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## The Impact of the EU's Return *Acquis* on the International Law Regimes Governing the 'Expulsion of Aliens' – Universal and Regional Developments (A Brief Summary)\*\*

The following short contribution is an edited version of the English-language part of the author's 'habilitation' lecture (having the same title as above), held on 29 November 2021 at the ELTE Faculty of Law. It summarises the selected thoughts – forming a separate chapter – of the author's habilitation manuscript (*Habilitationschrift*), which was published as a monograph in 2021 [*The Interplay between the EU's Return Acquis and International Law*, (Edward Elgar Publishing, Cheltenham, 2021) 272 pages].

### 1.

Shaping international law has been essential to the European Union (EU) since the very beginning of the European integration process.<sup>1</sup> Developing public international law has also become a key and explicit external relations objective of constitutional character in EU primary law since the entry into force of the Treaty of Lisbon<sup>2</sup> (December 2009) pursuant to Articles 3(5) and 21 of the Treaty on European Union (TEU). This endeavour of the EU holds particularly true when viewed through the lens of the EU's strategically exercised normative influence on *international migration law* in the field of the 'expulsion of aliens'. Remarkably, however, the EU's contribution to the

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\*\* The views expressed in this piece are solely those of the author and its content does not necessarily represent the views or position of the European Union Agency for Fundamental Rights.

<sup>1</sup> D. Kochenov and F. Amtenbrink, Introduction: the active paradigm of the study of the EU's place in the world, in D. Kochenov and F. Amtenbrink (eds), *The European Union's Shaping of the International Legal Order*, (Cambridge University Press, Cambridge, 2014) 3. <https://doi.org/10.1017/CBO9781139519625.002>

<sup>2</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 [2007] OJ C 306/1.

conceptualization and development of this specific branch of international migration law – whether on the universal or the regional (pan-European) level – has not yet received much academic attention.

The active role of EU law in contributing to the ‘development of international law’ can be perceived in various ways and in a number of domains. Four select standard-setting processes, both universal and regional ones, have been put under scrutiny – the following recaps the gist of the EU’s (and its legal order’s) engagement with these.

## 2.

First, the EU claimed before the United Nations (UN) *International Law Commission* (ILC) in the context of the latter’s *codification work on the ‘expulsion of aliens’ (2005–2014)* that EU law should be taken into account in this exercise for the progressive development of international law, notably standards stemming from the so-called *EU Return Directive* (Directive 2008/115/EC)<sup>3</sup> and the relevant *case law of the Court of Justice of the EU* (CJEU) interpreting it.<sup>4</sup> When assessing the influence of the EU’s return *acquis* with regard to the ILC draft articles on the expulsion of aliens, adopted in second reading in 2014,<sup>5</sup> the effectiveness of the external impact of EU rules may be debated, but some tangible results cannot be denied as a number of provisions in the ILC draft articles have been inspired by EU law. It is beyond doubt that the EU has positioned itself in the UN context as a serious global player and norm creator/exporter in the field of the law governing the ‘expulsion of aliens’.

The whole exercise – together with EU interventions on other topics discussed by the ILC, such as the responsibility of international organizations, the protection of persons in the event of disasters and the identification of customary international law – put Articles 3(5) and 21(1) TEU into operation and helped to promote an image of the EU as a respected and committed partner in the quest for more coherent multilayered migration governance, with the aim of arriving at converging legal standards. Both EU law and the ILC draft articles pursue the same goals and defend the same values, namely: “any person who is subject to expulsion measures should be treated with respect

<sup>3</sup> Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348/98.

<sup>4</sup> For an overview on that, see e.g. T. Molnár, The impact of ECtHR case-law on the CJEU’s interpreting of the EU’s return *acquis*: More than it first seems?, (2021) 62 (4) *Hungarian Journal of Legal Studies*, 257–280. <https://doi.org/10.1556/2052.2022.00354>; M. Moraru, G. Cornelisse and P. De Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union*, (Hart Publishing, 2020). <https://doi.org/10.5040/9781509922987>

<sup>5</sup> ILC, Expulsion of aliens – Text of the draft articles and commentaries thereto, UN Doc A/69/10 (2014).

for that person's human dignity and in accordance with agreed minimum standards, based on the rule of law".<sup>6</sup>

The UN General Assembly (UNGA) Sixth Committee (Legal) discussed this topic again in the autumns of 2017 and 2020<sup>7</sup> with a view to deciding whether to endorse the draft articles in the form of an UNGA resolution – hence officially concluding the codification process (as was the case with a number of previous ILC projects) – or to convene a diplomatic conference to develop a legally binding convention based on them. The latter would present another opportunity for the EU to make its mark on the outcome of such intergovernmental negotiations. The UNGA will return to this topic in November 2023.<sup>8</sup>

### 3.

*Second*, with regard to the EU's engagement in the development of the *UN Global Compact for Safe, Orderly and Regular Migration* (GCM)<sup>9</sup> – which is a non-legally binding universal cooperation framework,<sup>10</sup> offering a 'kaleidoscope' of international law governing migration<sup>11</sup> – the EU has lived up to its responsibility as a global actor in migration matters, notably as concerns return and readmission (Objective 21) and immigration detention (Objective 13). Its contribution to the GCM process underpins the Union's aspiration to be a major player in global migration governance. The EU undoubtedly enjoyed a stronger procedural standing than other non-state entities engaged in the process leading to the elaboration and adoption of the GCM. Official UN documents have clearly articulated that enhanced position.<sup>12</sup> This is noteworthy

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<sup>6</sup> Statement on behalf of the European Union by Lucio Gussetti, Director, European Commission Legal Service, at the United Nations 67th General Assembly Sixth Committee on the Report of the International Law Commission on the work of its sixty-fourth session on 'Expulsion of Aliens', New York, 1 November 2012 (hereinafter '2012 EU Statement'), para 7.

<sup>7</sup> See the summary records of the latest discussions here: [https://www.un.org/en/ga/sixth/75/expulsion\\_of\\_alien.html](https://www.un.org/en/ga/sixth/75/expulsion_of_alien.html) (Last accessed: 30 December 2021).

<sup>8</sup> UNGA, Expulsion of aliens, Resolution adopted by the General Assembly on 15 December 2020, UNGA Res 75/137 (2020) UN Doc A/RES/75/137, para 3.

<sup>9</sup> UNGA, Global Compact for Safe, Orderly and Regular Migration. Resolution adopted by the General Assembly on 19 December 2018, UNGA Res 73/195 (2018) UN Doc A/RES/73/195.

<sup>10</sup> On its possible legal effects, see e.g. A. Peters, The Global Compact for Migration: to sign or not to sign?, *EJIL:Talk! Blog of the European Journal of International Law*, 21.11.2018., [www.ejiltalk.org/the-global-compact-for-migration-to-sign-or-not-to-sign/](http://www.ejiltalk.org/the-global-compact-for-migration-to-sign-or-not-to-sign/) (Last accessed: 30 December 2021).

<sup>11</sup> V. Chetail, The Global Compact for Safe, Orderly and Regular Migration: a kaleidoscope of international law? (2020) 16 (3) *International Journal of Law in Context*, 253–268. <https://doi.org/10.1017/S1744552320000300>

<sup>12</sup> See UNGA, *Modalities for the Intergovernmental Conference to Adopt the Global Compact for Safe, Orderly and Regular Migration*, UN Res 72/244 (24 December 2017) UN Doc A/RES/72/244, Annex; as amended by UN Res 72/308 (6 August 2018) UN Doc A/RES/72/308, Annex.

within the still predominantly state-centred and conservative setting of UN multilateral diplomacy, especially when dealing with highly politicized and sensitive subject matter such as migration.

The final outcome document, i.e. the GCM itself – which is also a ‘blueprint for cooperation on return’<sup>13</sup> – corresponds to and reflects the EU’s priorities relating to return and readmission, even echoing the language of EU migration law and policy in respect of certain issues. In a similar vein, the agreed text has omitted a few (suggested) commitments that the EU considered undesirable in this context. Unlike with the ILC draft articles, where the EU pursued an agenda to ‘progressively develop international law’, the EU had lower ambitions substance-wise in relation to the GCM, with the primary aim of shielding its own migration/return *acquis* and keeping commitments under the GCM within the realm of its existing international obligations.

Both the ILC draft articles and the GCM are good examples of the EU’s strategic and successful involvement in a process leading either to the codification (and progressive development) of the law at the universal level, or to an inter-governmentally negotiated and agreed soft law UN outcome document.

#### 4.

*Third*, zooming in on the regional context, the EU return *acquis* might have had the furthest reach when influencing standard-setting activities in the *pan-European framework*, namely within the *Council of Europe* (CoE) – and this for various reasons. These include geographical proximity, greater legal and cultural homogeneity and the EU’s stronger procedural/institutional standing in CoE structures. The EU (and EU law) have specifically exerted influence on two return-related norm-setting activities of the CoE and the ensuing codification instruments: the Twenty Guidelines on Forced Return<sup>14</sup> and the (draft) European Rules on the Administrative Detention of Migrants.<sup>15</sup>

Interestingly, over time, the EU’s approach followed similar patterns in this regional context of the CoE as in universal settings. However, the initial more progressive and encouraging engagement with such CoE codification efforts relating to the expulsion of non-nationals (until 2014) was gradually replaced with a rather reserved,

<sup>13</sup> S. Mananashvili and M. Pluim, How to Ensure Inter-State Cooperation on Safe, Orderly and Dignified Return? Ideas for the UN Global Compact for Migration, *ICMPD Policy Brief*, (June 2017) 3, <https://www.icmpd.org/authors/sergo-mananashvili> (Last accessed: 30 December 2021).

<sup>14</sup> *Twenty Guidelines of the Committee of Ministers of the Council of Europe on Forced Return*, adopted at the 925th Meeting of the Ministers’ Deputies, Strasbourg, 4 May 2005.

<sup>15</sup> For an overview of this codification work, see <https://www.coe.int/en/web/cdcj/activities/administrative-detention-migrants> (Last accessed: 30 December 2021).

conservative attitude (from 2018 onwards). This was chiefly reflected in the European Commission's unwillingness to assist with the codification of new rules on pre-removal detention which are not (yet) settled in EU law or which might prejudice ongoing EU negotiations<sup>16</sup> and the future development of EU law in the field of return. This has been lately evidenced by the deadlock over the CoE-led codification of pan-European immigration detention rules.

## 5.

*Fourth and finally*, as far as the reach of the external dimension of the EU return policy is concerned, the expanding network of *readmission agreements concluded by the EU* (EURAs) has the potential to quietly influence the treaty-making practice of other countries concerning the readmission of migrants in an irregular situation. EURAs facilitate the removal of irregular migrants subject to an enforceable return decision by establishing reciprocal obligations, rules and procedures governing the readmission of persons between the contracting parties.<sup>17</sup>

The question thus arises: to what extent has this ever-expanding network of EURAs and other EU agreements with readmission clauses contributed to the shaping of new readmission agreements between non-EU countries, and thereby to the solidification of generally accepted readmission concepts and principles in international law? The relevant treaty practice of the EU – which is perhaps the most heavyweight player pushing for interstate readmission cooperation – is significant and well known globally. Hence, it has mostly likely exerted an influence on the treaty practice of other third countries on readmission, including the framing and development of various basic readmission principles.

At present, further (mostly empirical) research on their impact is needed, to divine the extent to which EURAs have influenced or inspired other readmission agreements around the world, thus contributing to the solidification of common readmission concepts and principles under international law.

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<sup>16</sup> For an overview of the pending EU legislative proposals of that time (mainly submitted in 2016, so even before the proposals presented under the EU Pact on Migration and Asylum in September 2020), see General Secretariat of the Council of the EU, *Reform of EU asylum rules*, <https://www.consilium.europa.eu/en/policies/eu-migration-policy/eu-asylum-reform/> (Last accessed: 30 December 2021).

<sup>17</sup> For more in detail on the EURAs, see e.g. T. Molnar, EU readmission policy: a (shapeshifter) technical toolkit or challenge to rights compliance?, in E. L. Tsourdi and P. De Bruycker (eds), *Research Handbook on EU Migration and Asylum Law*, (Edward Elgar Publishing, 2022) 487–505 (forthcoming).

## 6.

The picture concerning this outward-looking perspective of the EU's engagement with international migration law is not entirely rosy though – and shows some controversies, too. The EU has sought to contribute to the formation of international rules on the 'expulsion of aliens', including the progressive development of the law, with *varying degrees of ambition*. The EU's most progressive efforts to shape an international codification exercise in this regard concerned the ILC's work on the topic. In stark contrast, in the other examples examined (the GCM process and the CoE's work on the immigration detention of migrants), the EU adopted a more conservative approach, endeavouring to maintain the status quo and showing little interest in the creation of new standards beyond the existing legal frameworks (both the current EU migration *acquis* and existing international obligations).

This unambitious approach satisfies only the first limb of Article 3(5) TEU, which commits the EU, in its "relations with the wider world", to "uphold and promote its values and interests". It has not truly endeavoured to "develop international law" as articulated in the second limb of the same provision. This is a half-hearted operationalization of this external relations objective of constitutional importance. Looking at the underlying reasons for this, in addition to the differences in nature of the relevant processes (the ILC is a primarily legalistic forum, whereas the GCM negotiations were more political), there are other explanations for this shift. They include the fact that while the EU's input to the work of the ILC preceded the 2015/2016 refugee crisis in Europe, the two other codification processes took place in its aftermath, in a political climate that was less permissive towards migration matters, with more restrictive policy lines<sup>18</sup> and more stringent (soft law) guidance from the European Commission on returns.<sup>19</sup>

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<sup>18</sup> See 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, COM(2017)200 final, Brussels, 2 March 2017.

<sup>19</sup> Commission Recommendation (EU) 2017/432 of 7 March 2017 on making returns more effective when implementing the Directive 2008/115/EC of the European Parliament and of the Council [C(2017)1600] [2017] OJ L 66/15.

## 7.

Still, the external normative impact of the EU return and readmission *acquis* should *not be underestimated* – albeit that thus far this aspect has not fallen under the spotlight of legal scholarship. There is definitely a need to fill in this knowledge gap, with a view to fully exploring and understanding the international reach of the EU return *acquis*, in its all possible forms and dimensions. Also, comparing the regulatory and codification efforts outlined above in relation to the EU's global 'norm-exporting role' could also open the discourse to evaluate that as which level of regulation the expulsion of non-nationals would be best addressed. But this is a story for another day.





## BOOK REVIEW

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