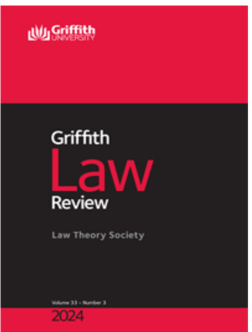

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The European Union, 'Expulsion of aliens' and the Return Directive: a repressive or protective framework?*

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ABSTRACT
This piece, targeting also international (migration) lawyers who may not be familiar with all the complexities of the European Union (EU)'s return acquis, is centred on the Return Directive (Directive 2008/115/EC) which sets out the common EU standards and procedures for Member States to expel (return) and deport (remove) those non-EU nationals who are in an irregular situation within the territory of the Union – with a view to promoting an effective EU return policy. The article seeks to shed light, critically and with necessary nuances, on the tenability of diametrically opposing views about the Return Directive. These essentially revolve around the question whether the Return Directive can be coined as the 'directive of shame' which heavily emphasises the repressive elements and falls short of meeting human rights standards stemming from either universal (United Nations) or regional (primarily Council of Europe) instruments; or it is a 'directive of protection' championing the fundamental rights of returnees by instilling several human rights safeguards and standards, making it thus a commendable protection-oriented blueprint to replicate by other regional settings and/or the international community as a whole.

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Expulsion of aliens; EU return acquis; Return Directive (2008/115/EC); Court of Justice of the EU; fundamental rights; 'directive of shame'; directive of protection'

1. Introduction – setting the scene

From the vantage point of international law, expulsion is a state's unilateral act compelling a non-national to leave its territory and, if necessary, to forcibly remove them. A wide-ranging set of international rules on expulsion has been evolving in this politically sensitive area over the past century – even if the contours of these norms are not fully clarified and not free from contradictions in some constellations. Most commonly, the term 'expulsion' denotes a formal, legally framed order addressed to a non-national to leave the

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territory of a state;[1] whereas 'deportation' or 'removal' refers to the forcible implementation of such order where the person concerned does not follow it voluntarily.[2]

Expelling and removing migrants in an irregular situation from the European Union (EU) to third countries has been an integral part of the EU's common migration policy since the entry into force of the Treaty of Amsterdam in May 1999.[3] Taking a cursory look at the figures at the EU level, an annual 350–500 thousand non-EU nationals in an irregular situation were formally expelled in the past ten years or so,[4] but of them not more than one third were actually returned or removed annually by Member States to third countries.[5] This definitely portrays an efficiency gap – but holistically assessing the implementation of the EU rules on returning non-EU nationals without the right to stay is a much more complex exercise (see below in Section 5).

Before delving into the specifics and the nature of this branch of EU law governing 'expulsion', together with the multiple challenges and critiques it faces, some terminological clarifications are put forward, notably as they stem from the different use of terms under international law, as authoritatively codified in the United Nations (UN) International Law Commission's (ILC) draft articles on the expulsion of aliens,[6] and EU law.

1.1. Terminologies under international and EU law on 'expulsion of aliens'

Looking at, first, the second component of the somewhat anachronistic but well-known (and still widely used[7]) term 'expulsion of aliens', under general international law – notably, in light of the ILC's 2014 draft articles[8] – the term '*aliens*' is quite a broad and all-encompassing notion. It is meant to cover all kinds of non-nationals: that is, individuals who do not hold the nationality of the state in which they are present and who stay (lawfully or unlawfully) in a given country.[9]

[1]ILC, 'Expulsion of Aliens – Text of the Draft Articles and Commentaries Thereto' (2014) UN Doc A/69/10 (ILC Draft Articles), draft art 2(a).

[2]Guy Goodwin-Gill, 'The Limits of the Power of Expulsion in Public International Law' (1975) 47 British Yearbook of International Law 55; Julia Wojnowska-Radzińska, *The Right of an Alien to Be Protected Against Arbitrary Expulsion in International Law* (Brill Nijhoff 2015); Walter Kälin, 'Aliens, Expulsion and Deportation' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press 2008) [article last updated: October 2020] para 1; Vincent Chetail, 'Expulsion, Protection Against' in Christina Binder and others (eds), *Elgar Encyclopedia of Human Rights* (Edward Elgar Publishing 2022) 165.

[3]Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts [1997] OJ C340/1.

[4]'Return & Readmission' (*European Commission*) <https://home-affairs.ec.europa.eu/policies/migration-and-asylum/irregular-migration-and-return/humane-and-effective-return-and-readmission-policy_en> accessed 10 February 2025.

[5]For instance, in 2013, the EU Member States effectively removed some 166 470 illegally staying third-country nationals subject to a return decision [European Commission, '5th Annual Report on Immigration and Asylum (2013)' COM (2014) 288 final, 4–5], while this figure was 186 630 in 2012 (the number of irregular migrants who were issued a return decision and then actually returned) [see European Commission, '4th Annual Report on Immigration and Asylum (2012)' COM (2013) 422 final, 4]. For more recent figures, see 'Commission Implementing Decision Establishing the 2024 Thematic Schengen Evaluation Report "Bridging National Gaps: Towards an Effective EU Return System Through Common Solutions and Innovative Practices"' C(2024) 9171 final and its Annex 2.

[6]ILC Draft Articles (n 1).

[7]This is both a black-letter law term stemming from various conventions and other instruments (eg, International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 13; Protocol No 4 to the European Convention on Human Rights, art 4; ILC Draft Articles (n 1)) and a notion frequently employed by international law scholars alike (see the referenced academic writings in n 2).

[8]See also ILC, 'Expulsion of Aliens – Memorandum by the Secretariat' (10 July 2006) UN Doc A/CN.4/565.

[9]cf ILC Draft Articles (n 1) draft art 2(1)(b), which stipulates that 'alien' means an individual who does not have the nationality of the State in whose territory that individual is present; and the commentary to ILC Draft Articles (n 1) draft article

The observer loses this relative simplicity offered by international law when turning to EU law to understand who falls under the umbrella term 'aliens' by virtue of this regional, *sui generis* legal order. Employing a distinction based on the legality of stay of non-nationals ('aliens'), the ILC's category of 'aliens lawfully present' already covers a great variety of foreigners in the EU legal order. These range from those belonging to the diverse group of EU-harmonised statuses for non-EU nationals (the so-called 'third–country nationals') – under the directives on family reunification;[10] long-term stay;[11] students, researchers, trainees and *au pairs*;[12] highly skilled workers;[13] seasonal workers;[14] intra-corporate transferees;[15] holders of a 'single permit';[16] and those travelling with a local border traffic permit[17] or on a Schengen visa[18] – through third-country nationals covered by an EU partnership, stability or association agreement concluded with a non-EU country (eg, Türkiye or Tunisia);[19] to persons who enjoy the right of free movement within the European Economic Area (EEA) (citizens of the EEA Member States and Switzerland and their family members, in line with Directive 2004/38/EC);[20] and lately, British nationals under the terms of the Withdrawal Agreement from the EU[21] and the EU-UK Trade and Cooperation Agreement.[22] It is, therefore, clear from the above that the abstract and catch-all term applied by the ILC ('aliens lawfully present') is much more differentiated under EU law which includes heterogenous legal statuses (even EEA nationals) who enjoy 'lawful stay', regardless of the degree of attachment, in a given Member State as a common thread.

1 para 3, which makes explicit that '[t]he draft articles cover the expulsion of both aliens lawfully present and those unlawfully present in the territory of the expelling State … '.

[10]Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L251/12.

[11]Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2004] OJ L16/44 (as amended).

[12]Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing (recast) [2016] OJ L132/21.

[13]Directive (EU) 2021/1883 of the European Parliament and of the Council of 20 October 2021 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, and repealing Council Directive 2009/50/EC [2021] OJ L382/1.

[14]Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers [2014] OJ L94/375.

[15]Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer [2014] OJ L157/1.

[16]Directive (EU) 2024/1233 of the European Parliament and of the Council of 24 April 2024 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (recast) [2024] OJ 1233, 30.4.2024.

[17]Regulation (EC) No 1931/2006 of the European Parliament and of the Council of 20 December 2006 laying down rules on local border traffic at the external land borders of the Member States and amending the provisions of the Schengen Convention [2006] OJ L405/1.

[18]Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) [2009] OJ L243/1 (as amended).

[19]See eg the Agreement creating an association between the European Economic Community and Turkey [1964] OJ 217/3687 and the 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.

[20]Directive 2004/38/EC of the European Parliament and the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Free Movement Directive) [2004] OJ L158/77.

[21]Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2020] OJ L29/7.

[22]Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part [2020] OJ L444/14.

Added to this complexity, the 'EU-nglish' term of 'illegally staying third-country nationals'[23] – the counterpart of the expression 'aliens unlawfully present' used by the ILC – likewise refers to a heterogeneous group under EU law, according to the reasons behind these individuals' situation. It comprises 1) non-EU nationals who have entered the territory of an EU Member State in an unauthorised manner, either through border crossing points or through 'green' (land) or 'blue' (sea) borders, by avoiding the control of authorities; 2) overstayers; 3) status changers (eg, foreign students taking up employment after finishing their studies without being authorised to do so); 4) rejected asylum applicants; 4) non-removable migrants in an irregular situation; and, viewed through the lens of international law, 5) third-country national family members having enjoyed the EU right of free movement but who have become an unreasonable burden on the social assistance system of the host Member State or who for any other reason lose the EU right to freedom of movement.

Turning to the term 'expulsion', this carries an autonomous meaning under international law that does not necessarily correspond to the one under domestic law.[24] In the EU legal order, which can be assimilated with a domestic legal system for the purposes of this study, the 'expulsion' of unlawfully staying non-nationals (aliens), within the meaning of the ILC draft articles, is regulated essentially by two pieces of secondary EU law. One is the so-called 'Return Directive' (Directive 2008/115/EC)[25] with respect to 'third-country nationals' without the right to stay; whereas the other is the Free Movement Directive (Directive 2004/38/EC) as regards EU/EEA citizens and their third-country national family members who are subject to expulsion[26] – these two EU legal instruments do not even use the same terminology for the order compelling someone to leave the territory of a Member State. The underlying logic of this distinction is that EU law operates with a clear separation between the legislation addressed to third-country nationals on the one hand, and the legislation addressed to EU/EEA citizens and their family members enjoying free movement rights on the other.[27]

Next to the above pairings of international and EU legal terms, further terminological clarifications need to be made. As referred to at the very outset, in international law, '*expulsion*' means a formal act or conduct attributable to a state by which a non-national is compelled to leave the territory of that state; but it does not include extradition to another state, surrender to an international criminal court or non-admission to a state.[28] EU law applies a similar, albeit more limited, definition of 'expulsion', which has been baptised as '*return (decision)*' – which is a sort of a euphemism in view of the inherent repressive nature of ordering someone to leave the territory of a State.[29]

[23]On the use of this term under EU law, see more recently Martin Wagner, Alan Desmond, and Albert Kraler, 'EU Policy Framework on Irregular Migrants' (2024) MIrreM Working Paper 8/2024.
[24]Chetail (n 2) para 1.
[25]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 (Return Directive) [2008] OJ L348/98.
[26]See notably Free Movement Directive (n 20) arts 15, 28, 31, 33.
[27]See also the case law of the Court of Justice of the EU (CJEU), eg Case C-230/97 *Criminal Proceedings against Ibiyinka Awoyemi* [1998] ECR I-6795, paras 26–30; and Case C-371/08 *Nural Ziebell v Land Baden-Württemberg* [2011] ECR I-12735, para 73.
[28]ILC Draft Articles (n 1) draft art 2(a).
[29]It is to be noted that some earlier EU instruments used and defined the term of 'expulsion decision' (Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals [2001] OJ

As defined by the Return Directive, the term 'return decision' denotes 'an administrative or judicial decision or act, stating or declaring the stay of a [non-EU national] to be illegal and imposing or stating an obligation to return';[30] whereas 'return' is defined as the process of a non-EU national going back – whether in voluntary compliance with a return decision or enforced – to his or her country of origin, a transit country or any other third country that is willing to accept the returnee.[31] Finally, the term '*forcible implementation of an expulsion decision*' employed in the 2014 ILC's draft articles can be assimilated with '*removal*' within the meaning of the Return Directive, which refers to 'the enforcement of the obligation to return, namely the physical transportation out of the Member State.'[32]

1.2. The Janus-faced nature of the Return Directive – research question

This piece, targeting also international (migration) lawyers who may not be familiar with all the complexities of the EU's return acquis, is centred on the *Return Directive* which sets out the common EU standards and procedures for Member States to expel (return) and deport (remove) those third-country nationals who are in an irregular situation within the territory of the Union – with a view to promoting an effective EU return policy.[33] Successfully returning those third-country [non-EU] nationals who do not fulfil the conditions for entry, stay or residence in the EU is an element of crucial importance to the effective functioning of the common EU migration policy. Over the years, EU policymakers have recurrently urged returning more migrants in an irregular situation to third countries. To achieve this goal, the EU and its Member States have been increasingly adopting multiple tools, ranging from 'hard law' instruments (eg, the Return Directive and EU readmission agreements) through various non-legally binding EU instruments (eg, the EU Return Handbook and other recommendations to make returns more effective), and have agreed on several informal return arrangements with third countries of origin, externally.

L149/34, art 2) and simply 'expulsion' (Return Action Programme adopted by the Council on 28 November 2002, EU Document No 14673/02, Annex I [Indicative Definitions]).

[30]Return Directive (n 25) art 3(4).

[31]ibid art 3(3).

[32]ibid art 3(5).

[33]For leading in-depth academic commentaries on the directive, see Jean-Yves Carlier, 'La "directive retour" et le respect des droits fondamentaux' L'Europe des Libertés – Revue d'actualité juridique, No 26, 2008, 13; Pieter Boeles and others, *European Migration Law* (Intersentia 2009) 411–22; Francesco Martucci, 'La directive "retour": la politique européenne d'immigration face à ses paradoxes' (2009) 45 Revue trimestrielle de droit européen 47; Anneliese Baldaccini, 'The EU Directive on Return: Principles and Protests' (2009) 28 Refugee Survey Quarterly 114; Anneliese Baldaccini, 'The Return and Removal of Irregular Migrants under EU Law: An Analysis of the Returns Directive' (2009) 11 European Journal of Migration and Law 1; Diego Acosta Arcarazo, 'The Returns Directive: Possible Limits and Interpretation' in Karin Zwaan (ed), *The Returns Directive: Central Themes, Problem Issues, and Implementation in Selected Member States* (Wolf Publishers 2011) 7; Diego Acosta Arcarazo and Elspeth Guild, 'The Returns Directive' in Steve Peers and others (eds), *EU Immigration and Asylum Law (Text and Commentary)* (2nd rev edn, Martinus Nijhoff Publishers 2012) 483; Steve Peers, *EU Justice and Home Affairs Law: Volume I: EU Immigration and Asylum Law* (4th edn, Oxford University Press 2016) sub-s 7.7; Izabella Majcher, *The European Union Returns Directive and its Compatibility with International Human Rights Law. Analysis of Return Decision, Entry Ban, Detention and Removal* (Brill/Nijhoff 2020); Madalina Moraru, Galina Cornelisse and Philippe De Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union* (Hart Publishing 2020); Madalina Moraru, 'EU Return Directive: A Cause for Shame or Unexpectedly Protective Framework?' in Evangelia (Lilian) Tsourdi and Philippe De Bruycker (eds), *Research Handbook on EU Migration and Asylum Law* (Edward Elgar Publishing 2022) 435; Madalina Moraru, Fabian Lutz and Sergo Mananashvili, 'Return Directive 2008/115/EC' in Kay Hailbronner and Daniel Thym (eds), *EU Immigration and Asylum Law. A Commentary* (3rd edn, CH Beck/Hart/Nomos 2022) 692; Daniel Thym, *European Migration Law* (Oxford University Press 2023) ch 16 [Irregular Presence and Return].

Out of this complex EU toolbox on returns, the article puts under scrutiny the core instrument of the internal dimension of the EU return policy, namely the *Return Directive* – using the above-described EU law terminology. Seen through the lenses of international law, the Return Directive is the only regional international instrument on the matter,[34] legally binding 30 countries (all EU Member States except Ireland and the four non-EU Schengen Associated Countries[35]) and at the same time shaping the legislation of the EU candidate countries, too (Albania, Bosnia and Herzegovina, Georgia, Moldova, Montenegro, North Macedonia, Serbia, Türkiye, and Ukraine[36]). The EU return acquis may thus represent a significant regional practice for (universal) international law-making; and can serve as a blueprint and/or a source of inspiration for other regional organisations wishing to set common standards on the matter.[37]

As already hinted in the title, this article seeks to shed light, critically and with necessary nuances, on the tenability of diametrically opposing views about the Return Directive. These essentially revolve around the question whether the Return Directive can be described as the '*directive of shame*'[38] which heavily emphasises the repressive elements and falls short of meeting human rights standards stemming from either universal (UN) or regional (primarily Council of Europe (CoE)) instruments; or it is a '*directive of protection*' championing the fundamental rights of returnees by instilling several human rights safeguards and standards, making it thus a commendable protection-oriented blueprint to replicate by other regional settings and/or the international community as a whole. In other words, is the Return Directive a repressive or protective instrument; or a combination of both?

1.3. Structure

In terms of the structure of the article, Section 2 first canvasses the broader landscape of the EU legal framework governing return, which is followed by a panoramic overview of the regulatory logic, objectives and scope of the Return Directive (Section 3). Section 4 zooms in to critically discuss both repressive and protective elements of the directive; whereas Section 5 focuses on the implementation and application of the directive from the perspective of this dichotomy, pointing out gaps and challenges. Finally, Section 6 formulates conclusions and presents an outlook to the future.

[34] Another key – pan-European – reference document is the *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) <https://www.refworld.org/policy/legalguidance/coeministers/2005/en/20254> accessed 10 February 2025, which is, however, non-legally binding.

[35] Iceland, Liechtenstein, Norway and Switzerland.

[36] See 'EU Enlargement' (*European Union*) <https://european-union.europa.eu/principles-countries-history/eu-enlargement_en> accessed 10 February 2025.

[37] For more on this outward dimension, see Tamás Molnár, *The Interplay between the EU's Return Acquis and International Law* (Edward Elgar Publishing 2021) ch 5 [The impact of the EU return acquis on the international law regimes governing the 'expulsion of aliens'].

[38] On the very harsh critiques of the Return Directive from Latin American countries, see eg Diego Acosta Arcarazo, 'Latin American Reactions to the Adoption of the Returns Directive' (November 2009) CEPS Liberty and Security in Europe Publication Series <https://www.ceps.eu/system/files/book/2009/11/latin-american-reactions-adoption-returns-directive.pdf> accessed 10 February 2025; Baldaccini, 'The Return and Removal of Irregular Migrants under EU Law' (n 33). Consider also Fabian Lutz, *The Negotiations on the Return Directive: Comments and Materials* (Wolf Legal Publishers 2010) 73–80.

As a delimitation of the scope of this study, the external dimension of the EU return acquis, namely the EU-level readmission agreements[39] – which facilitate the practical implementation of the Return Directive – are not discussed herein. Due to its focus and length constraints, larger theoretical frameworks are not engaged in this paper either.

2. The broader landscape: the EU legal framework (and case law) on return

Within the architecture of the EU founding treaties, Article 79(1) of the Treaty on the Functioning of the European Union (TFEU) defines the general objectives of Union action on combating irregular migration as follows:

> [t]he Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, […] and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.

Article 79(2) TFEU goes on by specifying:

> (2) For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas:
>
> […]
>
> c) illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation.

Competence-wise, return policy is 'shared EU competence' with Member States as part of the 'area of freedom, security and justice' by virtue of Article 4(2)(j) TFEU. 'Shared EU competence' means that both the EU and its Member States may adopt legally binding acts in the area concerned.

Although the Return Directive constitutes the flagship piece of the EU return acquis, the legal landscape is denser and more complex than it appears at first sight. The full body of return-related EU legal instruments ('secondary EU law' made by the EU institutions),[40] comprising both hard law and soft law,[41] includes the following (in chronological order):

Hard law instruments [creating legally binding and judicially enforceable obligations for Member States and/or EU institutions, as the case may be]:

- Directive on mutual recognition of decisions on the expulsion of third-country nationals (Directive 2001/40/EC);[42]

[39]For more on this, see, eg, Tamás Molnár, 'EU Readmission Policy: A (Shapeshifter) Technical Toolkit or Challenge to Rights Compliance?' in Evangelia (Lilian) Tsourdi and Philippe De Bruycker (eds), *Research Handbook on EU Migration and Asylum Law* (Edward Elgar Publishing 2022) 486.

[40]Secondary EU law must be in conformity with primary EU law, i.e. the EU founding Treaties and the Charter of Fundamental Rights of the EU as interpreted by the CJEU – otherwise pieces of secondary EU law conflicting with primary EU law can be invalidated by the CJEU (via action for annulment [TFEU art 263] or preliminary ruling procedure [TFEU art 267]).

[41]On the emerging role of soft law in the EU return acquis, see Peter Slominski and Florian Trauner, 'Reforming Me Softly – How Soft Law has Changed EU Return Policy Since the Migration Crisis' [2020] West European Politics 1 <https://doi.org/10.1080/01402382.2020.1745500>.

[42]Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals [2001] OJ L149/34.

- Directive for transit operations in removals by air (Directive 2003/110/EC);[43]
- Decision on the compensation of financial imbalances resulting from the mutual recognition of expulsion decisions (Decision 2004/191/EC);[44]
- Decision on removals by joint flights (Decision 2004/573/EC);[45]
- Regulation establishing a European travel document for the return of illegally staying third-country nationals (Regulation (EU) 2016/1953);[46]
- Regulation on the use of the Schengen Information System for the return of irregular migrants (Regulation (EU) 2018/1860);[47]
- Recast Regulation creating a European network of immigration liaison officers (ILO) (Regulation (EU) 2019/1240);[48]
- Revamped Regulation establishing the European Border and Coast Guard (Regulation (Regulation (EU) 2019/1896);[49]
- Regulation establishing the Asylum, Migration and Integration Fund (Regulation (EU) 2021/1147, especially its Annex III, point 4 setting out eligible return-related actions);[50] and
- Regulation establishing a return border procedure (Regulation (EU) 2024/1349).[51]

Soft law [non-legally binding] instruments:[52]

- Annex 39 of the Schengen Handbook – 'standard form for recognizing a return decision for the purposes of transit by land' (2011);[53]
- Guide for Joint Return Operations by Air coordinated by Frontex (2016);[54]
- Recommendation on making returns more effective when implementing the Return Directive (Commission Recommendation (EU) 2017/432);[55]

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[43]Council Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by air [2003] OJ L321/26.

[44]Council Decision 2004/191/EC of 23 February 2004 setting out the criteria and practical arrangements for the compensation of the financial imbalances resulting from the application of Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third-country nationals [2004] OJ L60/55.

[45]Council Decision 2004/573/EC of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more Member States, of third-country nationals who are subjects of individual removal orders [2004] OJ L261/28.

[46]Regulation (EU) 2016/1953 of the European Parliament and of the Council of 26 October 2016 on the establishment of a European travel document for the return of illegally staying third-country nationals, and repealing the Council Recommendation of 30 November 1994 [2016] OJ L311/13.

[47]Regulation (EU) 2018/1860 of the European Parliament and of the Council of 28 November 2018 on the use of the Schengen Information System for the return of illegally staying third-country nationals [2018] OJ L312/1.

[48]Regulation (EU) 2019/1240 of the European Parliament and of the Council of 20 June 2019 on the creation of a European network of immigration liaison officers [2019] OJ L198/88.

[49]Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 [2019] OJ L295/1.

[50]Regulation (EU) 2021/1147 of the European Parliament and of the Council of 7 July 2021 establishing the Asylum, Migration and Integration Fund [2021] OJ L251/1.

[51]Regulation (EU) 2024/1349 of the European Parliament and of the Council of 14 May 2024 establishing a return border procedure, and amending Regulation (EU) 2021/1148 (OJ L, 2024/1349, 22.5.2024).

[52]All of them are available via 'EUR-Lex' (*European Union*) <http://eur-lex.europa.eu>.

[53]See at <https://www.udiregelverk.no/en/documents/international-legal-sources/schengen2/schengen-practical-handbook-for-border-guards/annex-39/> accessed 10 February 2025.

[54]See at <https://www.frontex.europa.eu/assets/Publications/General/Guide_for_Joint_Return_Operations_by_Air_coordinated_by_Frontex.pdf> accessed 10 February 2025.

[55]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 L66/15.

- Updated Return Handbook (Commission Recommendation (EU) 2017/2338);[56]
- Revised Code of Conduct for Return Operations and Return Interventions coordinated or organised by Frontex;[57]
- Recommendation on mutual recognition of return decisions and expediting returns when implementing the Return Directive (Commission Recommendation (EU) 2023/682);[58] and
- Council Implementing Decision setting out recommendations addressing identified common areas for improvement resulting from the 2024 thematic Schengen evaluation 'Bridging national gaps: towards an effective EU return system through common solutions and innovative practices'.[59]

The authentic interpretations of the Court of Justice of the EU (CJEU)[60] in its growing return-related case law also play a vital role in clarifying and developing the law in this field. Remarkedly enough, there is practically no CJEU jurisprudence relating to the interpretation of other instruments of the EU return acquis that pre-date the Return Directive. Since the directive's entry into force (January 2009), the EU Court has delivered over 40 rulings interpreting the directive (as of the end of 2024).[61] This reflects the need for finding a careful balance between competing interests: on the one hand, the legitimate interests of Member States in effectively returning migrants in an irregular situation; and on the other, duly respecting the fundamental rights of the persons concerned.

In its rulings, the CJEU drew on a large body of European Court of Human Rights (ECtHR) jurisprudence relevant to the subject matter of the Return Directive. Demarcating the width of the matters harmonised by EU law, notably those governed by the directive and Member States' reserved competences, has been part of this litigation.[62] The CJEU's jurisdiction to rule in preliminary references as well as in other actions (eg, in infringement procedures other than the failure of transposition within the set deadline) has a substantial impact on the definitional and interpretative guidance of EU legislation on returning irregular migrants. It does not come by surprise, given that the CJEU has the monopoly to authentically – with precedent force – interpret the whole body of EU law,[63] including the return acquis.

[56]Commission Recommendation (EU) 2017/2338 of 16 November 2017 establishing a common 'Return Handbook' to be used by Member States' competent authorities when carrying out return-related tasks (C/2017/6505) [2017] OJ L339/83, Annex. Its first version was adopted in 2015 – see Commission Recommendation of 1.10.2015, C(2015) 6250 final.

[57]Decision of the Executive Director No R-ED-2018-40, adopting the Code of Conduct for Return Operations and Return Interventions Coordinated and Organised by Frontex of 26/04/2018 <https://frontex.europa.eu/assets/Key_Documents/Code_of_Conduct/Code_of_Conduct_for_Return_Operations_and_Return_Interventions.pdf> accessed 10 February 2025.

[58]Commission Recommendation (EU) 2023/682 of 16 March 2023 on mutual recognition of return decisions and expediting returns when implementing Directive 2008/115/EC of the European Parliament and of the Council (C/2023/1763) [2023] OJ L86/58.

[59]Council Document No 6775/25 (6 March 2025).

[60]As per its judicial function under the EU founding Treaties, the CJEU has the ultimate authority on the interpretation of EU law and its judgments have *erga omnes* effects across the EU Member States (see, eg, Treaty on European Union (TEU) art 19 and TFEU art 267).

[61]For a list of these CJEU judgments, consult the Quarterly Overviews of CJEU judgments and pending cases published by the Centre for Migration Law at the Radboud University of Nijmegen <https://cmr.jur.ru.nl/cjeu/> accessed 10 February 2025.

[62]Moraru (n 33) 436.

[63]TEU art 19(1): 'The Court of Justice … shall ensure that in the interpretation and application of the Treaties the law is observed.'

3. The Return Directive: how do its logic, objectives and scope grasp ‘expulsion of aliens’?

Zooming in on the central piece of the EU return acquis under scrutiny, the Return Directive, it harmonises, in essence, Member States’ domestic legislation governing the expulsion of non-EU nationals. It sets forth common rules relating to basic notions and definitions, the issue of return decisions, the enforcement of removals (forced returns), entry bans, the use of pre-removal detention (together with certain aspects of detention conditions) as well as key substantive and procedural safeguards, including the due process guarantees and access to effective remedies.

Still, the directive – also due to its legal nature,[64] not being a regulation[65] – has not brought uniformity in all aspects of the return of third-country nationals in an irregular situation; the harmonisation goes, by default, only to a certain extent. For instance, besides the room left for national authorities when choosing the ways and means to achieve the regulatory aim, a number of areas and issues are not covered by the scope of the directive[66] (eg, reasons for unlawful stay; preconditions for ending legal stay; the use of criminal sanctions in the case of those who do not have the right to stay; and immigration detention for public order reasons). Even from within its material scope, Member States are free to opt out for certain types of cases (about these ‘border cases’ and ‘criminal cases’, see their discussion below).[67] In these matters, national law continues to apply. Still, the CJEU stressed that even in these non-EU harmonised areas related to return the standards stemming from the European Convention on Human Rights (ECHR)[68] and its Protocols as interpreted by the ECtHR and those of the 1951 Geneva Convention relating to the Status of Refugees[69] where appropriate, continue to apply as standards of conformity for national laws governing these areas.[70]

In general, the Return Directive pursues a dual objective which links back with the key research question of this piece: on the one hand, the directive seeks to foster effective and speedy returns of those non-EU nationals who are not entitled to stay within the EU (*repressive dimension*), while, on the other hand, respecting the fundamental rights of the returnees (*protective dimension*). At the very outset, Article 1 of the directive enshrines this duality of objectives by stating that the entire return process must be carried out ‘in accordance with fundamental rights as general principles of [EU] law as well as international law, including refugee protection and human rights obligations’. This is likewise echoed in the words of the CJEU:

[64]TFEU art 288, fourth sentence: ‘A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.’

[65]TFEU art 288, second sentence: ‘A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.’

[66]For more, see Moraru, Lutz and Mananashvili (n 33) 698; Thym (n 33) 527.

[67]For more detailed insightful academic commentary on the scope of the Return Directive, see, eg, Galina Cornelisse, ‘The Scope of the Return Directive: How Much Space is Left for National Procedural Law on Irregular Migration?’ in Madalina Moraru, Galina Cornelisse and Philippe De Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union* (Hart Publishing 2020) 41.

[68]Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) ETS No 5.

[69]Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.

[70]See Case C-329/11 *Alexandre Achughbabian v Préfet du Val-de-Marne* [2011] ECLI:EU:C:2011:807, para 49; Case C-290/14 *Criminal proceedings against Skerdjan Celaj* [2015] ECLI:EU:C:2015: 640, para 32; Case C-806/18 *Criminal proceedings against JZ* [2020] ECLI:EU:C:2020:307, para 41; and most recently Case C-673/19 *M and Others v Staatssecretaris van Justitie en Veiligheid and T* [2021] ECLI:EU:C:2021:127, para 47.

> the objective of Directive 2008/115 is […] to establish an effective removal and repatriation policy, based on common standards and common legal safeguards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity.[71]

Striking the right balance is particularly challenging due to the complexities and delicate nature of these competing interests and considerations – as shown in the high number of cases that have reached the docket of the EU Court thus far (see above in Section 2).

The directive's personal scope (*ratione personae*) is fairly broad: as explained in subsection 1.1 above, it covers any irregularly staying non-EU national, including irregular border crossers, overstayers, rejected asylum applicants, those whose legal status was ended, and so on. The circle of persons covered has been even further expanded by the CJEU: it ruled that the stay of rejected asylum applicants by the administrative authority can be considered irregular, but in case a Member State issues a return decision, its legal effects are suspended until the expiry of the deadline for judicial review or the delivery of the court ruling in the appeal phase.[72]

Nonetheless, Member States are allowed to derogate from the personal scope of the directive in two categories of cases: these are the 'border cases' and 'criminal law related ones'. The 'opt out clause' in Article 2(2)(a) of the Return Directive allows Member States not to apply the directive to people who are refused entry[73] at border crossing points and those who have been apprehended in connection with the irregular crossing of the external border; whereas Article 2(2)(b) enables Member States to disapply the directive to those non-EU nationals who are subject to return as a criminal law sanction or the consequence thereof; and those who are the subjects of extradition procedures[74] – without compromising the application and *effet utile* of the directive.[75] Still, Article 4(4) of the directive obliges Member States to respect a set of minimum safeguards even in the afore-discussed situations carved out of its remit. These include the principle of *non-refoulement* and the requirement that the level of protection for affected persons must not be less favourable than guaranteed by the Return Directive, such as the limitations on the use of coercive measures, the postponement of removal, emergency health care and necessary treatment of illnesses, taking into account needs of vulnerable persons, as well as detention conditions pending removal.

4. The Return Directive's balancing act: an appraisal of its repressive and protective dimensions

4.1. A toolkit of repressive measures

A key concept in the whole legal architecture of the EU return acquis – and a prerequisite to set in motion its procedures – is 'irregular stay'. The Return Directive defines irregular stay as the presence in the territory of a Member State of a third-country national who does not fulfil, or no longer fulfils, the conditions of entry as set out in the Schengen

[71]Case C-146/14 *PPU Bashir Mohamed Ali Mahdi* [2014] ECLI:EU:C:2014:1320, para 38.
[72]Case C-181/16 *Sadikou Gnandi v État belge* [2018] ECLI:EU:C:2018:465, paras 50, 61–64.
[73]As per Schengen Borders Code (Regulation (EU) 2016/399) art 14.
[74]For more details, see Aniel Pahladsingh, *Crimmigration and the Return Directive: Fundamental Rights, Criminal Sanctions and the Legal Position of the Migrant* (Eleven Publishing 2023).
[75]See the CJEU's consistent line of case law in Case C-61/11 *PPU Hassen El Dridi, alias Soufi Karim* [2011] ECR I-3015; Case C-329/11 (*Achughbabian*) (n 70); and Case C-430/11 *Md Sagor* [2012] ECLI:EU:C:2012:777.

Borders Code or other conditions for entry, stay or residence in that Member State (Article 3(2)). It is thus initially for Member States to determine, in accordance with their national law, what those conditions are and hence whether a particular person's stay on their territory is legal or illegal.[76]

The underlying regulatory logic of the Return Directive can be grasped in the obligation to issue a return decision to any non-EU national staying irregularly on EU territory, no matter what the reason for irregular stay is (Article 6(1)). At the same time, Member States may decide to grant a residence permit to such individuals for humanitarian, compassionate, or other reasons (Article 6(4)). Put differently, Member States are no longer allowed to tolerate in practice the presence of third-country nationals in an irregular situation on their territory without either launching a return procedure or granting a right to stay. This binary logic aims to eliminate 'grey areas', as Member States are obliged to do 'A' (initiating the return procedure) or 'B' (granting the right to stay). As a result, merely tolerating the presence of irregular migrants on their territory, leaving them in legal limbo, is not acceptable under the scheme of the Return Directive.

In case a return decision is adopted, which prompts a sequence of further procedural steps, a key feature of the directive is to prioritise voluntary departure over removal (forced return). The CJEU underlined the preference for voluntary departure numerous times: the priority given to voluntary departure

> seeks, inter alia, to ensure that the fundamental rights of [the returnees] are observed in the implementation of a return decision […]. In accordance with Article 79 (2) [of the TFEU], the objective of Directive 2008/115 is, as is apparent from […] the preamble thereto, to establish an effective removal and repatriation policy, based on common standards and common legal safeguards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity.[77]

As a main rule, national authorities have to first consider granting a period of voluntary departure, based on individual assessment on a case-by-case basis – between 7 and 30 days, which can be extended (eg, to let children attending school finish the term/school year; to take into account other family and social links) – unless there is a counter-indication (eg, a risk of absconding; if an application for a legal stay has been dismissed as manifestly unfounded or fraudulent; or if the person concerned poses a risk to public policy, public security or national security) (Article 7).

More generally, the CJEU underscored that the Return Directive applies the logic of gradation of return measures, allowing for only a step-by-step intensification of coercion, in line with the principle of proportionality throughout all stages of the return process.[78]

In case no period for voluntary departure has been granted in accordance with the conditions set out in Article 7(4) (eg, there was a significant risk of absconding or the person poses a risk to public policy, public security or national security); or if the obligation to return has not been complied with within the period for voluntary departure, Member States are obliged to take all necessary measures to forcibly implement the return decision, i.e. to remove the person concerned subject to a return decision (Article

[76]Case C-225/16 *Mossa Ouhrami, Opinion of Advocate General Sharpston delivered on 18 May 2017* [2017] ECLI:EU:C:2017:398, para 36.
[77]Case C-554/13 *Z. Zh. v Staatssecretaris Voor Veiligheid En Justitie and Staatssecretaris Voor Veiligheid En Justitie v I. O.* [2015] ECLI:EU:C:2015:377, para 47; and Case C-146/14 *PPU (Mahdi)* (n 71) para 38.
[78]Case C-61/11 *(El Dridi)* (n 75) para 41.

8). This is obviously the more coercive way of enforcing a return decision. Removals vary in terms of the degree of force, form of escorts used, and scope of escorting.[79]

Another novelty is that the effects of Member States' national return measures should be given a European dimension. In case voluntary departure is not granted, i.e. removal (forced return) accompanies a return decision, Member States are required to issue an entry ban – in other cases the issuance of an entry ban is optional. Entry bans must be given an EU-wide effect, i.e. prohibiting the entry of the third-country national concerned into the territory of all Member States for its period of validity (which, in principle, is maximum five years – it can be prolonged in exceptional cases) (Article 11). In a similar vein, even if the EU-wide effect of return decisions is not expressly stated in the Return Directive, each return decision must be formulated in a way to expel the person concerned not only from the territory of the Member State of apprehension, but from all Member States bound by the directive (this approach has also been confirmed by the Schengen evaluation and monitoring mechanism looking into the actual implementation and application of the EU return acquis by national authorities).[80] In addition, from March 2023 onwards, Member States are required to enter an alert on return in the Schengen Information System (SIS) without delay following the issuance of a return decision.[81] This enables all other EU countries to see immediately through the SIS whether an apprehended non-EU national has already been issued to a return decision in another Member State.

A particularly intrusive measure of constraint in the edifice of the Return Directive is pre-removal detention, which can be ordered 1) to prepare the return and/or 2) to carry out the removal process, unless other sufficient but less coercive measures (alternatives to detention)[82] can be applied effectively in a specific case (Article 15(1)). The directive explicitly lists two particular grounds for ordering detention pending return/removal, namely 1) the risk of absconding; and 2) when the person avoids or hampers the removal process. Pre-removal detention, which is a measure of last resort (*ultima ratio*), should not be applied as a punitive measure and must be 'subject to the principle of proportionality with regard to the means used and objectives pursued' (recital (16)). The CJEU also confirmed this measure's *ultima ratio* nature by underscoring that depriving one's liberty is only allowed if it appears after an individual assessment that 'the enforcement of the return decision in the form of removal risks being compromised by the conduct of the person concerned'.[83]

Administrative or judicial authorities are to order pre-removal detention, the absolute duration of which should not exceed, in principle, six months – which is exceptionally extendable in specific cases by an additional twelve months (in case of lack of cooperation

[79]European Parliamentary Research Service, 'The Return Directive 2008/115/EC. European Implementation Assessment' (June 2020) PE 642.840 71.

[80]See, eg, 'Council Implementing Decision setting out a recommendation on addressing the deficiencies identified in the 2016 evaluation of France on the application of the Schengen acquis in the field of return', Council Document No 6388/18 (26 February 2018), para 1.

[81]Regulation (EU) 2018/1860 (n 47).

[82]For in-depth analysis of alternatives to detention under EU and international law, see, eg, Evangelia (Lilian) Tsourdi, 'Alternatives to Immigration Detention in International and EU Law: Control Standards and Judicial Interaction in Heterarchy' in Madalina Moraru, Galina Cornelisse and Philippe De Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union* (Hart Publishing 2020) 167.

[83]Case C-61/11 *(El Dridi)* (n 75) paras 39–41; Case C-146/14 *PPU (Mahdi)* (n 71) para 70.

by the returnee; and when delays in obtaining the necessary documentation from the third country occur) (Article 15(5)–(6)). In any event, as a reflection of the principle of proportionality,[84] detention must be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence (Article 15(1), last sentence). As a consequence, detention must end, and the returnee needs to be released when there is no reasonable prospect of removal[85] or the above-mentioned conditions for its ordering no longer exist (Article 15(4)). In terms of the facilities where returnees can be kept pending their return, pre-removal detention must take place in specialised detention facilities, with particular attention paid to vulnerable persons. Where a Member State cannot provide accommodation in a specialised detention facility and is obliged to resort to prison accommodation, returnees must be kept separated from ordinary prisoners (Article 16(1)).[86]

4.2. Protective provisions – the role of fundamental rights

The above *tour d'horizon* of selected provisions of the Return Directive clearly demonstrates that national return-enforcing authorities have quite a toolbox of repressive measures at their disposal to return and remove irregularly staying third-country nationals from the EU. The repressive side of the Return Directive is thus clearly there. But what about the protective provisions? Looking at this angle is indispensable to provide meaningful answers to the research question.

To start with, the directive integrates a set of standards and principles stemming from international human rights law and EU law, including the Charter of Fundamental Rights of the EU[87] (hereinafter: 'Charter'). The above-referred to Article 1 of the Return Directive encapsulates their essence: the common standards and procedures governing return are to be applied 'in accordance with fundamental rights […] as well as international law, including refugee protection and human rights obligations'. Added to this, reference is made in the text quite a few times to international human rights law in general and as embodied in specific treaties in particular. The international human rights conventions, serving as yardsticks to assess the legality of the application of the Return Directive, comprise the ECHR, the 1951 Geneva Convention relating to the Status of Refugees and its 1967 Protocol,[88] and the 1989 UN Convention on the Rights of the Child,[89] coupled with all other relevant treaties concluded by the Member States, the EU or both, which contain more favourable provisions for the migrants subject to expulsion (eg, the CoE Istanbul Convention on Preventing and Combatting Violence against Women and Domestic Violence;[90] or the CoE Warsaw

[84]Galina Cornelisse, 'Criminalisation, Containment and Courts: A Call for Cross-Fertilisation Between the Social Sciences and Legal-Doctrinal Research into Immigration Detention in Europe' in Evangelia (Lilian) Tsourdi and Philippe De Bruycker (eds), *Research Handbook on EU Migration and Asylum Law* (Edward Elgar Publishing 2022) 457.

[85]See also Case C-357/09 *PPU Said Shamilovich Kadzoev (Huchbarov)* [2009] ECR I-11189, para 68.

[86]See also Joined Cases C-473/13 and C-514/13 *Bero and Bouzalmate* [2014] ECLI:EU:C:2014:2095, paras 15, 28, 32; Case C-474/13 *Thi Ly Pham v Stadt Schweinfurt, Amt für Meldewesen und Statistik* [2014] ECLI:EU:C:2014:2096, paras 16, 23.

[87]Charter of Fundamental Rights of the European Union [2012] OJ C326/391.

[88]Protocol relating to the Status of Refugees (adopted 16 December 1966, entered into force 4 October 1967) 606 UNTS 267.

[89]Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

[90]Council of Europe Convention on preventing and combating violence against women and domestic violence (11 May 2011) CETS No 210, arts 59, 61. The EU ratified it in June 2023 (see Council Decision (EU) 2023/1075 of 1 June 2023 on

Convention against Trafficking in Human Beings[91]). Compliance with fundamental rights was intended by the EU legislator as a cardinal principle of interpretation of the Return Directive[92] and the CJEU has significantly clarified and further elucidated these standards, playing thus a key role in reinforcing the protection function of fundamental rights provisions.[93]

Content-wise, besides general references to 'refugee protection' and 'fundamental rights/human rights obligations', the operative provisions of the Return Directive name a few concrete human rights norms and principles. These include the best interests of the child, the right to family life, the right to health, the principle of *non-refoulement* (all referred to in Article 5), the principle to provide humane and dignified detention conditions (recital (17) and Articles 16–17) as well as to respect human dignity and physical integrity of migrants in an irregular situation subject to return procedures (Article 8(4)).

More specifically, further human rights safeguards include the following:

- The returnees are subject to a number of procedural safeguards. These include written decision-making, setting out the reasons both in fact and in law, linguistic assistance and interpretation, together with judicial review of all return-related decisions, including the possibility for the judge to temporarily suspend their enforcement (Articles 12–13).
- In case of unaccompanied children, before deciding to issue a return decision in respect of such a child, assistance by appropriate bodies other than the authorities enforcing return must be granted with due consideration being given to the best interests of the child. In addition, before actually removing an unaccompanied child from a Member State, the authorities concerned must be satisfied that the person will be returned to a member of his or her family, a nominated guardian, or adequate reception facilities in the third country of return (Article 10).
- When carrying out removal, any coercive measure must be used as a last resort and must be proportional, 'not exceed reasonable force' and be in accordance with fundamental rights and the dignity and physical integrity of the person concerned (Article 8(4)).
- Member States are required to set up effective forced return monitoring systems at the national level (Article 8(6)).[94]

the conclusion, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to institutions and public administration of the Union [2023] OJ L143I/1; and Council Decision (EU) 2023/1076 of 1 June 2023 on the conclusion, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to matters related to judicial cooperation in criminal matters, asylum and non-refoulement [2023] OJ L143I/4). The convention entered into force with respect to the Union on 1 October 2023. For the binding nature of the Istanbul Convention under EU law and its prominent role in interpreting the EU asylum acquis by virtue of TFEU art 78(1), see also CJEU, Case C-621/21 *Intervyuirasht organ na DAB pri MS (Femmes victimes de violences domestiques)* [2024] EU:C:2024:47, paras 46–48.

[91]Council of Europe Convention on Action against Trafficking in Human Beings (16 May 2005) CETS No 197, art 13 – no expulsion during the recovery and reflection period of at least 30 days. All EU Member States have ratified it, but the EU is not party to this convention, although this CoE treaty allows the EU to accede to it (see art 42(1)).

[92]Moraru, Lutz and Mananashvili (n 33) 698.

[93]See also monographically Majcher (n 33).

[94]For more about the criteria of their effectiveness and independence, see the 2017 Return Handbook (n 56). For an overview of existing national forced return monitoring systems across the EU, see the following overview (including a

- Removal is to be postponed due to risks of *refoulement* (which is a compulsory reason for postponement);[95] or because of practical or other reasons or impediments (which is at the discretion of Member States) (Article 9).
- Non-removable returnees[96] must enjoy some basic rights during the postponement of their removal, such as receiving a written confirmation on their status, respecting their family unity, providing them basic health care and schooling for children as well as taking into account the special needs of vulnerable persons.
- The rules governing pre-removal detention have several built-in safeguards, too. These start with the limited and well-circumscribed grounds for detention in Article 15(1) (which have been introduced above) and the principle that deprivation of liberty must be used as a measure of last resort, hence alternatives to detention have to be duly considered. All of these are coupled with the above-mentioned limitations on its length and the criteria when pre-removal detention has to cease to exist.
- Moreover, detention conditions must be humane and dignified, with extra safeguards applicable to families (with children) and unaccompanied children, also with a view to guaranteeing the best interests of the child (Articles 16–17).
- Finally, another set of fundamental rights safeguards concern judicial review, either initiated by the detainees themselves or carried out the by a court *ex officio*. In the case of prolonged detention periods, reviews must be subject to the supervision of a judicial body (Article 15(2)–(3)).

It is worth noting that most of these fundamental rights safeguards, notably the ones enshrined in Article 5 of the directive, would also be applicable without express references in the text itself, given that such rights form part of general principes of Union law,[97] and/or qualify as customary international law norms which are an integral part and parcel of the EU legal order.[98] They are likewise protected by the Charter which has the same legal value as the EU founding treaties (see Article 6(3) of the Treaty on European Union (TEU)). It can be thus argued that such explicit mentions in the Return Directive have a declaratory nature and serve rather practical purposes, namely making clear for the return-reinforcing authorities the applicability of all these basic rights in the context of return-related procedures, too. Nonetheless, the jurisprudence of the CJEU vested some of these basic rights (such as the prohibition of *refoulement*, the right to family life, the best interests of the child etc.) with a self-standing character and an autonomous meaning, further elucidating the wording of the respective provisions and sometimes even going beyond that.[99]

comparative table) produced by the EU Agency for Fundamental Rights, which is updated annually: <https://fra.europa.eu/en/publication/2024/forced-return-monitoring-systems-2024-update> accessed 10 February 2025.

[95]See also Case C-546/19 *BZ v Westerwaldkreis* [2021] ECLI:EU:C:2021:432, paras 58–59.

[96]On their peculiar situation, see, eg, Jean-Baptiste Farcy, 'Unremovability under the Return Directive: An Empty Protection?' in Philippe de Bruycker, Galina Cornelisse and Madalina Moraru (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Unio*n (Hart Publishing 2020); and Diego Gines Martin, 'When Deportation Fails: Non-Removable Migrants in the European Union' (PhD dissertation, European University Institute 2022).

[97]Moraru, Lutz and Mananashvili (n 33) 719.

[98]See, eg, Case C-162/96 *A. Racke GmbH & Co. v Hauptzollamt Mainz* [1998] ECR I-3655, paras 45–46; Joined Cases C-402/05 P and C-415/05 *P Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-6351, para 291; and Case C-364/10 *Hungary v Slovak Republic* [2012] ECLI: EU:C:2012:630, para 44.

[99]See also Moraru, Lutz and Mananashvili (n 33) 719.

4.3. Assessment: protectively repressive?

The Return Directive is by design and by default an immigration law enforcement instrument, given its subject matter and main objective pursued as laid down in its Article 1: '[it] sets out common standards and procedures to be applied in Member States for returning illegally staying third-county nationals'. This is its very *raison d'être*, since the directive regulates the modalities of returning and/or removing those third-country nationals who do not have the right to stay. At the same time, the very same provision also states that all these immigration law enforcement (repressive) measures must be 'in accordance with fundamental rights as general principles of [EU] law as well as international law, including refugee protection and human rights obligations'. And these are not just lipstick on a pig, to pay lip service to addressing human rights concerns related to return, the consequences of which can be grave and irreversible.

The various fundamental rights safeguards discussed under Section 4.2 above forcefully demonstrate that the EU legislator was mindful of all the risks the repressive dimension of the instrument may pose to respecting the basic rights of the returnees. The directive operates in a highly sensitive context where national authorities' enforcement powers and coercive measures can significantly interfere with or intrude into the rights and freedoms of those non-EU nationals who are obliged to leave the EU – many times in a vulnerable situation. Against this backdrop and in view of the analysis in Sections 4.1–4.2 above, in the author's assessment, the Return Directive cannot be legitimately considered as a 'directive of shame'. It rather embodies a 'directive of protection', especially if seen in light of its underlying objective of general (security-driven) interest, as echoed in recitals (4) and (5), to return those non-EU nationals who do not have the right to stay in the EU. No other universal or regional instrument goes beyond the directive's protection standards, which shield the returnees from arbitrary decision-making and offer them human and dignified treatment, coupled with genuine mechanisms and safeguards to prevent rights violations in various stages of the return process.

5. Implementation and application of the Return Directive – gaps and challenges

After mapping and critically discussing the key repressive and protective provisions of the Return Directive, it is now opportune to turn to its practical application, in order to see how it has achieved its objectives and to what extent the balance between these two seemingly competing goals was kept in practice at the national level. This inquiry into the actual national policies and practices can serve as a testing ground to gain more insights about the functioning and dynamics as concerns the directive's repressive and protective components as well as their interplay.

In the initial – and thus far only – evaluation report on the application of the Return Directive, published in 2014, the European Commission observed that the flexibility of the directive and the Member States' implementation of its provisions had positively influenced the situation regarding voluntary departure and operating effective forced return monitoring mechanisms at the national level. They also contributed to achieving more coherence on immigration detention practices, including the overall reduction of pre-removal detention periods with wider implementation of alternatives to detention

across the EU.[100] These are welcome findings for the protection of returnees' fundamental rights. Still, in the past ten years, challenges remained as concerns the full compliance of Member States' national return policies and practices with the Return Directive, giving rise to persistent divergences between national procedures and standards.

In the absence of further European Commission evaluation after the above-mentioned one released in 2014, the European Parliament decided to carry out its own implementation assessment of the directive in 2020.[101] This assessment report, drawing on a wide range of scholarly writings on the matter, identified many protection gaps and shortcomings at the national level. These include 1) the lack of explicit prohibition to issue return decisions when *refoulement* risks emerge; 2) insufficient procedural safeguards falling short of international human rights law requirements; 3) flawed imposition of entry bans accompanying a return decision, generally disrespecting the principle of proportionality, without the individual assessment of the case; 4) the lack of rules on adequate living standards for non-removable returnees; and 5) pre-removal detention practices that are contrary to the principles of necessity and proportionality, and even violating the right to liberty (Article 6 of the Charter).

In a similar vein, the EU Agency for Fundamental Rights found, in a report covering the period from 2015 until March 2023, that 1) procedural safeguards in the return procedures are insufficiently implemented (as concerns, eg, the right to information, the availability of translations of the return decision, access to legal aid, and appeal deadlines when seeking judicial review); 2) gaps remain in assessing risks of *refoulement*; 3) people are pushed back at EU internal borders, disrespecting the applicable provisions of the Return Directive;[102] and 4) although monitoring forced returns has become established practice, gaps remain;[103] together with 5) multiple issues persisting around pre-removal detention (eg, safeguards against arbitrary detention are not always applied, specialised detention facilities are lacking and detention conditions are inadequate in some jurisdictions, as well as alternatives to detention remaining underused).[104]

Council recommendations on addressing deficiencies identified by the Schengen Evaluation and Monitoring Mechanism[105] – which covers return policy since 2015 – have also flagged several return- and detention-related shortcomings and gaps in Member States' own return systems and the practical application of the EU return acquis at national level.[106]

[100]European Commission, 'Communication from the Commission to the Council and the European Parliament on EU Return Policy' COM (2014) 199.

[101]European Parliamentary Research Service, 'The Return Directive 2008/115/EC. European Implementation Assessment' (n 79).

[102]Return Directive (n 25) art 6(3) allows Member States to pass back to a neighbouring Member State people whom they have apprehended in connection with their irregular crossing of an internal border, on the basis of intra-EU bilateral readmission agreements – provided that the readmission agreement existed before January 2009 (the date of entry into force of the Return Directive).

[103]See also more recently, EU Agency for Fundamental Rights (n 94).

[104]EU Agency for Fundamental Rights, *Asylum and Migration: Progress Achieved and Remaining Challenges* (Publications Office of the European Union May 2023) 5, 33–38.

[105]Council Regulation (EU) 2022/922 of 9 June 2022 on the establishment and operation of an evaluation and monitoring mechanism to verify the application of the Schengen acquis, and repealing Regulation (EU) No 1053/2013 [2022] OJ L160/1.

[106]See also the outcome document of the recent thematic Schengen evaluation in the field of returns: C(2024) 9171 final (n 5). On the recommended actions to take to remedy the deficiencies found, see Council Document No 6775/25 (n 59).

Owing to some of the above persistent problems and discrepancies, the European Commission opened infringement procedures in the past years against several Member States, including Belgium, Germany, Greece and Spain (still pending at the time of writing)[107] and Hungary (CJEU ruling delivered but not complied with)[108] for failing to comply with the Return Directive.

Looking at the (perceived) effectiveness of the Return Directive, the current framing of policy debates pays limited attention to the fundamental rights considerations and attributes the greatest significance to the number of effective returns (including both voluntary departures and forced returns). From the EU Member States, in total, an annual 350–500 thousand 'illegally staying third-country nationals' were issued a return decision in the past ten years but the number of actual returns remained low – oscillating between 55 and 196 thousand per year in the same period.[109] Since the adoption of the strategic policy document titled 'European Agenda on Migration' in May 2015,[110] increasing the enforcement rate of return decisions has been gaining gradual prominence when it comes to measuring effectiveness. The European Commission has repeatedly expressed concerns about low return rates (at the end of 2023, it stood around 25%),[111] as this is seen as undermining the credibility of the EU return system and increasing incentives for irregular migration, notably secondary onward movements within the EU.[112] Driven by the same considerations, in March 2017, the European Commission adopted a renewed Action Plan on Returns[113] accompanied by a Recommendation,[114] which included a set of measures for Member States to make returns more effective. A number of these recommendations are based on the findings of the Schengen evaluation mechanism. European Council conclusions likewise highlighted the need to step up effective returns.[115]

In reality, actual return rates depend on several factors, such as the level of cooperation with the countries of origin/transit, and the practical feasibility of return (meaning issues beyond the respect of the principle of *non-refoulement*). Another complex issue concerns the real explanatory power of return rates as the central indicator to assess the effectiveness of the EU return policy. Mananashvili has powerfully explained why too obsessive insistence on return rates is misleading and that this rate is an ineffective indicator in itself for measuring the effectiveness of returns. He underscored, for instance, that a 'return decision taken in a given year does not always lead to actual departure or removal in the same year'.[116] Another factor is that some EU countries issue more than one return

[107]'September Infringements package: Key decisions' (*European Commission*, 29 September 2022) <https://ec.europa.eu/commission/presscorner/detail/en/inf_22_5402> accessed 10 February 2025.

[108]Case C-808/18 *Commission v Hungary* [2020] ECLI:EU:C:2020:1029; Case C-123/22 *Commission v Hungary (Accueil des demandeurs de protection internationale II)* [2024] ECLI:EU:C:2024:493.

[109]European Parliamentary Research Service, 'Common Approach on Return Policy' (January 2024) PE 757.604 2 [Figure 1]. See also European Parliamentary Research Service, 'Data on Returns of Irregular Migrants' (June 2023) PE 749.802.

[110]European Commission, 'A European Agenda on Migration' COM (2015) 240 final.

[111]European Parliamentary Research Service, 'Common Approach on Return Policy' (n 109) 3 [Figure 3].

[112]European Commission, 'Progress Report on the Implementation of the European Agenda on Migration' COM (2019) 126 final 10.

[113]COM (2017) 200 final.

[114]Commission Recommendation (EU) 2017/432 (n 55).

[115]See, eg, European Council, 'European Council meeting (28 June 2018) – Conclusions', EUCO 9/18, Brussels; European Council, 'European Council meeting (17 October 2024) – Conclusions', EUCO 25/24, Brussels.

[116]Sergo Mananashvili, 'EU's Return Policy: Mission Accomplished in 2016? Reading Between the Lines of the Latest EUROSTAT Return Statistics' (International Centre for Migration Policy Development 2016) 5.

decision to a migrant in an irregular situation if the person was re-apprehended at a later stage. A further limitation is that there are no fully reliable statistics which show how many non-EU nationals subject to a return decision actually leave the territory of the Member States. The European Commission's Joint Research Centre (JRC) has likewise carried out an in-depth study into the matter. Without going into the details, the JRC report found that while return rates are useful indicators, they present several limitations. It highlighted that more caution should be applied to measuring the effectiveness of EU return policy solely based on return rates.[117] In light of the foregoing, the author concurs with those who submit that the return rate is a misleading and incomplete indicator to adequately assess the effectiveness of the EU return policy.[118]

6. Final thoughts and outlook to the future

The EU return policy in general and the Return Directive in particular, pursuing the double objective of being repressive and protective at the same time, have received much political attention as a result of compliance and enforcement deficits.[119] As mentioned above, various factors influence the effectiveness of the EU return acquis. Three major practical challenges standing in the way of the effective application can be identified:[120]

- internal difficulties and obstacles encountered by the Member States within their own countries in successfully enforcing return decisions, such as poor inter-agency cooperation, administrative problems, financial and staffing issues etc. (*internal institutional dimension*);
- lack of cooperation from the returnee, eg, to facilitate the identification process or to remain at the disposal of the authorities (*internal human dimension*); and
- lack of cooperation with countries of origin/transit to enable actual removals (eg, in identifying, re-documenting and readmitting their own nationals) (*external dimension*).

Internally, it is vital to carefully balance between ensuring swift and effective return procedures on the one hand, and fully respecting fundamental rights as well as humane and dignified conditions when carrying out returns, with adequate built-in safeguards, on the other hand. The repressive side of the EU return acquis needs to be in harmony with its protective dimension – and the legal framework itself is able to make this happen. Ensuring respect for fundamental rights in return procedures not only safeguards the rights of the returnees but also serves the interests of national authorities. It prevents situations where fundamental rights violations during the return procedure lead to

[117] Martina Belmonte, Dario Tarchi and Francesco Sermi, 'How to Measure the Effectiveness of Return' (JRC122948, Publications Office of the European Union 2021).

[118] See also European Parliamentary Research Service, 'The Return Directive 2008/115/EC. European Implementation Assessment' (n 79) 64–65.

[119] Thym (n 33) 508.

[120] 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): A contribution from the European Commission to the Leaders' meeting in Salzburg on 19-20 September 2018' COM (2018) 634 final. See also EU Agency for Fundamental Rights, 'Planned Return Hubs in Third Countries: EU Fundamental Rights Law Issues' (February 2025) FRA Position Paper 1/2025, 11.

challenges or appeals at a later stage, resulting in delays in removal operations, prolonged detention and interventions of (inter)national courts, as well as reputational damage to the Member States. All of this, therefore, contributes to the effectiveness, in a holistic sense, of the EU return policy and its overall credibility.

The most recent developments shaping the EU's return acquis should not be left out of the equation either. The legal instruments adopted under the new EU Pact on Migration and Asylum[121] will also bring novel elements and reignite the dynamics within the EU legislation on returns. One piece of the new legislative package will regulate return border procedures (not yet in force).[122] Those non-EU nationals will be channelled into such return procedures at the EU external border whose asylum application is rejected following an asylum border procedure.[123] In case return cannot be carried out within 12 weeks, then the ordinary return procedure under the Return Directive will follow (Article 4(4)). The new rules, applicable only from June 2026, seek to create seamless connection between asylum and return procedures carried out at or in the proximity of EU external borders, and thus to render returns more efficient and increase the current moderate return rates.[124] It remains to be seen whether the EU (and its Member States) will be able to address these (in)efficiency issues simply through a dedicated return procedure implemented at locations in the vicinity of the external borders. On top of that, a worrisome dimension of the new Return Border Procedure Regulation is that it allows for derogations in situations of crisis (Articles 6–8). When activated, through the European Commission's assessment and requiring the authorisation by the Council of the EU, people can be kept in the border return procedure – and correspondingly in pre-removal detention – for an additional six weeks, deviating thus further from the common standards enshrined in the Return Directive.

Compared to the broader (global) legal framework such as the ILC draft articles on the matter, the rules governing the 'expulsion of aliens' from the EU, which constitute a multi-layered body of law and are composed of an ever-growing number of norms relating to various branches international law, were the subject of a particularly detailed and advanced codification under EU law – mostly in the Return Directive and other pieces of the EU's return acquis, which have been considerably developed by the generally protection-driven case law of the CJEU. Given its more detailed and elaborate regulatory character, paired with primacy, direct effect and the applicable enforcement mechanisms under EU law, the Return Directive operates as the *lex specialis* for the European countries bound by the directive, whereas the general international legal norms, codified in the ILC draft articles on the expulsion of aliens, remain rather a set of background, fallback norms as *lex generalis*.

[121]The EU adopted the Pact on Migration and Asylum in May 2024 which comprises 10 legally binding instruments (mostly regulations and one directive). This major legislative overhaul mainly concerns the EU borders and asylum acquis. All EU legal instruments born under the aegis of the Pact can be accessed here: 'Official Journal L series daily view' (*European Union*, 22 May 2024) <https://eur-lex.europa.eu/oj/daily-view/L-series/default.html?&ojDate=22052024>.

[122]Regulation (EU) 2024/1349 (n 51).

[123]See Regulation (EU) 2024/1348 of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU (OJ L, 2024/1348, 22.5.2024) arts 43–54.

[124]Evangelia (Lilian) Tsourdi, *The New Screening and Border Procedures: Towards a Seamless Migration Process?* (Policy Study, Foundation for European Progressive Studies, Friedrich-Ebert-Stiftung and European Policy Centre 2024) 9.

The forgoing critical review sought to demonstrate that the EU has crafted a sophisticated and progressive (protection-oriented) – although far from being flawless – regional legal regime governing the 'expulsion of aliens'. At the same time, the tension between seeking a more effective common return system and ensuring the humane treatment of those subject to return is likely to continue.[125] Despite these challenges and incongruences (or perhaps owing to them), analysing the EU's return acquis and its impact beyond Europe, seen from the outside and from a comparative legal perspective, would be a worthwhile academic endeavour, capable of bringing added value to current legal discourses on that highly sensitive and oftentimes controversial topic.

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No potential conflict of interest was reported by the author(s).

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[125]Peers (n 33) 540.