

Tamás Molnár, *The Interplay Between the EU's Return Acquis and International Law* (Book Review)

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The book *The Interplay Between the EU's Return Acquis and International Law* is dedicated to the return (expulsion) of migrants in an irregular situation under EU law. In particular, it examines the interactions between EU and international law in the field of the return or expulsion of migrants. On the one hand, it assesses how the EU's return acquis is inspired by, and integrates, international migration and human rights law, and on the other hand, it examines how this body of EU law has shaped international law-making pertaining to the removal of non-nationals. By exploring the question of return from the perspective of interactions between the two legal orders, the book offers unique analyses and reflections.

The author first explores the relationship between EU and international law from the internal (inward-looking) perspective of the EU legal order. Does EU law in the area of return policies reflect international law? The key focus is on the EU Return Directive, which is the main EU instrument regulating return, removal, pre-removal detention, and entry ban.¹ Molnár's nuanced analysis leads him to

* The views expressed in this book review are those of the author and do not necessarily reflect the position of ECRE.

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1 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.

the conclusion that the EU's legislative and judiciary institutions have adopted divergent approaches to international human rights law in shaping and interpreting the Return Directive. From a legislative perspective, the text of the Return Directive makes several references to international (UN Convention on the Rights of the Child and Geneva Refugee Convention) and regional (ECHR) human rights conventions as well as standards (Council of Europe's Twenty Guidelines on Forced Return). Likewise, some international human rights norms are reflected in the text of the Directive, including the principle of *non-refoulement*, the best interests of the child, the right to family life, and adequate conditions of detention.² On the other hand, from a judicial perspective, the autonomy of EU law prevails. The CJEU exhibits a strong autonomy-driven approach, rarely relying on international law (including the case-law of the ECtHR) to interpret the Return Directive. However, as Molnár points out, although the CJEU has generally formally disregarded international human rights norms, it still considered some of these norms to be general principles of EU law.³

The Return Directive is in the process of being recast. The recast proposal presented by the European Commission in September 2018 significantly reduces safeguards for returnees.⁴ Key changes include restrictions on the suspensive effect of appeal against return, additional ground justifying immigration detention, restriction on granting a so-called voluntary departure period, and additional conditions for imposing a re-entry ban.⁵ If the recast is adopted, as Molnár argues, the CJEU may need to change its approach towards the interpretation of the Return Directive and begin relying on external legal standards beyond EU legislation to uphold standards and safeguards protecting returnees' rights.⁶

The second part of the analysis probes the interactions between the two normative orders from the external (outward-looking) perspective of the EU's engagement with international law. It investigates how the EU has attempted to shape the development of international law in the field of return of migrants. Molnár takes three examples of such an engagement to demonstrate variable levels of contribution by the EU. (i) First, in its contribution to the work of the UN International Law Commission (ILC) on the Draft Articles on the Expulsion of Aliens,⁷ the EU generally adhered to its commitment to "progressively develop international law", as per Article 3(5) TEU. It sought to ensure that the ILC take the Return Directive and CJEU case-law into consideration to the extent possible.

2 Tamás Molnár, *The Interplay Between the EU's Return Acquis and International Law*, Edward Elgar, Cheltenham, 2021, pp. 88-89.

3 Id. pp. 101-103, 121, and 123.

4 European Commission, Proposal for a Directive of the European Parliament and of the Council on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals (Recast), COM(2018) 634 final.

5 For an analysis of the recast proposal, see Izabella Majcher & Tineke Strik, 'Legislating without Evidence: The Recast of the EU Return Directive', *European Journal of Migration and Law*, Vol. 23, Issue 2, 2021, pp. 103-126.

6 Molnár 2021, pp. 123-124.

7 International Law Commission, Draft Articles on Expulsion of Aliens, A/CN.4/L.832, 30 May 2014.

While some of the EU's proposals tried to prevent the ILC Draft Articles from offering stronger protection than the level guaranteed under the Directive (e.g. qualification of detention of children under the same conditions as adults as cruel, inhuman or degrading treatment; or automatic suspensive effect of appeal), most EU proposals sought to strengthen protective safeguards (e.g. inclusion of sexual orientation as a ground for non-discrimination, limitation on grounds justifying detention, judicial review of the lawfulness of detention, consideration of the health status of the person, written return decision, or preference for voluntary departure over forced return).⁸ (ii) Secondly, the EU's engagement in two other codification processes exhibited a conservative approach that aimed at upholding and promoting its values and interests, as per the first limb of Article 3(5) TEU. In the process of developing the Global Compact for Migration (GCM),⁹ the EU's position centered on restating existing international standards and settled principles, with the aim of shielding its own migration *acquis*.¹⁰ In particular, the EU attempted to prevent the endorsement of a ban on the detention of migrant children¹¹ and generally focused on the readmission commitments of destination countries at the expense of human rights safeguards in the return process.¹² A similar conservative approach was followed in the context of the Council of Europe's standard-setting activities in the area of immigration detention [see the (Draft) European Rules on the Administrative Detention of Migrants]. The EU expressed its opposition to a codification of new rules which were not yet embedded in EU law and may prejudice ongoing EU negotiations (i.e. the reform of the Common European Asylum System) and the future development of EU law in that field (notably the recast of the Return Directive). In a nutshell, the EU wanted to prevent EU Member States from being subject to more stringent rules on immigration detention than under EU law. Hence, it sought to maintain the status quo and block the adoption of more protective detention standards.¹³ It was primarily the EU's position that caused the process of codification of pan-European immigration detention standards to be put on hold.¹⁴

As Molnár argues, this restrictive 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 failed to live up to its commitment to “develop international law,” as articulated in the second limb of the same provision. Molnár explains the conflicting approaches by reference to

8 For a more detailed account, see Tamás Molnár, ‘EU Migration Law Shaping International Migration Law in the Field of Expulsion of Aliens: The Case of the ILC Draft Articles’, *Hungarian Journal of Legal Studies*, Vol. 58, Issue 3, 2017, pp. 237-260.

9 Global Compact for Safe, Orderly and Regular Migration, A/RES/73/195, 19 December 2018.

10 Molnár 2021, pp. 191-192 and 218.

11 Izabella Majcher, ‘Immigration Detention under the Global Compacts in the Light of Refugee and Human Rights Law Standards’, *International Migration*, Vol. 57, Issue 6, 2019, pp. 96-97.

12 For a more detailed account, see Tamás Molnár, ‘The EU Shaping the Global Compact for Safe, Orderly and Regular Migration: The Glass Half Full or Half Empty?’, *International Journal of Law in Context*, Vol. 16, Issue 3, 2020, pp. 321-338.

13 Molnár 2021, pp. 209-211, and 218.

14 Majcher & Strik 2021, p. 126.

Izabella Majcher

the shift in the EU's position on the question of return following the so-called refugee crisis of 2015-2016.¹⁵ Indeed, to deal with the "crisis," the EU focused on the number of returns at the expense of potential improvement in other areas, such as the functioning of asylum systems and the fair distribution of protection seekers across the EU Member States. The EU adopted more restrictive policy lines and soft-law guidance, culminating in the proposal for the recast of the Return Directive mentioned above. (iii) Finally, beyond the EU's involvement in international standard-setting processes, Molnár observes that the expanding network of EU readmission agreements and arrangements has the potential to covertly influence the treaty-making practice of other countries in the area of readmission.¹⁶ Under the EU readmission agreements and arrangements, non-EU countries are obliged to cooperate in identification procedures and readmit their nationals or other non-nationals who transited their territory before entering the EU. Non-EU countries are encouraged to conclude similar agreements with other countries to send back non-nationals readmitted from the EU. As Molnár argues, the EU's focus on readmission cooperation has most likely influenced the treaty-making practices of non-EU countries, but it's unfeasible to gather evidence on its actual impact. A recent review of the implementation of the GCM within the region falling under the UN Economic Commission for Europe (UNECE) appears to demonstrate such an impact. One country, indicating the readmission agreements concluded with nearly all the EU Member States, stressed the challenge it faced in concluding readmission agreements with countries of origin. Further, two other countries that already have readmission agreements with the EU in place highlighted that they also have readmission agreements with other non-EU countries and are in the process of concluding more such agreements with other countries.¹⁷ The readmission agreements do not guarantee that the recipient country will effectively admit the readmitted person to its asylum procedure, which may result in chain *refoulement* and is a prime example of the externalization of refugee protection and migration management by the EU.

In conclusion, as Molnár puts it,

"[the] EU seeks to have an impact on international law, from which it claims normative independence (autonomy), but which simultaneously forms an integral part of its legal order [...] and which the EU is internally (constitutionally) committed to respect."¹⁸

15 Molnár 2021, p. 223.

16 Id. pp. 215-216, and 218.

17 Izabella Majcher, 'Implementation of GCM Objective 21 in the UNECE Region: Selective Interpretation of the Return, Readmission, and Reintegration Commitments', *Refugee Law Initiative*, 20 May 2021, at <https://rli.blogs.sas.ac.uk/2021/05/20/implementation-of-gcm-objective-21-in-the-unece-region-selective-interpretation-of-the-return-readmission-and-reintegration-commitments/>.

18 Molnár 2021, p. 223.

By exploring the question of return from the perspective of a multifaceted relationship between EU and international law, the book proves to be a unique contribution to the existing literature in the field. It enriches the literature devoted to both the EU and international legal orders. From the EU law perspective, it has the potential to influence a broader debate about the place of the EU within the international legal order by offering significant insights into this field from both a constitutional perspective and the point of view of the substantive area of migration law. The book will be a useful read for legal scholars and practitioners, as well as postgraduate students who wish to deepen their understanding of the links between these two legal orders. It will also be instructive for academics and lawyers dealing with the expulsion of migrants in an irregular situation. This book is timely and relevant as the negotiations on the recast Return Directive are ongoing and an overriding objective of the EU's new Pact on Migration and Asylum¹⁹ is to increase the number of returns. In light of the risk of reducing protective safeguards in various pieces of EU secondary legislation, the book is a timely reminder of international human rights return-related norms and standards applicable to all EU Member States.

19 European Commission, Communication from the Commission to the European Parliament, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, COM(2020) 609 final.