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Foreword

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Foreword

Today, following the revival of the debate on the autonomy of EU law – fuelled in particular by the *Kadi* cases, as well as by Opinion 2/13 and, more recently, Opinion 1/17 – the question of the relationship between EU and international law is high on the agenda. To make certain key principles of EU law (including primacy and direct effect) work, the EU legal order needs to stress its autonomy *vis-à-vis* international law – in particular when deciding on the validity and interpretation of its own rules. At the same time, as an international actor, the EU needs to live up to the rules that make up the international legal order and to implement these rules whenever they bind it. Moreover, apart from the strict observance of international law, the development of international law is among the EU's external action objectives, with the aim of shaping new rules, both globally and regionally.

This tension between the need for the EU to develop its own rules to achieve its integration objectives and the pressure to follow the international rules of the game has become more apparent with the further development of the EU's external relations. During the first decade of its existence, the perhaps logical starting point was that the EU, as a non-state entity, was not automatically bound by international law. This notion may initially have followed from the famous case law in which the Court of Justice of the European Union (CJEU) pointed to 'a new legal order of international law' and the creation by the EU of 'its own legal system'. The clear separation between EU and international law may also have been based on the idea that the union of Member States was to become 'ever closer'; and that many of those Member States were (and still are) familiar with 'dualism' to differentiate between legal orders.

I have never seen the EU's claim for autonomy as an attempt to isolate the EU from the international legal system. Rather, the CJEU case law reflects a constant struggle between ensuring that it remains the sole interpreter of EU law and the EU being accepted as a global actor in a state-dominated legal system. Yes, this may raise eyebrows when, for instance, the founding EU Treaties call for accession to the European Convention on Human Rights, but the CJEU is hesitant to accept an external assessment of the EU's human rights record (Opinion 2/13); or alternatively, when the Court suddenly trusts a foreseen external arbitration tribunal to apply EU law as a matter of fact (Opinion 1/17). Yet, as the CJEU recently argued during the Brexit debate, the auton-

omy of EU law 'is justified by the essential characteristics of the European Union and its law, relating in particular to the constitutional structure of the European Union and the very nature of that law'.¹

At the same time, the EU needs to accept the rules agreed upon for international cooperation. Indeed, this latter aspect has become more important with the coming of age of the EU's external competences and activities. This implies that conflicts between internal and external rules arise more easily. As this book testifies, this is perhaps most clearly visible in the area of migration law and in particular in relation to the EU's return acquis. In this field in particular, this is not just a theoretical problem, but also one that directly impacts on the lives and wellbeing of many individuals. This book reveals not only the inconsistent approach of the EU legislative and judicial institutions in adopting and interpreting international rules on, for instance, established human rights, but also the reluctance of an EU institution – the CJEU – to apply these standards in its case law to the fullest possible extent. As the book reveals, the CJEU 'has generally disregarded ... human rights norms of international origin' in cases on the Return Directive, expressing 'a strong autonomy-driven position in this specific field of EU migration law and policy'.²

Yet, the relationship between EU and international law is not one-way. The active role of the EU in shaping and influencing international law has also been studied, and is apparent not only in many substantive areas where EU standards have proved to have a global reach or where EU negotiators have convinced global partners to use their existing rules as a template for international agreements, but also in an institutional sense when, for instance, international organizations adapt their rules to allow this 'regional integration organization' to take a special place at the table. The present book contributes to this debate by revealing the EU's strategically exercised normative influence on international migration law in the field of the expulsion of aliens. Clear traces of the EU's acquis in this area can be discovered, for instance, in the relevant work of the International Law Commission, but also in the Global Compact for Migration and, regionally, in the work within the Council of Europe. In addition, in that sense, the growing number of EU-level readmission agreements may continue to shape emerging international standards.

This book thus shows us once again that EU and international law cannot and should not be separated, and should instead be studied in combination in an increasing number of policy areas. Elsewhere, I have pointed to the unfortunate drifting apart of the two academic disciplines, and the need for EU lawyers to understand international law and for public international lawyers engaging

¹ Case C-621/18 *Wightman and Others* [2018] ECLI:EU:C:2018:999.

² Chapter 3, section 7.

with the EU to study at least the basics of the EU legal order. Migration law, by definition, is an area that does not stop at the external borders of the EU; but other policy areas (eg, asylum law, trade law and environmental law) and conceptual questions (eg, constitutionalism, direct effect and judicial protection) also benefit from combining insights from EU and international law. I firmly hope that this book can serve as a vehicle to strengthen the dialogue between the two legal disciplines and their respective epistemic communities.

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