of their respective constitutions, they may interpret the provision differently beyond the constitutional text. This further research could extend to Member States without written constitutions, examining how their domestic courts and legislation have engaged with human dignity. Including such Member States would provide a fuller picture to inform the EU’s conception and may reveal further nuances between Member States.

In defining the rule of law and democracy, further research could incorporate to a greater extent international sources such as UN conventions or international standards on the rule of law and democracy. Where this may assist is in examining the EU’s ability to export these values. For example, research could be conducted on the African Union and other regional organisations. A comparative approach with the EU could be applied. Identifying commonalities may have academic and policy-making implications, revealing how the EU could improve engagement on these issues, whether there are significant gaps in understanding which prevent the EU’s conceptions translating into different political and social contexts.

As outlined in Chapter Four, the Cotonou Agreement is due to be replaced in 2020. A future research proposal could examine the readmission provisions in the new agreement and assess its impact over time. How the EU approaches this agreement may have significant ramifications for its readmission policy, will the language mirror the 2010 revision, or will the EU seek to include the provisions which it failed to negotiate in 2015? Another area of investigation is the rationale behind the different language used in EURAs. With the recent EU-Belarus Agreement including a fundamental principles provision, marking a different approach, a future proposal could investigate the rationale behind this
change. As set out in Chapter Six, there does not appear to be a consistent rationale behind the non-affection clauses. Therefore, it would be interesting to conduct interviews with the members of the Commission and Council involved in formulating the mandate and conducting the negotiations to understand the different approaches which have been taken.

The final future proposal is to investigate the full extent of the Readmission Network. This thesis has focused on legal agreements which have been concluded by third countries, however, it is possible they also use political arrangements themselves. An in-depth investigation of the exact support the EU provides to these third countries and how they approach their own readmission negotiations would be interesting. It may reveal that not only is the EU exporting its values and its migration priorities, it may also be exporting its methods and approaches.
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