

The impact of ECtHR case-law on the CJEU's interpreting of the EU's return acquis: More than it first seems?

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ORIGINAL RESEARCH PAPER

Received: October 1, 2021 • Accepted: May 12, 2022

Published online: July 21, 2022

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ABSTRACT

After canvassing the CJEU's return-related case-law and identifying the references to the ECHR and the Strasbourg case-law within it, based on empirical research of CJEU rulings, this article explores the possible reasons and motivations for the EU Court's more guarded approach towards ECHR and ECtHR case-law in interpreting and developing the EU's return acquis (as opposed to the EU asylum legislation). Potential explanations are manifold. Nonetheless, one might still argue that, substance-wise, quite a number of human rights protected under the ECHR and ECtHR case-law have been presented in the CJEU rulings as EU law standards. Hence, it is also arguable that ECtHR jurisprudence does play a role behind the scenes in the CJEU's deliberations but does not surface in the judgments themselves.

KEYWORDS

ECHR, ECtHR case law, EU return acquis, CJEU, interactions between legal orders

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1. INTRODUCTION

The expulsion of non-nationals from a country is a common phenomenon: this affects several million people around the world every year. Since the 1989 *Soering* ruling,¹ the European Court of Human Rights (ECtHR) has developed extensive case-law relating to the expulsion and pre-removal detention of non-nationals, setting out and further nuancing various safeguards protecting the rights of the individual in relation to being expelled. While acknowledging that ‘States have the right, as a matter of well-established international law and subject to their treaty obligations,... to control ...the expulsion of aliens’,² the ECtHR has repeatedly underlined that states must exercise this classic sovereign power within the limits defined by international law, with due respect for the growing number of relevant human rights obligations.³ This tranche of ECtHR jurisprudence powerfully demonstrates that expelling foreigners from a state’s territory involves critical human rights issues, since such coercive measures may easily result in drastic changes with serious consequences for the life and future of the returnee.

The other European apex court, the one seated in Luxembourg, has also put itself on the ‘scoreboard’ in the past decade or so when it comes to adjudicating matters related to the expulsion of non-nationals. The case-law of the Court of Justice of the EU (CJEU) that interpret the EU acquis related to the ‘return of illegally staying third-country nationals’ (the equivalence of ‘expulsion of aliens’ in EU parlance) has been constantly increasing since its initial ruling on the matter in *Kadzoev*, delivered in November 2009,⁴ which for the first time interpreted the so-called Return Directive (Directive 2008/115/EC).⁵

These two regional courts in Europe do not exist in splendid isolation, especially since the CJEU has never remained intact from ECtHR case-law when it comes to adjudicating issues pertaining to human rights protection – despite the lack of any institutional or formalised ties between these ‘twin peaks’.⁶ This article aims to map and analyse the approach of the CJEU – which is the guardian that ensures that ‘the law is observed’ in the interpretation and application of the EU Treaties⁷ – towards ECtHR case law in the context of the EU return acquis. In doing so, it focuses on the Return Directive as the keystone element of the EU acquis related to the

¹*Soering v United Kingdom* App no 14038/88 (ECtHR, 7 July 1989).

²See, for example, *ND and NT v Spain* App nos 8675/15 and 8697/15 (ECtHR, 13 February 2020), para 167; *Chahal v United Kingdom* App no 22414/93 (ECtHR, 15 November 1996), para 73; *Vilvarajah and Others v United Kingdom* App nos 13163/87; 13164/87; 13165/87; 13447/87; and 13448/87 (ECtHR, 30 October 1991), para 102.

³Wojnowska-Radzińska (2015) ix.

⁴Case C-357/09 PPU *Said Shamilovich Kadzoev (Huchbarov)* [2009] ECR I-11189.

⁵Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348/98 (hereinafter: ‘Return Directive’).

⁶The process of the EU’s accession to the European Convention on Human Rights – mandated by Art 6 (2) of the Treaty on European Union (TEU) – has been put on hold since the CJEU delivered its Opinion 2/13 in December 2014 (ECLI:EU:C:2014:2454). The 2013 Draft Accession Agreement, found to be incompatible with the EU Treaties, aimed to set up the legal framework for an institutionalised cooperation scheme for the Luxembourg court with its Strasbourg counterpart. For thorough analyses of the Draft Accession Agreement and Opinion 2/13, see for example [Lock \(2021\)](#); [Lock \(2017\)](#); and [Korenica \(2015\)](#).

⁷Art 19(1) of the TEU.



expulsion and removal of non-nationals, and seeks to explore and understand the place and role of the European Convention on Human Rights (ECHR) and the case law of the ECtHR in the CJEU's return-related jurisprudence based on the Return Directive. Remarkably, the scholarly writings on the Directive⁸ have not yet really engaged with the role of ECtHR case law in the ever-growing case law of the CJEU that clarifies and expands on various provisions of the Return Directive.

2. ECHR STANDARDS, ECtHR CASE LAW, AND THE TEXT OF THE RETURN DIRECTIVE – A BRIEF OVERVIEW

As already outlined in the introduction, in the context of returning irregular migrants and human rights safeguards, the ECHR is the most relevant international instrument in Europe. This is primarily thanks to its Article 2 (right to life), Article 3 (on the prohibition of torture or other forms of ill-treatment, which enshrines an implied *non-refoulement* obligation), Article 5 (on the right to liberty, which is also relevant to the deprivation of liberty of irregular migrants pending removal), and Article 8 (on the right to respect for private and family life as a bar to removal). In addition, Protocol No 4 to the ECHR lays down the details of the prohibition of the collective expulsion of aliens; while Protocol No 7 contains various procedural safeguards related to the expulsion of aliens. All of these provisions have been subsequently interpreted by the ECtHR – resulting in a very rich, and at times progressive, body of jurisprudence.⁹

This section does not seek to recapitulate the extensive case law of the ECtHR relating to bars to removal – based on either absolute rights, such as the right to life and the prohibition of torture or other forms of ill-treatment; or qualified rights under certain circumstances, such as the right to liberty, the right to a fair trial and the right to respect for private and family life, which may also act as barriers to removal;¹⁰ let alone the ECtHR jurisprudence on the prohibition of collective expulsion.¹¹ This abundant and impressive case law is not analysed here, but relevant ECtHR rulings will pop up in relation to CJEU jurisprudence referring to and being inspired by them.

Under EU law, the Return Directive provides common standards and procedures to be applied by EU Member States to 'third-country nationals' (non-EU nationals) who do not fulfil the conditions for entry, stay, or residence in a Member State, with a view to promoting an effective return policy. The Return Directive sets out common, harmonized rules relating to the

⁸See e.g. Moraru, Cornelisse and de Bruycker (2020); Lutz and Mananashvili (2016); Acosta Arcarazo and Guild (2012); Acosta Arcarazo (2011); Baldaccini (2009); Martucci (2009); and Carlier (2008).

⁹For a concise yet thorough overview of these ECHR provisions and the connected ECtHR case law, see e.g. Scuto (2019); and van Dijk et al. (2018).

¹⁰A good overview is given by the European Union Agency for Fundamental Rights and Council of Europe (2020) sections 4.3 and 6.2; and the Council of Europe and European Court of Human Rights (2021) Parts III-IV. For more detailed and critical academic commentary on this case-law, see for example Blöndal and Arnardóttir (2021) and Elberling (2014).

¹¹European Union Agency for Fundamental Rights and Council of Europe (2020) Section 4.2. For a very detailed and in-depth analysis, see Arlettaz (2019).



issue of ‘return decisions’,¹² the enforcement of removals (forced returns)¹³ and the use of pre-removal detention, as well as procedural safeguards, including due process guarantees and access to effective remedies. Since its entry into force more than 13 years ago (and even before, during the negotiation phase), the Return Directive has been the subject of heated policy debate¹⁴ and harsh criticism from multiple civil society organizations¹⁵ and a number of academic commentaries.¹⁶ One recurring aspect of these concerns and controversies about the Directive’s contents and standards relates to its (non-) compliance with international human rights law,¹⁷ particularly the ECHR, as interpreted by the ECtHR.

This principal legal instrument of the EU return policy integrates a set of principles flowing from international human rights law, including the ECHR. It also explicitly refers to the ECHR – in the context of the respect for the right to family life – in its recital (22),¹⁸ and conceives, more broadly, international human rights law in general as the standard of conformity for EU law and Member State action when implementing this Directive (see especially its recital (17)¹⁹ and Article 1).²⁰ Additionally, the Return Directive applies a ‘without prejudice’ clause (Article 4(1)), which makes the application of the ECHR possible when these rules specify more favourable conditions for the individual concerned.

The ECHR as interpreted by the ECtHR serves thus as a yardstick for assessing the legality of the application of the Return Directive – and also as an interpretative tool for the CJEU and national courts. Accordingly, compliance with fundamental rights that comprise norms laid

¹² According to the definition in Art 3(4) of the Return Directive, a ‘return decision’ ‘means an administrative or judicial decision or act, stating or declaring the stay of a third-country national to be illegal and imposing or stating an obligation to return’. ‘Return’ is defined in paragraph (3) of the same article as follows: ‘the process of a third-country national going back – whether in voluntary compliance with an obligation to return, or enforced – to: ... his or her country of origin, or ... a country of transit in accordance with Community or bilateral readmission agreements or other arrangements, or ... another third country, to which the third-country national concerned voluntarily decides to return and in which he or she will be accepted’.

¹³ Art 3(5) of the Return Directive defines ‘removal’ as ‘the enforcement of the obligation to return, namely the physical transportation of [the person] out of the Member State’.

¹⁴ See, for example, Phillips (2008) (quoting the then UN High Commissioner for Human Rights, Louise Arbour); United Nations (2009) paras 81–103 (ten UN independent experts sent a joint communication to France, which held the rotating presidency of the EU Council during the second half of 2008 when the directive was adopted); United Nations High Commissioner for Refugees (2005); and United Nations High Commissioner for Refugees (2008).

¹⁵ See, *inter alia*, Save the Children (2005); Amnesty International EU Office (2006); European Council on Refugees and Exiles (2006); and Red Cross EU Office (2006).

¹⁶ For leading in-depth academic commentaries on the Return Directive, see Moraru, Cornelisse and de Bruycker (2020); Lutz and Mananashvili (2016); Acosta Arcarazo and Guild (2012); Acosta Arcarazo (2011); Baldaccini (2009); Martucci (2009); and Carlier (2008).

¹⁷ On this issue of (non-)compatibility and (dis)harmony, for a monographic and comprehensive treatise, see Majcher (2020).

¹⁸ ‘In line with the European Convention for the Protection of Human Rights and Fundamental Freedoms, respect for family life should be a primary consideration of Member States when implementing this Directive’.

¹⁹ ‘Third-country nationals in detention should be treated in a humane and dignified manner with respect for their fundamental rights and in compliance with international ... law’.

²⁰ Art 1 of the Return Directive stipulates: ‘This Directive sets out common standards and procedures ..., in accordance with fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations’.



down in the ECHR was intended as a cardinal principle of interpretation of the Return Directive.²¹ Against this backdrop, the following section examines the extent to which the CJEU has developed its case law on returns in line with the legislature's openness to ECHR and the accompanying Strasbourg jurisprudence.

3. THE CJEU'S ENGAGEMENT WITH ECTHR CASE LAW IN THE FIELD OF RETURN – MAPPING THE PATTERNS²²

The CJEU has played an increasingly important role in the development of European return *acquis* since its initial ruling on this matter in *Kadzoev* (November 2009). Since the entry into force of the Return Directive (January 2009), the CJEU has delivered over 30 rulings interpreting the directive (as of December 2021).²³ This reflects the need for 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, the fundamental rights of the persons concerned. Remarkably enough, there is practically no case law related to the interpretation of other legal instruments of the EU return *acquis* that pre-dates the Return Directive.

Given that there is practically no jurisprudence relating to instruments of the EU return *acquis* other than the Return Directive, the ensuing analysis focuses exclusively on the interpretation of the Directive and the role ECtHR case law played therein. The CJEU's jurisdiction to rule on preliminary references under Article 267 TFEU as well as in other actions (e.g., in infringement procedures other than those relating to the failure of transposition within the specified deadline)²⁴ has a substantial impact on the definitional and interpretative guidance of EU legislation on returning irregular migrants.²⁵ This is unsurprising, given that the CJEU has a monopoly to authentically interpret the whole body of EU law,²⁶ including the return *acquis*. The judgments of the CJEU, with an *erga omnes* binding force, are all the more instrumental given that, as described above, the EU law on returns makes explicit reference to international human rights law.

Looking carefully at the fairly abundant case law in this domain, which elaborates on various provisions of the Return Directive, one notices a rather EU law-centred argumentative strategy which, at first sight, does not genuinely engage with the ECHR and relevant ECtHR judgments. More generally, taking the CJEU jurisprudence as a whole, while it regularly highlights the

²¹Lutz and Mananashvili (2016) 668. Advocate General Szpunar also echoed and agreed with this academic position in his Opinion delivered on 28 May 2020 in Case C-233/19 *B v Centre public d'action sociale de Liège (CPAS)* [2020] ECLI:EU:C:2020:397, footnote 25.

²²This section draws on and further develops sub-section 3.6.1 in Molnár (2021).

²³For a list of these rulings, see CMR Quarterly Overview of CJEU judgments and pending cases at [link1](#), complemented by my own collection.

²⁴See, for instance, the ruling rendered in an infringement procedure brought against Hungary (C-808/18 [2020] ECLI:EU:C:2020:1029) (Hungary failed to ensure that return decisions are issued individually and include information on legal remedies, as result of which apprehended migrants in an irregular situation are being returned without the appropriate safeguards and in breach of the principle of *non-refoulement*).

²⁵Taylor (2015).

²⁶See Art 19(1) and (3) TEU and Arts 263, 267 and 344 TFEU.



‘special significance’ of the ECHR,²⁷ such references as are made are sporadic and often not elaborated.²⁸

The Advocates General, in their submissions, have been more willing to refer to the ECHR and some relevant ECtHR case law. They seem to be fairly open to holistic approaches and multi-layered legal reasoning underpinned by the international legal order and a ‘joined-up approach to fundamental rights’.²⁹ Table 1 below provides an overview of the various references to the ECHR (as a whole or its various provisions) and the ECtHR jurisprudence, which have thus far been made either by the Advocates General or by the CJEU in cases pertaining to the interpretation and application of the Return Directive.

After carefully reading the rulings listed in Table 1, one may conclude that the CJEU has only sporadically referred to the ECHR, as interpreted by the ECtHR. This is perhaps surprising, given that the CJEU is obliged under the Charter to take due account of ECtHR case law when interpreting Charter rights corresponding to those laid down in the ECHR (see Article 52(3) of the Charter). For instance, as far as Article 7 of the Charter and Article 8(1) of the ECHR are concerned (the right to respect for private and family life), the CJEU has explicitly confirmed that: ‘Article 7 of the Charter must ... be given the same meaning and the same scope as Article 8(1) of the ECHR, as interpreted by the case law of the European Court of Human Rights.’³⁰ Furthermore, in the context of human rights applicable in the return procedure, Mananashvili and De Bruycker rightly observe that:

[t]he obligation of the Court and the Advocate General to consult the relevant Strasbourg case law derives in first place from Article 1 of the [Return Directive], which lays down that the Directive must be applied ‘in accordance with fundamental rights as general principles of [EU] law as well as international law, including refugee protection and human rights obligations.’³¹

References to the ECHR and to ECtHR case law vary. They range from acknowledgements of states’ sovereign powers to decide on the admission and expulsion of non-nationals (see the views of the Advocates General in the *Kadzoev*,³² *El Dridi*³³ and *Mahdi*³⁴ rulings), through the application of the ECtHR’s proportionality test in the context of the length of immigration detention (see the *El Dridi* judgment)³⁵ and the grounds of pre-removal

²⁷Case C-260/89 *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others* [1991] ECR I-2925, para 41; Case C-299/95 *Friedrich Kremzow v Republik Österreich* [1997] ECR I-2629, para 14.

²⁸Peers (2011) 82; Ziegler (2015) 20.

²⁹For this term, see the EU Fundamental Rights Agency’s toolkit entitled ‘Joining up fundamental rights’ at [link2](#).

³⁰Case C-400/10 PPU *J McB v LE* [2010] ECR I-8965, para 53.

³¹de Bruycker and Mananashvili (2015) 569.

³²Case C-357/09 PPU *Said Shamilovich Kadzoev (Huchbarov)* [2009] ECR I-11189, View of AG Mazák delivered on 10 November 2009, para 5.

³³Case 61/11 PPU *Hassen El Dridi, alias Soufi Karim* [2011] ECR I-3015, View of AG Mazák delivered on 1 April 2011, para 29.

³⁴Case C-146/14 PPU *Bashir Mohamed Ali Mahdi* [2014] ECLI:EU:C:2014:1936, View of AG Szpunar delivered on 14 May 2014, para 45 and footnote 9.

³⁵Case 61/11 PPU *Hassen El Dridi, alias Soufi Karim* [2011] ECR I-3015, paras 43–44.



Table 1. Return-related CJEU rulings referring to the ECHR and ECtHR case law (as of December 2021)

Case	Subject matter	References to ECHR		References to ECtHR case law	
		In AG opinion/views	In CJEU ruling	In AG opinion/views	In CJEU ruling
C-357/09, <i>Kadzoev</i> , Judgment of 30 November 2009 (ECLI:EU:C:2009:741)	Detention – reasons for prolongation; link to asylum-related detention	<ul style="list-style-type: none"> - Art 5 ECHR - 'law of human rights and fundamental freedoms' 	-	<ul style="list-style-type: none"> - ECtHR, <i>Amuur v France</i>, 25 June 1996 - ECtHR, <i>Chahal v United Kingdom</i>, 15 November 1996 - ECtHR, <i>Mohd v Greece</i>, 27 April 2006 - ECtHR, <i>Riad and Idiab v Belgium</i>, 24 January 2008 - ECtHR, <i>Saadi v United Kingdom</i> [GC], 29 January 2008 - ECtHR, <i>Mikolenko v Estonia</i>, 8 October 2009 	-
C-61/11 PPU, <i>El Dridi</i> , Judgment of 28 April 2011 (ECLI:EU:C:2011:268)	Criminalization of irregular migration – penalization of illegal stay by imprisonment	-	-	<ul style="list-style-type: none"> - ECtHR, <i>Moustaquim v Belgium</i>, 18 February 1991 - ECtHR, <i>Riad and Idiab v Belgium</i>, 24 January 2008 	- ECHR, <i>Saadi v United Kingdom</i> [GC], 29 January 2008
C-146/14 PPU, <i>Mahdi</i> , Judgment of 5 June 2014 (ECLI:EU:C:2014:1320)	Detention – reasons for prolongation and judicial supervision	- ECHR (as a whole and Art 5)	-	<ul style="list-style-type: none"> - '[C]ase-law of the [ECtHR] relating to the right to liberty' - ECtHR, <i>Abdulaziz, Cabales and Balkandali v United Kingdom</i>, 28 May 1985 	-

(continued)





Table 1. Continued

Case	Subject matter	References to ECHR		References to ECtHR case law	
		In AG opinion/views	In CJEU ruling	In AG opinion/views	In CJEU ruling
				<ul style="list-style-type: none"> - ECtHR, <i>Moustaquim v Belgium</i>, 18 February 1991 - ECtHR, <i>Quinn v France</i>, 22 March 1995 - ECtHR, <i>Chahal v United Kingdom</i>, 15 November 1996 - ECtHR, <i>Kaya v Romania</i>, 12 October 2006 - ECtHR, <i>Riad and Idiab v Belgium</i>, 24 January 2008 - ECtHR, <i>Herman and Serazadishvili v Greece</i>, 24 April 2014 	
C-473/13 and C-514/13, <i>Bero and Bouzalmate</i> , Judgment of 17 July 2014 (ECLI: EU:C:2014:295)	Detention conditions – obligation to provide for specialized facilities	<ul style="list-style-type: none"> - '[I]nternational commitments' - Arts 3, 5 and 8 ECHR 	-	<ul style="list-style-type: none"> - ECtHR, <i>Chahal v United Kingdom</i>, 15 November 1996 - ECtHR, <i>SD v Greece</i>, 11 June 2009 - ECtHR, <i>Popov v France</i>, 19 January 2012 - ECtHR, <i>Aden Ahmed v Malta</i>, 23 July 2013 	-
C-562/13, <i>Abdida</i> , Judgment of 18 December 2014 (ECLI:EU:C:2014:2453)	Rights of the returnees pending postponed return	- Arts 2, 3 and 13 ECHR (and also generally)	- Arts 3 and 13 ECHR	<ul style="list-style-type: none"> - ECtHR, <i>D v United Kingdom</i>, 2 May 1997 - ECtHR, <i>Larioshina v Russia</i>, 23 April 2002 - ECtHR, <i>Kutepov and Anikeyenko v Russia</i>, 25 October 2005 - ECtHR, <i>Budina v Russia</i>, 18 June 2009 	<ul style="list-style-type: none"> - '[C]ase-law of the [ECtHR]' - ECtHR, <i>Gebremedhin [Gaberamadhien] v France</i>, 26 April 2007 - ECtHR, <i>N v United Kingdom [GC]</i>, 27 May 2008

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Table 1. Continued

Case	Subject matter	References to ECHR		References to ECtHR case law	
		In AG opinion/views	In CJEU ruling	In AG opinion/views	In CJEU ruling
				<ul style="list-style-type: none"> - ECtHR, <i>Huc v Romania and Germany</i>, 1 December 2009 - ECtHR, <i>MSS v Belgium and Greece</i> [GC], 21 January 2011 - ECtHR, <i>IM v France</i>, 2 February 2012 - ECtHR, <i>De Souza Ribeiro v France</i> [GC], 13 December 2012 	<ul style="list-style-type: none"> - ECtHR, <i>Hirsi Jamaa and Others v Italy</i> [GC], 23 February 2012
C-82/16, <i>KA and Others</i> , Judgment of 8 May 2018 (ECLI:EU:C:2018:308)	Suspension of entry ban and family life	- Art 8 ECHR (and also generally)	-	<ul style="list-style-type: none"> - ECtHR, <i>Arvelo Aponte v the Netherlands</i>, 3 November 2011 - ECtHR, <i>Jeunesse v the Netherlands</i> [GC], 3 October 2014 	-
C-181/16, <i>Gnandi</i> , Judgment of 19 June 2018 (ECLI:EU:C:2018:465)	Suspensive effect of an appeal against a return decision and effective remedy	- Arts 3 and 13 ECHR	-	<ul style="list-style-type: none"> - '[C]ase-law of the [ECtHR]' - ECtHR, <i>Saadi v United Kingdom</i>, 29 January 2008 - ECtHR, <i>VM and Others v Belgium</i>, 7 July 2015 - ECtHR, <i>Allanazarova v Russia</i>, 14 February 2017 	-
C-175/17, <i>X v Belastingdienst/Toeslagen</i> , Judgment of 26 September 2018 (ECLI:EU:C:2018:776)	Suspensive effect of appeal against a return decision (risk of refoulement)	- Arts 3, 13 and 35(1) ECHR	- ECHR (as a whole and Arts 3 and 13)	<ul style="list-style-type: none"> - ECtHR, <i>Čonka v Belgium</i>, 5 February 2002 - ECtHR, <i>Gebremedhin [Gaberamadhien] v France</i>, 26 April 2007 	<ul style="list-style-type: none"> - '[C]ase law of the [ECtHR]' - ECtHR, <i>AM v The Netherlands</i>, 5 July 2016

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Table 1. Continued

Case	Subject matter	References to ECHR		References to ECtHR case law	
		In AG opinion/views	In CJEU ruling	In AG opinion/views	In CJEU ruling
				<ul style="list-style-type: none"> - ECtHR, <i>Hirsi Jamaa and Others v Italy</i> [GC], 23 February 2012 - ECtHR, <i>AM v The Netherlands</i>, 5 July 2016 - ECtHR, <i>Allanazarova v Russia</i>, 14 February 2017 	
C-180/17, <i>X and Y v Staatssecretaris van Veiligheid en Justitie</i> , Judgment of 26 September 2018 (ECLI:EU:C:2018:775)	Suspensive effect of appeal (risk of refoulement)	- Arts 3, 13 and 35(1) ECHR	- Arts 3 and 13 ECHR (and also as a whole)	<ul style="list-style-type: none"> - ECtHR, <i>Conka v Belgium</i>, 5 February 2002 - ECtHR, <i>Gebremedhin [Gaberamadhien] v France</i>, 26 April 2007 - ECtHR, <i>Hirsi Jamaa and Others v Italy</i> [GC], 23 February 2012 - ECtHR, <i>AM v The Netherlands</i>, 5 July 2016 - ECtHR, <i>Allanazarova v Russia</i>, 14 February 2017 	<ul style="list-style-type: none"> - '[C]ase law of the [ECtHR]' - ECtHR, <i>AM v The Netherlands</i>, 5 July 2016
Joined Cases C-924/19 PPU and C-925/19 PPU, <i>FMS et al.</i> , Judgment of 14 May 2020 (ECLI:EU:C:2020:367)	Detention in transit zones at land borders; judicial review of return-related decisions	- Arts 5, 8 ECHR	-	<ul style="list-style-type: none"> - ECtHR, <i>Souza Ribeiro v France</i> [GC], 12 December 2012 - ECtHR, <i>Ilias and Ahmed v Hungary</i> [GC], 21 November 2019 	- ECtHR, <i>SMM v United Kingdom</i> , 22 June 2017

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Table 1. Continued

Case	Subject matter	References to ECHR		References to ECtHR case law	
		In AG opinion/views	In CJEU ruling	In AG opinion/views	In CJEU ruling
C-18/19, <i>WM v Stadt Frankfurt am Main</i> , Judgment of 2 July 2020 (ECLI:EU:C:2020:511)	Pre-removal detention in prison, separated from ordinary prisoners, if the person poses a genuine and serious threat to society	- Arts 3, 5–6, 13, 15(2) ECHR	–	- ECtHR, <i>Al-Nashif v Bulgaria</i> , 20 June 2002 - ECtHR, <i>Ramirez Sanchez v France</i> , 4 July 2006 - ECtHR, <i>Nasroulloiev v Russia</i> , 11 October 2007 - ECtHR, <i>Rahimi v Greece</i> , 5 April 2011 - ECtHR, <i>Yengo v France</i> , 21 May 2015 - ECtHR, <i>Gjini v Serbia</i> , 15 January 2019	–
C-806/18, <i>Criminal proceedings against JZ</i> , Judgment of 17 September 2020 (ECLI: EU: C: 2020: 307)	Article 11(2) RD entry bans; national legislation providing for a custodial sentence in the event of the returnee still staying in that Member State despite notice of the entry ban	Art 5 ECHR	ECHR (as a whole)	- ECtHR, <i>Del Río Prada v Spain</i> , 21 October 2013	- ECtHR, <i>Del Río Prada v Spain</i> , 21 October 2013
C-402/19, <i>LM v Centre public d'action sociale de Seraing</i> , Judgment of 30 September 2020 (ECLI:EU:C:2020:759)	Provision of basic needs for returnee with seriously ill, dependent child; automatic suspensive effect of appeal	- Arts 3, 8 and 13 ECHR	–	- ECtHR, <i>Marckx v Belgium</i> , 13 June 1979 - ECtHR, <i>Olsson v Sweden</i> , 24 March 1988 - ECtHR, <i>Maslov v Austria</i> , 23 June 2008 - ECtHR, <i>Neulinger and Shuruk v Switzerland</i> , 6 July 2010 - ECtHR, <i>Nunez v Norway</i> , 28 June 2011	–

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Table 1. Continued

Case	Subject matter	References to ECHR		References to ECtHR case law	
		In AG opinion/views	In CJEU ruling	In AG opinion/views	In CJEU ruling
				<ul style="list-style-type: none"> - ECtHR, <i>De Souza Ribeiro v France</i> [GC], 13 December 2012 - ECtHR, <i>Jeunesse v The Netherlands</i> [GC], 3 October 2014 - ECtHR, <i>AS v Switzerland</i>, 30 June 2015 - ECtHR, <i>Levakovic v Denmark</i>, 23 October 2018 	
C-441/19, <i>TQ v Staatssecretaris van Justitie en Veiligheid</i> , Judgment of 14 January 2021 (ECLI:EU:C:2021:9)	Enforcement of return decision and unaccompanied children (Articles 5 and 10 RD)	Art 8 ECHR	–	- ECtHR, <i>Mubilanzila Mayeka and Kaniki Mitunga v Belgium</i> , 12 October 2006	–
C-673/19, <i>M and Others</i> , Judgment of 24 February 2021 (ECLI:EU:C:2021:127)	Pre-removal detention and intra-EU transfer under Article 6(2) RD	Art 5 ECHR	ECHR as a whole – standard of conformity	<ul style="list-style-type: none"> - ECtHR, <i>Del Rio Prada v Spain</i>, 21 October 2013 - ‘case-law of the Strasbourg Court with respect to Article 5 of the ECHR’ 	–

Notes: AG = Advocate General. RD = Return Directive.

detention and detention conditions, as well as the judicial review of detention orders in light of ECtHR case law (see the Advocates General's views in *Mahdi*,³⁶ *WM*,³⁷ *JZ*³⁸ and *M and Others*³⁹) to the interpretation of the principle of *non-refoulement* as set out in Article 19(2) of the Charter in respect of serious health issues in accordance with the jurisprudence of the ECtHR (see the *Abdida* ruling).⁴⁰

A number of ECHR rights have been referred to as a minimum level of protection when interpreting a given Charter right – especially by Advocates General.⁴¹ Summary references to ECtHR jurisprudence have also been made by some Advocates General to confirm the outcome of the textual interpretation of certain provisions of the Return Directive.⁴² In other cases, the CJEU has only briefly mentioned a given right protected by the ECHR, but has drawn no significant conclusions from its wording in relation to the Return Directive.

In addition, there are some issues in the context of the Return Directive in relation to which the CJEU has stated that they are not governed by EU law (i.e., the Directive) but national law applies. Such issues concern criminal sanctions against returnees, custodial sentence in the case of an entry ban, and forced transfer and detention of people falling under Article 6(2) of the Directive (i.e., foreigners who have a right to stay in another Member State) who cannot be issued a return decision. Still, the CJEU stressed that in even these non-EU harmonised areas the standards stemming from the ECHR and the ECtHR case law – and those of the 1951 Geneva Refugee Convention⁴³ where appropriate – continue to apply as standards of conformity for national laws governing these areas⁴⁴ (on this scenario, see Fig. 1 below).

As Table 1 above illustrates, the Advocates General have been thus far more inclined to refer to the ECHR and related ECtHR jurisprudence than the judges of the CJEU. Most recent

³⁶Case C-146/14 PPU *Bashir Mohamed Ali Mahdi* [2014] ECLI:EU:C:2014:1936, View of AG Szpunar delivered on 14 May 2014, para 2 and footnotes 14, 17–18, 20 and 33.

³⁷Case C-18/19 *WM v Stadt Frankfurt am Main* [2020] ECLI:EU:C:2020:130, Opinion of AG Pikamäe delivered on 27 February 2020, paras 125–126, 130 and footnotes 65–66, 82, 85, 93.

³⁸Case C-806/18 *Criminal proceedings against JZ* [2020] ECLI:EU:C:2020:307, Opinion of AG Szpunar delivered on 23 April 2020, paras 46, 49 and footnote 27.

³⁹Case C-673/19 *M and Others v Staatssecretaris van Justitie en Veiligheid and T* [2020] ECLI:EU:C:2020:840, Opinion of AG Szpunar delivered on 20 October 2020, paras 57, 61 and footnote 21.

⁴⁰Case C-562/13 (*Abdida*) paras 47, 51–52.

⁴¹Case C-441/19 *TQ v Staatssecretaris van Justitie en Veiligheid* [2020] ECLI:EU:C:2020:515, Opinion of AG Pikamäe delivered on 2 July 2020, para 65; Case C-806/18 *Criminal proceedings against JZ* [2020] ECLI:EU:C:2020:307, Opinion of AG Szpunar delivered on 23 April 2020, para 46.

⁴²See Case C-146/14 PPU *Bashir Mohamed Ali Mahdi* [2014] ECLI:EU:C:2014:1936, View of AG Szpunar delivered on 14 May 2014, paras 2 and 90.

⁴³Convention on the Status of Refugees, Geneva, 28 July 1951 (189 UNTS 137, entered into force 22 April 1954).

⁴⁴See 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* 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.



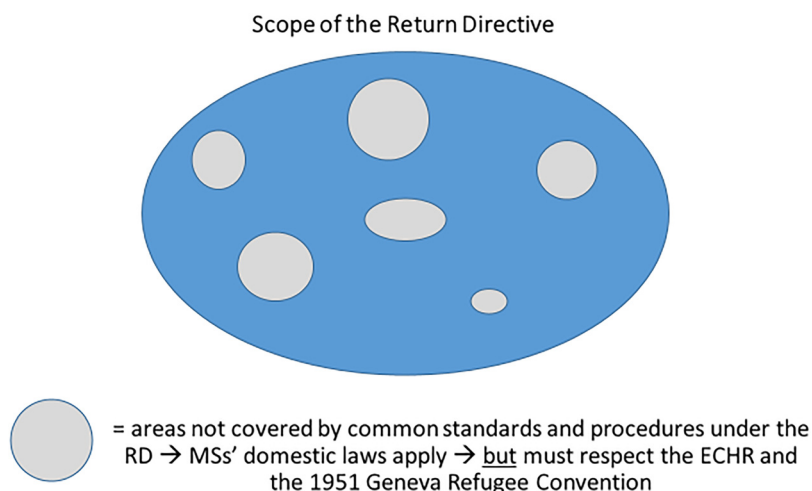


Fig. 1. areas not covered by the Return Directive where Member States must respect the ECHR

Notes: RD = Return Directive; MS = Member States.

opinions of some Advocates General confirm this trend⁴⁵ – one of which even stresses that ‘certain legislative parallels between, on the one hand, international law and, on the other, EU law, may be understood to reveal a common legal conviction.’⁴⁶

In examining the channels through which the ECHR and its interpretation by the ECtHR – including norms of a procedural nature – can flow into CJEU jurisprudence on the Return Directive, the category of ‘general principles of EU law’ must also be mentioned. It is a well-established judge-made doctrine that fundamental rights form an integral part of the general principles of EU law.⁴⁷ Some general principles of EU law have particular relevance to coercive measures regulated under the Return Directive, such as the principle of proportionality, which

⁴⁵See Opinion of AG Szpunar delivered on 23 April 2020 in Case 806/18 *Criminal proceedings against JZ* [2020] ECLI:EU:C:2020:307, paras 46–47 and footnote 27 (concerning Art 5 ECHR and ECtHR case law on the arbitrariness of deprivation of liberty); Opinion of AG Pikamäe delivered on 2 July 2020 in Case C-441/19 *TQ v Staatssecretaris van Justitie en Veiligheid* [2020] ECLI:EU:C:2020:135, paras 61 and 65 (concerning Art 8 ECHR and related ECtHR case law); and Opinion of AG Richard De La Tour delivered on 25 November 2021 in Case C-519/20 *Proceedings brought by K* [2021] ECLI:EU:C:2021:958 (concerning the appropriateness of detention conditions in light of Arts 3, 5 and 8 ECHR and related ECtHR case law, together with Council of Europe soft law instruments on the matter).

⁴⁶Case C-441/19 *TQ v Staatssecretaris van Justitie en Veiligheid* [2020] ECLI:EU:C:2020:515, Opinion of AG Pikamäe delivered on 2 July 2020, footnote 20 (reiterating his Opinion in C-74/19 *Transportes Aéreos Portugueses* [2020] ECLI:EU:C:2020:135, para 35).

⁴⁷The leading cases in this respect are Case 29–69 *Erich Stauder v City of Ulm – Sozialamt* [1969] ECR 419, para 7; Case 11–70 *International Handelsgesellschaft v Einfuhr-und Vorratsstelle Getreide* [1970] ECR 1125; and Case 4/73 *J Nold, Kohlenund Baustoffgroßhandlung v Commission of the European Communities* [1974] ECR 491, para 13. With respect to the ECHR as a source of general principles of EU law, see also Art 6(3) TEU.



entails that a measure should be proportionate to the legitimate goal pursued.⁴⁸ As Majcher observes, the CJEU has relied on the principle of proportionality in a few cases relating to the Return Directive.⁴⁹ In the *Z.Zh. and I.O.* ruling, the CJEU held that the principle of proportionality applies to all decisions taken under the Directive and requires an individualized assessment of the adequacy of a return measure.⁵⁰ Hence, in accordance with the general principles of EU law, including the principle of proportionality, decisions taken under the Directive must be adopted on a case-by-case basis and properly take into account the fundamental rights of the person concerned.⁵¹ Subsequently, the CJEU added in its *Mukarubega* judgment that prior to the adoption of a return decision, the person concerned has the right to be heard, which stems from the right to a defence as a general principle of EU law.⁵²

Summing up the preceding analysis, in contrast to the *Völkerrechtsfreundlichkeit* advanced by the EU legislature, as outlined in the previous section, the CJEU has thus far been rather reluctant to refer to ECHR and ECtHR case law when interpreting the Return Directive. Despite the CJEU's expanding case law relating to the Directive (in addition to the 30-plus rulings delivered since *Kadzoev* in November 2009, several cases were pending at the time of writing), the EU judiciary has hitherto seemed unwilling to look beyond the EU law framework when shaping its case law on returns. This is despite some suggestions from the Advocates General, who have adopted a more inclusive, 'joined-up' approach towards external sources of human rights applicable in the return context, especially the ECHR as interpreted by the Strasbourg Court.

Certainly, not each and every case offers a springboard for the CJEU to engage with ECtHR jurisprudence. This will depend on the subject matter of the individual case and the type of procedure/legal action, and is limited by the (narrow) questions that the referring national court may ask. Nevertheless, cases involving the interpretation of the prohibition of *refoulement*, various procedural safeguards – such as the right to be heard and the right to an effective judicial review of the return decision and the detention order (also set out under the ECHR protection regime) – and the grounds of detention and detention conditions (significantly developed by the ECtHR) could have provided more room to use the Strasbourg case law at least as an interpretative tool. The pending cases may provide the CJEU with further occasions to increase its engagement with relevant elements of international human rights law, especially as protected under the ECHR and developed in ECtHR case law.

⁴⁸See, for example, Case C-60/00 *Mary Carpenter v Secretary of State for the Home Department* [2002] ECR 434, paras 42–45; Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091, paras 90–94; Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* [2004] ECR I-9925, para 32; and Case C-343/09 *Afton Chemical Limited v Secretary of State for Transport* [2010] ECLI:EU:C:2010:419, para 45. For more on the principle of proportionality as a general principle of EU law, consider, for example, *Hofmann* (2017) 198–226.

⁴⁹*Majcher* (2020) 43.

⁵⁰Case C-554/13 *Z Zh v Staatssecretaris Voor Veiligheid En Justitie and IO v Staatssecretaris Voor Veiligheid En Justitie* [2015] ECLI:EU:C:2015:377, paras 49 and 69.

⁵¹Case C-554/13 *Z Zh v Staatssecretaris Voor Veiligheid En Justitie and IO v Staatssecretaris Voor Veiligheid En Justitie* [2015] ECLI:EU:C:2015:377, para 69.

⁵²Case C-166/13 *Sophie Mukarubega v Préfet de Police and Préfet de La Seine-Saint-Denis* [2014] ECLI:EU:C:2014:2336, paras 44–45.



Of the pending cases, case C-39/21⁵³ concerns the applicability of the prohibition of *refoulement* for medical reasons, seen in light of Article 19(2) of the Charter (*non-refoulement*) and read in conjunction with Articles 1 (human dignity) and Article 4 (prohibition of torture and other forms of ill-treatment) of the Charter; whereas case C-519/20⁵⁴ seeks the interpretation of the term ‘specialised detention facility’ for detainees awaiting removal (whether a specifically designated and separate section of a prison satisfies this requirement). These and future cases may provide the CJEU with further occasions to increase its engagement with the ECHR and relevant ECtHR case law. We will surely see whether the CJEU grasps these opportunities where the texture of EU law is ‘thinner’ compared to the jurisprudence of the ECtHR in these human-rights sensitive matters, hence seeking inspiration from Strasbourg would come more naturally.

4. REASONS BEHIND THE CJEU’S DISTANCING FROM ECtHR CASE LAW⁵⁵

There exists a vast literature on the inter-relationship between the two European judicial systems, notably on the dynamics of the dialogue between the Luxembourg and the Strasbourg courts and how the CJEU embraces the ECHR as an external source of law, alongside the ECtHR’s case law interpreting and elucidating the rights protected under the Convention.⁵⁶ The EU Court’s inclination to engage with the Council of Europe’s human rights protection framework – and the extent to which it actually occurs – varies from one policy area to another, without following a consistent and articulate pattern.⁵⁷ Zooming in on the theme under review in this piece, mapping and analysing the CJEU’s judicial practice allow us to explore the possible reasons and motivations behind the CJEU’s more guarded approach to ECtHR case law in the EU return *acquis*. The conceivable explanations are manifold. In scholarly works, these range from the desire to preserve the autonomy of EU law to the more extensive, if not exclusive, reliance on the EU Charter instead of the ECHR.⁵⁸

With regard to the former consideration, the CJEU’s position in the *JN* ruling (C-601/15 PPU) is illustrative. Here, the Explanations to the EU Charter were used to define the boundaries of ensuring the necessary consistency between the meaning and scope of Charter rights and the ECtHR jurisprudence (which obligation stems from Article 52(3) of the Charter).⁵⁹ According to

⁵³Request for a preliminary ruling from the Rechtbank Den Haag, zittingsplaats’s-Hertogenbosch (Netherlands) lodged on 4 February 2021 – *X v Staatssecretaris van Justitie en Veiligheid*.

⁵⁴Request for a preliminary ruling from the Amtsgericht Hannover (Germany) lodged on 15 October 2020 – *K*. See also Opinion of AG Richard De La Tour delivered on 25 November 2021 in Case C-519/20 *Proceedings brought by K* [2021] ECLI:EU:C:2021:958.

⁵⁵This section draws on and further develops sub-section 3.6.2 in Molnár (2021).

⁵⁶See for example Fan (2016) (who identifies various ways of engagement by the CJEU with the ECtHR case law such as substantive following, decorative citations, references by analogy and citation for legitimate guidance); Popelier et al. (2011) Chapters 1–4; Peers (2003).

⁵⁷See for example Mohay (2020); Douglas-Scott (2006).

⁵⁸See Peers (2011) 83–84; Ziegler (2015) 20–29, 54; Tomuschat (2016) 609, 619; Krommendijk (2015) 831–32; Ahmed (2017); and Kosta and de Witte (2019) 275–77.

⁵⁹Art 52(3) of the Charter: ‘In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection’.



the judges in Luxembourg, this need for such consistency must be met ‘without ... adversely affecting the autonomy of Union law and ... that of the Court of Justice of the European Union’.⁶⁰ The same dictum was reiterated in the *JZ* judgment (C-294/16)⁶¹ and was subsequently highlighted specifically in the return context.⁶² This jurisprudence shows that the CJEU has tried to minimize the effects of Article 52(3) of the Charter,⁶³ which requires consistency in the interpretation of Charter rights with ECtHR case law in relation to corresponding rights enshrined in the ECHR.

As far as the gradual downplaying of the ECHR and ECtHR case law is concerned, empirical research demonstrates that since the entry into force of the Lisbon Treaty in December 2009, the CJEU has examined and cited ECtHR case law less frequently and extensively.⁶⁴ Commentators have noted that since the Lisbon Treaty vested the Charter with the legal status of primary EU law, the CJEU started using it as the ‘EU’s own bill of rights’, at the expense of references to the ECHR and ECtHR case law.⁶⁵ Glas and Krommendijk describe this phenomenon as the ‘increasing Charter centrism of the CJEU’.⁶⁶ Former CJEU President Skouris points out that since the Charter became legally binding, it has become the starting point in human rights reasoning in Luxembourg;⁶⁷ even if a national court asks about the ECHR in a reference for a preliminary ruling, the CJEU will reformulate the question to base it on the Charter.⁶⁸

Several reasons have been proposed to explain this trend – primarily based on the observations of interviewed CJEU judges, former judges, and référendaires – with regard to the CJEU’s readiness to cite ECtHR case law. These include a growing awareness of the differences between the European apex courts, as well a strategic desire to develop an autonomous interpretation of the Charter⁶⁹ (and to use it as the basis for validating EU legal acts relating to human rights).⁷⁰ In addition, a few years ago, the then CJEU President Skouris held that ‘the Court of Justice is not a human rights court: it is the Supreme Court of the European Union’.⁷¹ As a result of this approach, cases are often decided on the basis of the primarily applicable secondary EU law (here, the Return Directive) and the CJEU’s own pre-existing case law, without relying on otherwise relevant standards of international human rights law and international (primarily ECtHR) case law. This is especially the case when the given piece of the EU *acquis* strikes a balance between conflicting fundamental rights claims, or fundamental rights

⁶⁰Case C-601/15 PPU *JN v Staatssecretaris voor Veiligheid en Justitie* [2016] ECLI:EU:C:2016:84, para 47.

⁶¹Case C-294/16 *JZ v Prokuratura Rejonowa Łódź — Śródmieście* [2016] ECLI:EU:C:2016:610, para 50.

⁶²Case C-175/17 *X v Belastingdienst/Toeslagen* [2018] ECLI:EU:C:2018:776, para 35.

⁶³*Ispolinov* (2018) 5, 8.

⁶⁴*de Búrca* (2013); *Krommendijk* (2015); and *Lehtinen* (2016).

⁶⁵*de Witte* (2019) 74.

⁶⁶*Glas and Krommendijk* (2015) 567, 573.

⁶⁷Joint Communication of Presidents Costa and Skouris, [link3](#).

⁶⁸*Kosta and de Witte* (2019) 275–76 (with case law references in footnote).

⁶⁹*Krommendijk* (2015) 830–33.

⁷⁰*Ahmed* (2017) 14 – criticizing this approach from the perspective of international human rights law: displacing the ECHR and the ECtHR case law thereunder sits uneasily with the obligation to interpret the Charter rights in line with the ECHR in relation to those rights that the Charter replicates.

⁷¹*Besselink* (2014).



and state interests, which also essentially holds true for the Return Directive. Furthermore, the CJEU's distancing from human rights treaties other than the ECHR in developing the 'general principles of EU law' is further reflected in its dismissal of the validity of the interpretations of human rights provisions by UN monitoring treaty bodies in one case.⁷² In *Grant*, the CJEU rejected the weight of UN Human Rights Committee findings, stating that this treaty body 'is not a judicial institution' and that its findings 'have no binding force in law'.⁷³

Another development should also be considered here. As the CJEU case law on the Return Directive has developed over the years, the CJEU has referred to its own rulings on the Directive in subsequent cases, rather than to the ECHR and the pertinent ECtHR jurisprudence. This might be a technique to find a clever workaround, allowing the CJEU to remain self-referential and avoid direct engagement with ECtHR case law.

However, one might also argue that the CJEU has introduced the substance of ECtHR case law into its return-related case law via the EU Charter or by presenting certain human rights protected by the ECHR as 'general principles of EU law', without labelling them expressly as flowing from the European Convention on Human Rights.⁷⁴ In other words, the CJEU was cognizant of the substance of ECHR standards and engaged with the relevant ECtHR case law—but in doing so, it labelled them as EU law, rather than as ECHR rights or ECtHR jurisprudence. The reason for this 'labelling' may be institutional or internal; and may also be due to a wish to avoid being seen to interpret international legal norms for which other international courts or treaty bodies are competent. All of this is paired with the CJEU's desire, following the French and continental tradition of constructing judgments, to keep rulings as concise and minimalistic as possible,⁷⁵ without any dissenting or concurring opinions – unlike in the jurisprudence of other international/regional courts such as the International Court of Justice, the Inter-American Court of Human Rights and the ECtHR.

5. CONCLUSIONS AND OUTLOOK

Given that the Return Directive has been repeatedly and harshly criticized in academia and civil society as falling short of certain international human rights standards (indeed, some have dubbed it 'the Directive of Shame'),⁷⁶ the CJEU, using relevant 'hooks' in the Directive, could have capitalized on its position to address these alleged shortcomings. In particular, the CJEU could have developed an interpretation of the Return Directive which fully takes into account and builds on the higher standards and more robust safeguards offered by the ECtHR jurisprudence. This reticence towards external norms is even more striking when compared to the CJEU case law on asylum matters, which is much more open to international (refugee) law

⁷²Regional Office for Europe of the United Nations High Commissioner of Human Rights (2011) 11.

⁷³Case C-249/96 *Grant v South West Trains Ltd* [1998] ECR I-621, para 46.

⁷⁴See similarly *Lenaerts* (2003) 873 (where the author argues that the CJEU often bases its rulings on ECtHR case law, but this is rarely translated directly into its reasoning).

⁷⁵*Krommendijk* (2015) 827–29.

⁷⁶On the very harsh critiques of the Return Directive from Latin American countries, see, for example, *Acosta Arcarazo* (2009); *Baldaccini* (2009). Consider also *Lutz* (2010) 73–80; and *Majcher* (2020).



(e.g., see the rulings in *Bolbol*,⁷⁷ *El Kott*,⁷⁸ *Bundesrepublik Deutschland v Y and Z*⁷⁹ and *Minister voor Immigratie en Asiel v X, Y and Z*).^{80,81} The CJEU's failure to adequately integrate ECtHR case law in its reasoning in return-related cases is likewise surprising when considered in relation to its rulings on the EU Family Reunification Directive (2003/86/EC),⁸² which – like the Return Directive – also includes references to the ECHR (in its Recital (2)). The CJEU clearly stated in its *Chakroun* ruling that relevant provisions of the Family Reunification Directive 'must be interpreted in the light of the fundamental rights and, more particularly, in the light of the right to respect for family life enshrined in ... the ECHR'.⁸³

This distancing from ECtHR-developed human rights standards is despite the fact that Article 52(3) of the Charter provides that the rights contained in the Charter that correspond to rights guaranteed by the ECHR are to have the same meaning and scope as those laid down by the ECHR and interpreted by the ECtHR. Nonetheless, while acknowledging that fundamental rights recognized by the ECHR constitute 'general principles of EU law' (Article 6(3) TEU), and the cardinal role of the ECHR and the ECtHR case law as interpretive tools when adjudicating Charter rights, the CJEU has consistently underlined that until such time as the EU has acceded to the ECHR, the Convention does not constitute a legal instrument which has been formally incorporated into EU law. As such, therefore, the ECHR is not legally binding, as a matter of international treaty law, on the EU as a distinct legal entity.⁸⁴

Here, at the intersection of EU and international laws in the specific domain of the 'return of migrants in an irregular situation', one can clearly witness the CJEU's firm preference for one of these competing legal orders. As shown in the above discussion, the CJEU has generally disregarded ECHR and ECtHR case law when interpreting and further developing the EU's return *acquis*. Nonetheless, one might still argue that although this practice is contrary to the intention of the co-legislators (i.e., as expressed in the text of the Directive) from a purely formalistic perspective, substance-wise, quite a number of ECHR protected human rights and principles as interpreted by the Strasbourg Court have been presented in the CJEU rulings as EU law standards. Hence, it is also arguable that ECtHR case law does play a role behind the scenes in the CJEU's deliberations, but does not surface in the judgments themselves. This serious consideration of the jurisprudential developments at the pan-European human rights court can also be

⁷⁷Case C-31/09 *Nawras Bolbol v Bevándorlási és Állampolgársági Hivatal* [2010] ECR I-5539.

⁷⁸Case C-364/11 *Abed el Karem El Kott and Others v Bevándorlási és Állampolgársági Hivatal* [2012] ECLI:EU:C:2012:826.

⁷⁹Joined Cases C-71/11 and C-99/11 *Bundesrepublik Deutschland v Y and Z* [2012] ECLI:EU:C:2012:518.

⁸⁰Joined Cases C-199/12, C-200/12 and C-201/12 *Minister voor Immigratie en Asiel v X, Y and Z v Minister voor Immigratie en Asiel* [2012] ECLI:EU:C:2013:720.

⁸¹For more on the CJEU's engagement with the 1951 Geneva Refugee Convention, see [Bank \(2015\)](#).

⁸²Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L 251/12.

⁸³Case C-578/08 *Rhimou Chakroun v Minister van Buitenlandse Zaken* [2010] ECR I-1839, para 44. In the legal literature, see also [de Bruycker and Mananashvili \(2015\)](#) 578.

⁸⁴Case C-571/10 *Servet Kamberaj v Istituto per l'Edilizia Sociale della Provincia autonoma di Bolzano (IPES) and Others* [2012] ECLI:EU:C:2012:233, para 62; Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013] ECLI:EU:C:2013:105, para 44; Case C-398/13 P *Inuit Tapiriit Kanatami and Others v Commission* [2015] ECLI:EU:C:2015:535, para 45. For an argument that the ECHR is binding on the institutions of the Union as a matter of EU law, see [Kosta and de Witte \(2019\)](#) 267–68.



seen, in my view, in the CJEU's repeated pedagogic reference to the ECHR in non-EU harmonised areas related to the return of irregular migrants, reminding Member States to the Convention's applicability in these areas of national competence as fall-back international human rights standards of conformity for their domestic legislative action – which, *stricto sensu*, is none of CJEU business. The ever-evolving jurisprudence of the CJEU will provide further responses and clarifications to the main question. At the same time, further empirical and legal sociological research is required to deepen our understanding of the apparently 'exclusionary' approach of the EU judiciary towards the ECHR as interpreted by the ECtHR in the EU return *acquis*.

At present, it is beyond doubt that the CJEU expresses a strong autonomy-driven position in this specific field of EU migration law and policy. Looking to the future, if the proposed fairly restrictive changes to the Return Directive⁸⁵ which are currently under negotiation are adopted, the CJEU might need to look for legal yardsticks beyond those found in the EU legal toolkit to uphold with authority certain standards and safeguards that protect returnees' rights. In this eventual quest for additional external legal benchmarks that can trump secondary EU law, with the aim of ensuring that the Return Directive's standards do not drop below a red line, the ECHR and ECtHR case law on the expulsion of non-nationals, alongside other international instruments and jurisprudence upholding returnees' rights, may ultimately be utilized by the CJEU to prevent the watering down of existing return-related protection regimes. Such a scenario would present a good opportunity for fresh scrutiny of the CJEU return-related jurisprudence from the viewpoint of the impact of the ECtHR case law thereupon.

DISCLOSURE

The views expressed in this paper are solely those of the author and do not necessarily represent the views or the position of the European Union Agency for Fundamental Rights.

LITERATURE

Acosta Arcarazo, D. 'Latin American Reactions to the Adoption of the Returns Directive', *CEPS Liberty and Security in Europe Publication Series* (November 2009) <www.ceps.eu/system/files/book/2009/11/latin-american-reactions-adoption-returns-directive.pdf> accessed 15 December 2021.

Acosta Arcarazo, D., 'The Returns Directive: Possible Limits and Interpretation' in Zwaan, K. (ed), *The Returns Directive: Central Themes, Problem Issues, and Implementation in Selected Member States* (Wolf Publishers 2011) 7–24.

⁸⁵European 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 COM(2018)634 final (12 September 2018). In June 2019, the EU Justice and Home Affairs Council reached a partial general approach on the proposal (except for the border procedure) – see [link4](#). For thorough and detailed, fundamental-rights centred analyses of the legislative proposal, see [European Union Agency for Fundamental Rights \(2019\)](#); [European Parliamentary Research Service \(2019\)](#). For a more succinct presentation of the main issues of concern, see [Majcher \(2019\)](#).



- Acosta Arcarazo, D. and Guild, E., 'The Returns Directive' in Peers, S., et al. (eds), *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition*, Vol 2 (*EU Immigration Law* (Martinus Nijhoff Publishers 2012) 483–523.
- Ahmed, T., 'The opposition of the CJEU to the ECHR as a mechanism of international human rights' (2017) 4 *Journal of International and Comparative Law* 331–348.
- Amnesty International EU Office, 'Returning "irregular" migrants: The Human Rights Perspective: Amnesty International's Comments on the Draft Directive on Common Standards and Procedures in Member States for Returning Illegally Staying Third Country Nationals COM' (2005) 391 Final, May 2006 <<https://briguglio.asgi.it/immigrazione-e-asilo/2006/giugno/oss-amnesty-dir-rimpatri.pdf>> 15 December 2021.
- Arlettaz, F., 'Expulsions collectives: définition et portée de leur interdiction dans la jurisprudence de la Cour européenne des droits de l'homme' (2019) 56 *Canadian Yearbook of International Law/Annuaire canadien de droit international* 58–97.
- Baldaccini, A., 'The EU Directive on Return: Principles and Protests' (2009) 28 *Refugee Survey Quarterly* 114–138.
- Bank, R., 'The Potential and Limitations of the Court of Justice of the European Union in Shaping International Refugee Law' (2015) 27 *International Journal of Refugee Law* 213–244.
- Besselink, L., 'The CJEU as the European "Supreme Court": Setting Aside Citizens' Rights for EU Law Supremacy', *Verfassungsblog* (18 August 2014) <www.verfassungsblog.de/CJEU-european-supreme-court-setting-aside-citizens-rights-eu-law-supremacy> accessed 15 December 2021.
- Blöndal, E. K. and Arnardóttir, O. M., 'Non-Refoulement in Strasbourg: Making Sense of the Assessment of Individual Circumstances' (2021) 5 *Oslo Law Review* 147–174.
- Carrier, J.-Y., 'La « directive retour » et le respect des droits fondamentaux', *L'Europe des Libertés – Revue d'actualité juridique*, No 26, 2008, 13–21.
- Council of Europe and European Court of Human Rights, *Guide on the case-law of the European Convention on Human Rights – Immigration* (updated on 31 December 2020), (2021) <https://www.echr.coe.int/Documents/Guide_Immigration_ENG.pdf> accessed 15 December 2021.
- de Bruycker, Ph. and Mananashvili, M., 'Audi alteram partem in immigration detention procedures, between the ECJ, the ECtHR and Member States: G & R' (2015) 52 *Common Market Law Review* 569–590.
- de Búrca, G., 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) 13 *Maastricht Journal of European and Comparative Law* 168–184.
- de Witte, B., 'The Relative Autonomy of the European Union's Fundamental Rights Regime' (2019) 88 *Nordic Journal of International Law* 65–85.
- Douglas-Scott, S., 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis' (2006) 43 *Common Market Law Review* 645–682.
- Elberling, B., 'Protection against expulsion under the European Convention on Human Rights – beyond Soering and family life' in Delbrück, J., et al. (eds), *Aus Kiel in die Welt: Kiel's Contribution to International Law Festschrift zum 100-jährigen Bestehen des Walther-Schücking-Instituts für Internationales Recht. Essays in Honour of the 100th Anniversary of the Walther Schücking Institute for International Law* (Duncker & Humblot 2014) 319–344.
- European Council on Refugees and Exiles, 'Comments from the European Council on Refugees and Exiles on the 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' (COM(2005)391 Final), CO2/5/2006/ExtPC, May 2006.



- European Parliamentary Research Service, *The Proposed Return Directive (recast) – Substitute Impact Assessment* (February 2019).
- European Union Agency for Fundamental Rights, *The recast Return Directive and its fundamental rights implications – Opinion of the European Union Agency for Fundamental Rights*, FRA Opinion – 1/2019 [Return] (10 January 2019) <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-opinion-recast-return-directive-01-2019_en.pdf> accessed 15 December 2021.
- European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European law relating to asylum, borders and immigration. Edition 2020* (3rd edn, Publications Office of the European Union 2020).
- Fan, B. J., 'Convergence, Compatibility or Decoration: The Luxembourg Court's References to Strasbourg Case Law in its Final Judgments' (2016) 3 Pécs Journal of International and European Law 38–67.
- Glas, L. R. and Krommendijk, J., 'From Opinion 2/13 to Avotipš: Recent Developments in the Relationship between the Luxembourg and Strasbourg Courts' (2015) 17 Human Rights Law Review 567–587.
- Hofmann, H. C. H., 'General Principles of EU Law and EU Administrative Law' in Barnard, C. and Peers, S. (eds), *European Union Law* (2nd edn, Oxford University Press 2017) 198–226.
- Ispolinov, A., 'Consequences of the delay: the perspective of a non-EU member state' (2018) 3 Kazan University Law Review 5–15.
- Korenica, F., *The EU Accession to the ECHR. Between the Luxembourg Search for Autonomy and Strasbourg Credibility on Human Rights Protection* (Springer 2015).
- Kosta, V. and de Witte, B., 'Human Rights Norms in the Court of Justice of the European Union' in Scheinin, M. (ed), *Human Rights Norms in 'Other' International Courts* (Cambridge University Press 2019) 263–286.
- Krommendijk, J., 'The Use of the ECtHR Case Law by the Court of Justice after Lisbon. The View of Luxembourg Insiders' (2015) 22 Maastricht Journal of European and Comparative Law 812–835.
- Lehtinen, E., 'The European Court of Justice and European Court of Human Rights: A Complex Interaction and Coexistence between the Two Courts' Workshop in the ECHR – Tampere 2015 (7 March 2016) <<https://blog.uta.fi/ECHRworkshop/2016/03/07/lehtinen>> accessed 15 December 2021.
- Lenaerts, K., 'Interlocking Legal Orders in the EU and Comparative Law' (2003) 52 International and Comparative Law Quarterly 873–906.
- Lock, T., 'The EU before the European Court of Human Rights after accession' in Douglas-Scott, S. and Hatzis, N. (eds), *Research Handbook on EU Law and Human Rights* (Edward Elgar Publishing 2017) 226–242.
- Lock, T., 'EU Accession to the ECHR' in Peers, S., et al. (eds), *The EU Charter of Fundamental Rights. A Commentary* (2nd edn, Hart Publishing 2021) Part III.
- Lutz, F., *The Negotiations on the Return Directive. Comments and Materials* (Wolf Legal Publishers 2010).
- Lutz, F. and Mananashvili, S., 'Return Directive 2008/115/EC' in Hailbronner, K. and Thym, D. (eds), *EU Immigration and Asylum Law. A Commentary* (2nd edn, CH Beck/Hart/Nomos 2016) 658–763.
- Majcher, I., 'The Recast of the EU Returns Directive: Human Rights Lost Again?', *RLI Blog on Refugee Law and Forced Migration* (29 May 2019) <<https://rli.blogs.sas.ac.uk/2019/05/29/the-recast-of-the-eu-returns-directive-human-rights-lost-again/>> accessed 15 December 2021.
- Majcher, I., *The European Union Returns Directive and its Compatibility with International Human Rights Law. Analysis of Return Decision, Entry Ban, Detention, and Removal* (Brill/Martinus Nijhoff 2020).
- Martucci, M., 'La directive « retour »: la politique européenne d'immigration face à ses paradoxes' (2009) 45 Revue trimestrielle de droit européen 47–67.



- Mohay, Á., 'The Dorobantu Case and the Applicability of the ECHR in the EU Legal Order' (2020) 7 Pécs Journal of International and European Law 85–90.
- Molnár, T., *The Interplay between the EU's Return Acquis and International Law* (Edward Elgar Publishing 2021).
- Moraru, M., Cornelisse, G. and de Bruycker, Ph. (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union* (Hart Publishing 2020).
- Peers, S., 'The European Court of Justice and the European Court of Human Rights: Comparative Approach in Örüü, E. (ed), *Judicial Comparativism in Human Rights Cases* (United Kingdom National Committee of Comparative Law 2003) 113–127.
- Peers, S., 'International law, human rights law, and EU asylum and migration policy' in Maes, M., Foblets, M-C., De Bruycker, Ph., Vanheule, D. and Wouters, J. (eds), *External Dimensions of EU Migration and Asylum Law and Policy/Dimensions Externes du Droit et de la Politique d'Immigration et d'Asile de l'UE* (Bruylant 2011).
- Phillips, L., 'Global Outcry against EU Immigration Directive', *EU Observer* (19 June 2008) <<https://euobserver.com/rule-of-law/26354>> accessed 15 December 2021.
- Popelier, P., et al. (eds), *Human Rights Protection in the EU Legal Order: The Interaction between European and National Courts* (Intersentia 2011).
- Red Cross EU Office, 'Position Paper: 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', July 2006.
- Regional Office for Europe of the United Nations High Commissioner of Human Rights, *The EU and International Human Rights Law* (Brussels 2011).
- Save the Children, 'Comments on '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'', September 2005.
- Scuto F., 'Aliens' protection against expulsion and prohibition of collective expulsion by the jurisprudence of the European Court of Human Rights' (2018) *Federalismi.it – Rivista di diritto pubblico italiano, comunitario e comparato* 1-17.
- Taylor, A., 'The CJEU and its interaction with international law in the Qualification Directive: a calculated selectivity?', *EDAL Journal* (12 February 2015) <www.asylumlawdatabase.eu/en/journal/cjeu-and-its-interaction-international-law-qualification-directive-calculated-selectivity> accessed 15 December 2021.
- Tomuschat, Ch., 'The Relationship between EU Law and International Law in the Field of Human Rights' (2016) 35 *Yearbook of European Law* 604–620.
- United Nations, 'Report Submitted by the Special Rapporteur on the Human Rights of Migrants, Jorge G. Bustamante: Addendum: Communications Sent to Governments and Replies Received' UN Doc A/HRC/11/7/Add.1 (20 May 2009).
- United Nations High Commissioner for Refugees, 'UNHCR Observations on the European Commission's Proposal for a Directive on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals' COM(2005)391 final, Geneva, December 2005.
- United Nations High Commissioner for Refugees, 'UNHCR Position on the Proposal for a Directive on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals', Geneva, 16 June 2008.
- van Dijk, P., et al. (eds), *Theory and Practice of the European Convention on Human Rights* (5th edn, Intersentia 2018).



Wojnowska-Radzińska, J., *The Right of an Alien to be Protected against Arbitrary Expulsion in International Law* (Brill 2015).

Ziegler, K. S., 'Autonomy: From Myth to Reality – or Hubris on a Tightrope? EU Law, Human Rights and International Law' (2015) 25 University of Leicester School of Law Research Paper <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2665725> accessed 15 December 2021.

LINKS

Link1: CMR Quarterly Overview of CJEU judgments and pending cases (December 2021), <www.ru.nl/law/cmr/documentation/cmr-newsletters/cjeu-overview/> accessed 15 December 2021.

Link2: EU Fundamental Rights Agency's toolkit entitled 'Joining up fundamental rights' <<https://fra.europa.eu/en/joinedup/home>> accessed 15 December 2021.

Link3: Joint Communication of Presidents Costa and Skouris (24 January 2011), <www.echr.coe.int/Documents/UE_Communication_Costa_Skouris_ENG.pdf> accessed 15 December 2021.

Link4: Migration policy: Council agrees partial negotiating position on return directive <www.consilium.europa.eu/en/press/press-releases/2019/06/07/migration-policy-council-agrees-partial-negotiating-position-on-return-directive> accessed 15 December 2021.

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